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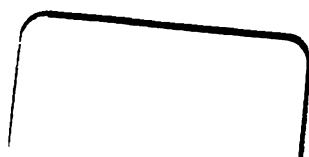
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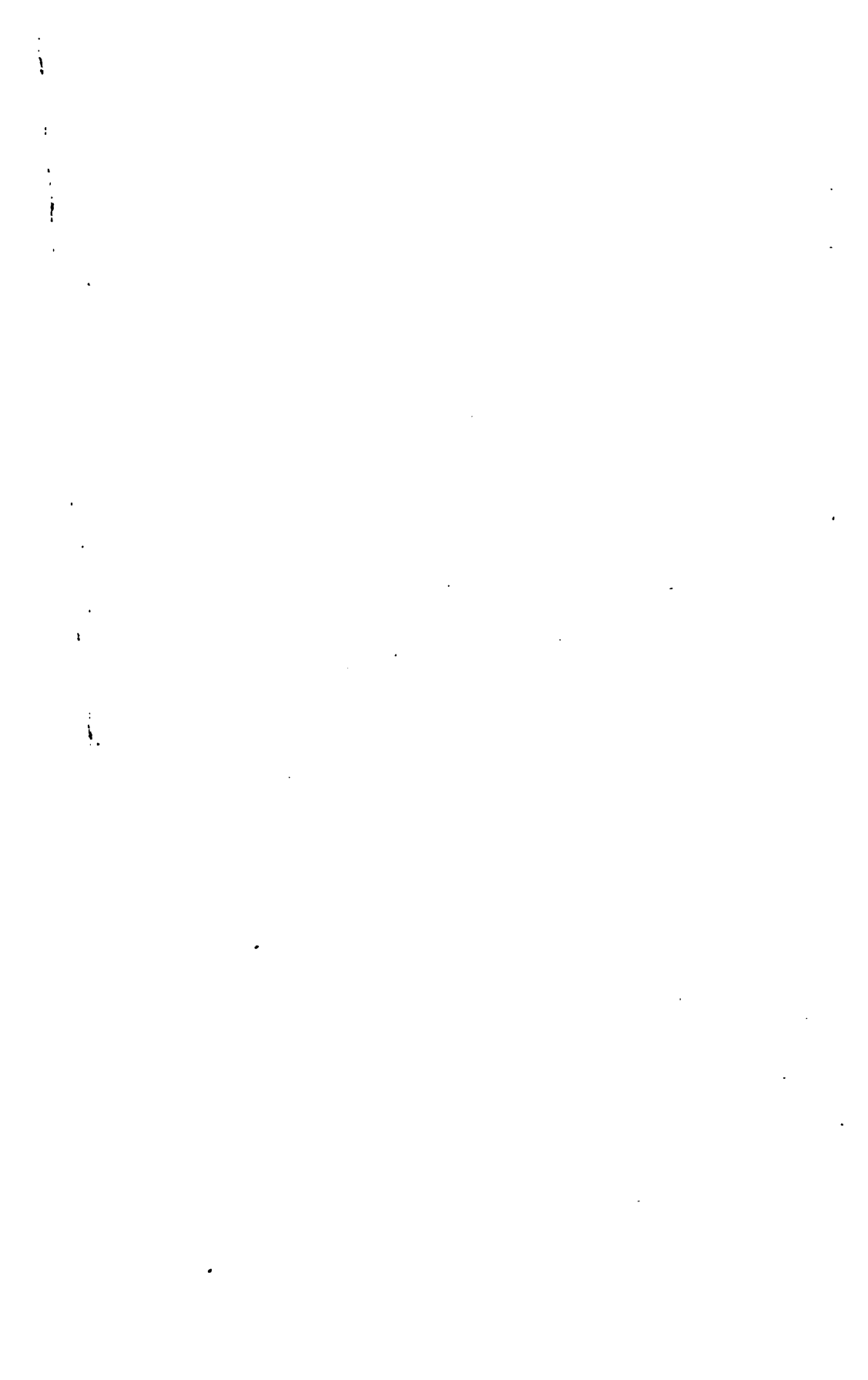
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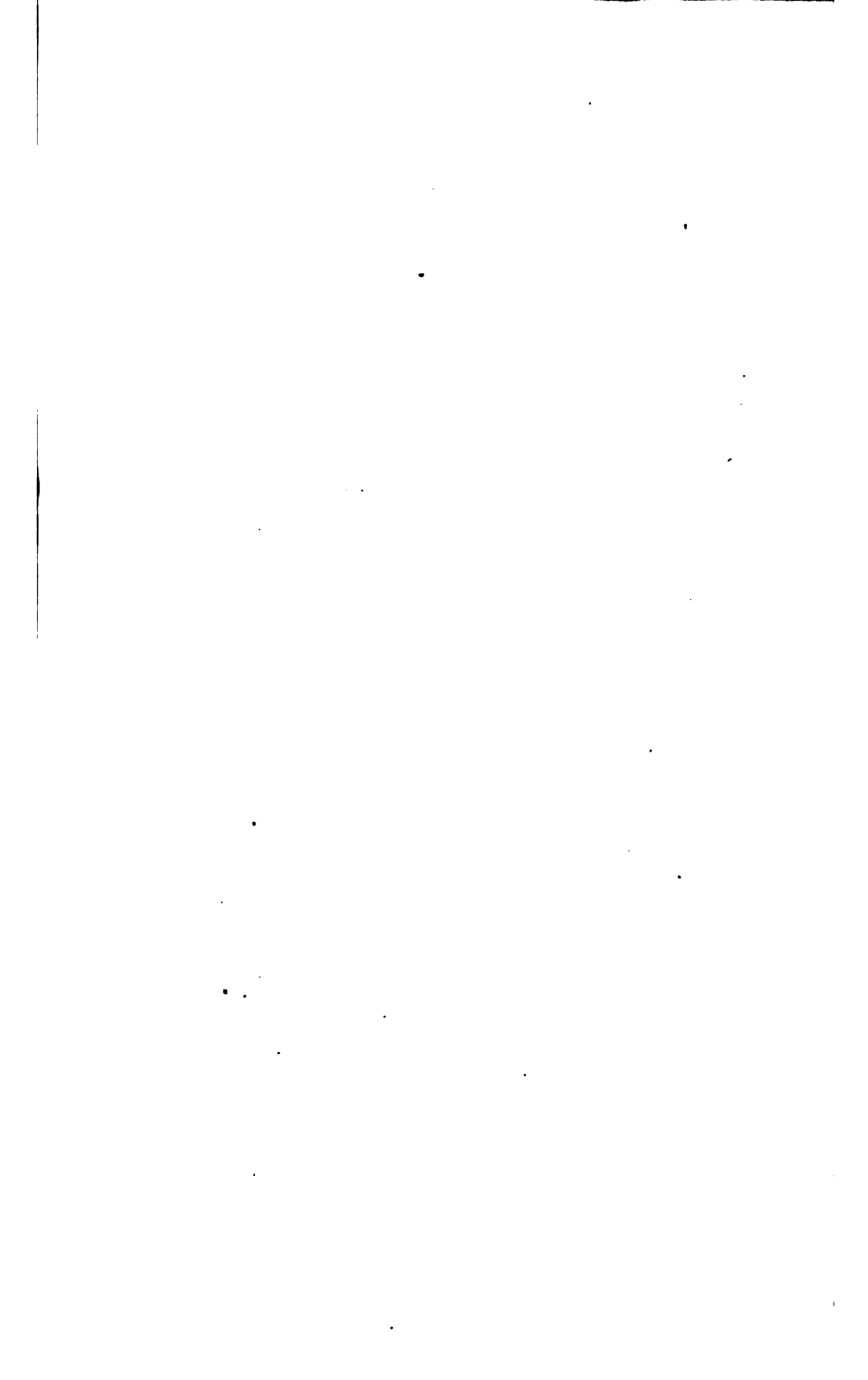
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THE LAWYERS REPORTS ANNOTATED

BOOK XVI.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
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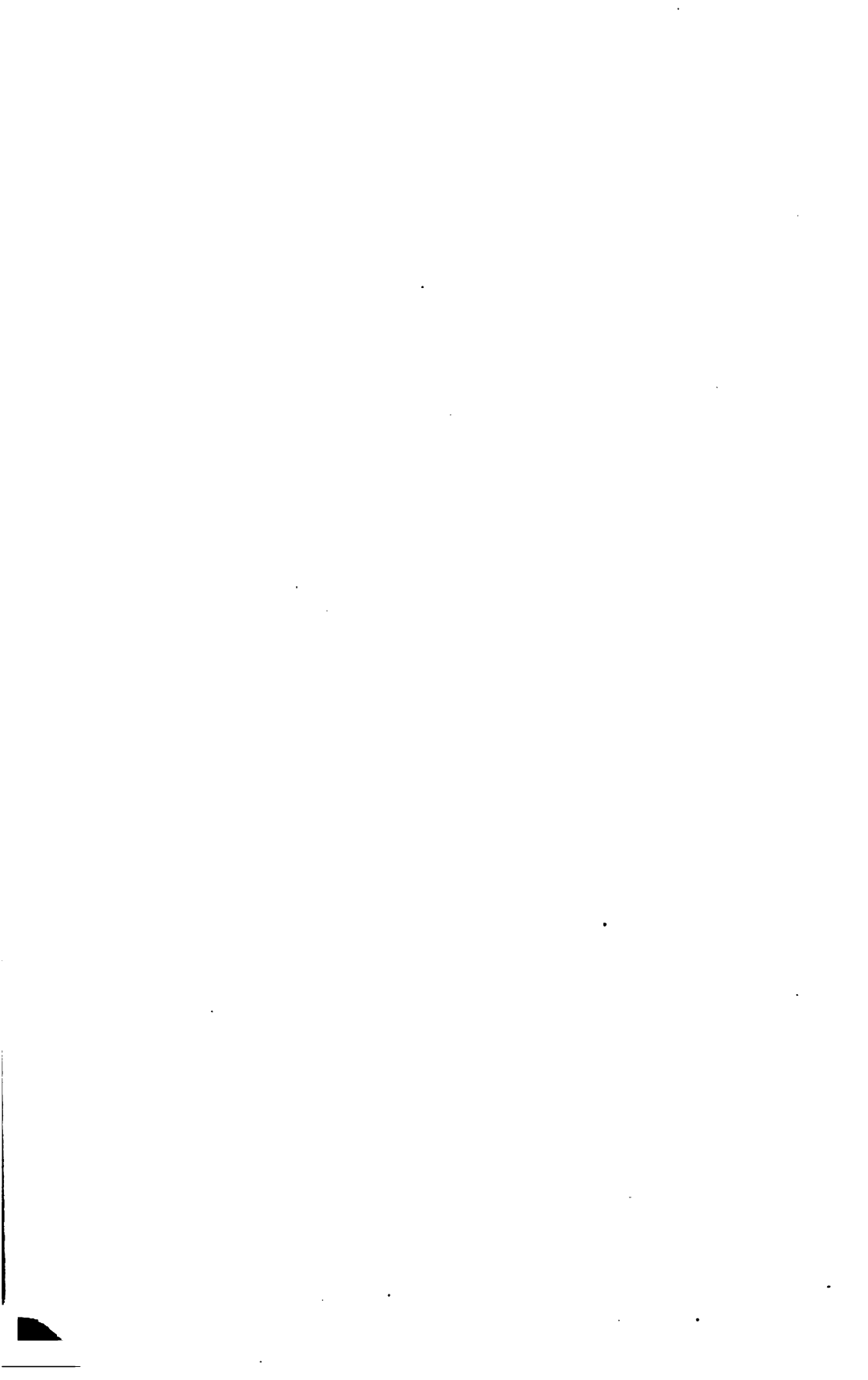
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LAWYERS' REPORTS,

ANNOTATED.

NEW YORK COURT OF APPEALS.

Mary CLEMANS, *Resp't.*,

v.

SUPREME ASSEMBLY ROYAL SOCIETY
OF GOOD FELLOWS, *Appl't.*

(.....N. Y.)

**1. A false warranty by an applicant
for life insurance that he has not been**

**rejected by any other company avoids
a contract of which it becomes a part, although
he believed it to be true while the agent of the
insurer knew it to be false, having received and
forwarded the former application and been notified
of its rejection, if the agent did not fraudu-
lently conceal the fact from the applicant.**

**2. The New York court of appeals can-
not draw the inference of fraud in the**

*Note.—Effect of knowledge by insurer's agent of
falsity of statements in application.*

In general.

The views taken of such knowledge are not entirely harmonious, that of the courts of some of the Eastern states being in general less liberal toward the insured.

The knowledge of the insurer's agent of the falsity of the representations made by the insured in his application is immaterial. *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42.

In *McCoy v. Metropolitan L. Ins. Co.*, 138 Mass. 82, the court says: "In an action at law in this Commonwealth on such a policy, to recover the amount of the insurance, the application is considered as a part of the contract, and if in fact the representations in it are in a material respect untrue, the action cannot be maintained; and oral testimony cannot be received to show either that the company when it issued the policy knew that the representations were untrue, or that the untrue representations were inserted in the application by the agent employed by the company to solicit the insurance without the knowledge of the applicant who had orally stated the truth to the agent,"—citing numerous Massachusetts cases.

In an action on a policy parol evidence is inadmissible to show that the provision by which the insurer seeks to avoid it was introduced by the agent of the insurer by mistake and contrary to the intention of the parties, the insured having accepted it without objection. *Holmes v. Charlestown Mut. F. Ins. Co.* 10 Met. 211, 43 Am. Dec. 428.

The mistake of the applicant in stating the condition of his title is not cured by the fact that the agent of the insurer drew up the application from statements made by the insured. *Lowell v. Middlesex Mut. F. Ins. Co.* 8 Cush. 127.

The court said: "It behooves the assured to see for himself, or get a skillful and trustworthy agent to act for him, and not to sign any paper which is not in fact substantially true, when his important rights, indeed all the benefits of the contract, are dependent upon it."

Where a policy is voidable by the insurer by reason of a false representation in the application inserted by the insurer's agent without the knowledge of the insured, the insured cannot escape payment of a premium note while the policy is still recognized as valid by the insurer, unless he of-

fered to surrender the policy within a reasonable time after discovering its voidability. *Plympton v. Dunn*, 148 Mass. 523. In this case a year and a half was held not a reasonable time.

Parol evidence of knowledge on the part of the agent of the insurer of the falsity of a warranty by the insured is inadmissible to raise an estoppel against the insurer to set up the breach of warranty. *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 20 Am. Rep. 271.

An agent of the insurer whose authority is limited to receiving and transmitting applications, who prepares an application for the assured, is for that purpose the agent of the insured who must bear the responsibility for errors made by him in the application. *Wilson v. Conway F. Ins. Co.* 4 R. L. 141.

Where the agent of the insurer, whose authority was limited to receiving and forwarding applications, receiving, countersigning and delivering policies and collecting premiums, fraudulently and falsely recorded the answers of an applicant, without the latter's knowledge, the policy issued thereon is not binding on the company. *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 166, 19 Am. Rep. 490.

If the agent of the insurer and the insured collusively insert false statements in the application, the knowledge of the agent of such falsity in no way estops the insurer to take advantage of it. *United States Nat. L. Ins. Co. v. Minch*, 83 N. Y. 144.

Knowledge by the agent of the insurer of the falsity of a warranty entered into by the insured will not relieve the latter from the consequences of the breach. *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75; *Chase v. Hamilton Ins. Co.* 20 N. Y. 62; *Galbraith v. Arlington Mut. L. Ins. Co.* 12 Bush, 20; *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. 315; *Bartean v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 595.

The mere fact that the agent of the insured knew the actual facts does not affect the insurer's right to assert the breach of warranty if the facts are not correctly stated by the insured in his application. *Kenyon v. Knights Templars & M. Mut. Aid Assn.* 122 N. Y. 247.

An insurance agent's knowledge of the falsity of warranties in an application which he helps to prepare will not prevent them from avoiding the policy. *Sullivan v. Metropolitan L. Ins. Co.* 36 N. Y. 8, R. 88.

first instance for the purpose of supporting a judgment which does not proceed upon that ground, even though there is evidence which would permit such inference, if there is also evidence negating its existence.

(March 15, 1892.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Dutchess County in favor of plaintiff in an action brought to recover the amount alleged to be due upon a certificate of life insurance. *Reversed.*

The case sufficiently appears in the opinion.

Mr. S. M. Lindale, for appellant:

The application to defendant warrants that

every statement made therein and to the medical examiner is strictly true.

The terms of the application clearly bring it within the accepted definition of warranty as applied to insurance contracts.

Alexander, Life Ins. 51; *Ripley v. Aetna Ins. Co.* 30 N. Y. 157, 86 Am. Dec. 362; May, Ins. § 156; 5 Lawson, Rights, Rem. & Pr. § 2051; *Barreau v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 595; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571; *Cushman v. United States L. Ins. Co.* 63 N. Y. 407.

Durnin warranted that he had never been rejected on an application for life insurance. That was false.

This constituted a breach of warranty, which avoided the contract and bars recovery.

Where the application states material facts falsely to the knowledge of the insured, the mere fact that the agent who prepared it knew by personal observation the truth, does not prevent the insurer from setting up the false representations to defeat the insurance. *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. 847.

In *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 385, Strong, J., who wrote the opinion, maintained that parol evidence was inadmissible to create an estoppel by showing that the agent of the insurer was responsible for the false statements in the application and the consequent breach of warranty, but the judgment of the court was put on other grounds.

In *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392, 72 Am. Dec. 52, the court at the same term by a majority of one (Johnson, Ch. J., Denio and Strong, J.J., dissenting), held such evidence was admissible and that the insurer was estopped to set up the breach of warranty for which the agent was responsible. Followed in *Rowley v. Empire Ins. Co.* 36 N. Y. 550, and in the later cases after some hesitation.

In *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468, it is said to be too well settled to be now questioned that if at the time of issuing the policy the company or its agents know the falsity of a representation by the applicant the company is estopped from asserting such falsity in order to escape liability.

The insurer is estopped to deny the correctness of representations in the application which his agent with full knowledge of the facts has induced the insured to make. *Mutual Ben. L. Ins. Co. v. Davies*, 87 Ky. 541.

An insurance company is estopped from taking advantage of the falsity of an answer in an application for insurance, where, at the time of the issue of the policy, it personally or through its agent has knowledge of the facts which the question answered is intended to elicit. *Dwelling-House Ins. Co. v. Brodie*, 4 L. R. A. 453, 52 Ark. 11; *Dunbar v. Phoenix Ins. Co.* 72 Wis. 493; *Menk v. Home Ins. Co.* 76 Cal. 50; *Continental Ins. Co. v. Pearce*, 30 Kan. 393, 7 Am. St. Rep. 557; *Pickels v. Phoenix Ins. Co.* 119 Ind. 291; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Western Assur. Co. v. Rector*, 85 Ky. 294.

Knowledge by the insurer's agent of the falsity of a material statement by the applicant estops the insurer to set up such falsity to avoid payment of the policy. *Miller v. Mutual Ben. L. Ins. Co.* 31 Iowa, 216, 7 Am. Rep. 122.

Where a policy-writing agent, with knowledge of the facts subsequently relied on to defeat a recovery, prepares an application satisfactory to himself, and acts on his own knowledge in taking the risk, the insured can recover in the absence of collusion or fraud. *Richards v. Washington F. & 16 L. R. A.*

M. Ins. Co. 60 Mich. 430; *Germania F. Ins. Co. v. Hick*, 23 Ill. App. 361.

If the agent of the insurer relies upon his own knowledge in filling up the application without consulting the applicant a mistake of the agent will not avoid the policy. *Parker v. Amazon Ins. Co.* 24 Wis. 383; *Mechler v. Phoenix Ins. Co.* 38 Wis. 665.

Where the insurer's agent assumed the entire preparation of the application which the applicant signed without knowing its contents, the company cannot set up the breach of warranty arising from the incorrectness of answers for which the agent was responsible. *Temminck v. Metropolitan L. Ins. Co.* 72 Mich. 388; *Dunbar v. Phoenix Ins. Co.* Id. 493.

If the agent of the insurer with knowledge of the facts incorrectly states them in the application the insurer is estopped to deny their correctness. *American Ins. Co. v. Luttrell*, 39 Ill. 314; *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308; *Sullivan v. Phoenix Ins. Co. of Brooklyn*, 34 Kan. 170; *Hartford Ins. Co. v. Haas*, 2 L. R. A. 64, 37 Ky. 531; *Williamson v. New Orleans Ins. Assn.* 84 Ala. 106; *Crescent Ins. Co. v. Camp*, 71 Tex. 508; *Western Assur. Co. v. Stoddard*, 38 Ala. 603.

The insured is not affected by an overestimate of the value of the property by the agent of the insurer who drew the application in which he took no fraudulent part. *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. 31.

Where the agent, seeing the property, inserts a value in the application not given by the insured, who signs the application without reading it and without knowing the valuation inserted therein, and was induced to do so by an act on the part of the company, the company is estopped from denying the correctness of such valuation. *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415.

Where the insured premises were thoroughly examined by the insurer's agent the insurer cannot plead fraudulent concealment. *Michael v. Nashville Mut. Ins. Co.* 10 La. Ann. 787.

In *Cotten v. Fidelity & C. Co.*, 41 Fed. Rep. 506, it was held that a general warranty against bodily infirmity in an application did not extend to near-sightedness when the applicant wore spectacles which the agent of the insurer saw.

Where insurance has been had upon an application representing the insured as free from bodily infirmity, which is contested because of deafness, the insured may show that the insurer's agent knew of such deafness before and while soliciting such insurance from conversations with him. *Follett v. United States Mut. Acc. Assn.* 12 L. R. A. 315, 107 N. C. 240.

Where a physician acting as agent for the company, in examining an applicant for life insurance,

Dwight v. Germania L. Ins. Co. 4 Cent. Rep. 529, 108 N. Y. 341, 87 Am. Rep. 729.

Plaintiff cannot escape the effect of the warranty, upon the claim that Durnin did not know the Prudential Company had rejected him.

He is presumed to have read his application and to know its contents.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934.

He warranted that no company had rejected him, and whether he knew that the statement in his warranty was untrue was clearly immaterial.

Bliss, Life Ins. 2d ed. § 38; Duckett v. Williams, 2 Cromp. & M. 848, 4 Tyr. 240; *Brisbane v. Parsons*, 33 N. Y. 332; *First Nat. Bank*

of Ballston Spa v. North America Ins. Co. 50 N. Y. 45; *Fitch v. American P. L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571; *Cushman v. United States L. Ins. Co.* 63 N. Y. 409; *Baker v. Home L. Ins. Co.* 64 N. Y. 649; *Powers v. North Eastern Mut. L. Asso.* 50 Vt. 630; *Continental L. Ins. Co. v. Yung*, 12 West. Rep. 715, 113 Ind. 159; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708; *Equitable L. Ins. Co. v. Hazlewood*, 7 L. R. A. 217, 75 Tex. 338, 16 Am. St. Rep. 898.

Knowledge of the agent of the company of the falsity of the warranty would not relieve the insured or his representatives from the consequences of a breach.

Bartreau v. Phoenix Mut. L. Ins. Co. 67 N. Y.

assumes to write out the answers to the questions upon his own knowledge of the facts, rather than from the answers given by the applicant, the answers as given by him are conclusive on the company. *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 423.

Where the soliciting agent, having personal knowledge of the situation and ownership of the property, fills up the application, statements therein as to title and the distance of the property from other buildings are statements of the company, not of the insured. *Thomas v. Hartford F. Ins. Co.* 2 West. Rep. 527, 20 Mo. App. 150.

The knowledge of a soliciting agent who wrote out an application for insurance, of facts concerning the title, which he fails to disclose to the company, is constructive notice to the company, which cannot avoid liability on the ground of misrepresentation, although the policy provides that the application is a warranty, and that any false representation therein shall render the policy void. *Reynolds v. Iowa & N. Ins. Co.* 80 Iowa, 563.

The knowledge of an agent, before the issuance of an insurance policy, of the truth as to the ownership of the insured property and litigation concerning it, will prevent a defense on the ground of misrepresentations as to those matters in the application. *Western Assur. Co. v. Stoddard*, 86 Ala. 606; *German Ins. Co. v. Churchill*, 26 Ill. App. 205; *American C. Ins. Co. v. Brown*, 29 Ill. App. 602.

Where payment of a policy is resisted because of a breach of a warranty that the building did not stand on leased ground, parol evidence is admissible to show that the agent of the insurer knew that the premises were leased, and if such knowledge is established the insurer is estopped to set up the breach of warranty. *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389, 28 Am. Rep. 364; *Germania F. Ins. Co. v. Hick*, 125 Ill. 361.

If the agent of the insurer knew at the time of issuing the policy that the building stood on leased ground, but did not so state in the policy, the insurer cannot escape liability under a clause voiding the policy if such fact is not stated therein. *Brothers v. California Ins. Co.* 3 N. Y. Supp. 89; *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 434.

Where an agent, having power to effect insurance without consulting the home office, was fully apprised of the ignorance of the person insured, who was an illiterate German woman unable to read or write the English language, and knew all about the nature and extent of her title, a policy issued by him on her property will not be void because she is not the absolute and unconditioned owner, although it contained a stipulation that it should be void in that event. *Hartford F. Ins. Co. v. Haas*, 2 L. R. A. 64, 87 Ky. 531.

Where an agent sent his clerk to solicit a risk and take an application, and the clerk knew that there was other insurance on the property, but the 16 L. R. A.

agent, ignorant of the other insurance, issued a policy thereon, and collected the premium, it was held that the company was bound by the knowledge of the agent's clerk, who, for the purpose of that policy, must be regarded as the company's soliciting agent. *Laws* 1890, chap. 211, § 1; *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600.

Where the insurer is seeking to escape liability because other insurance in excess of that named in the policy has been taken, it may be shown by parol that the amount taken was really assented to but that a different amount was expressed by the mistake of the insurer's agent, and the insurer is estopped to insist upon the forfeiture due to the blunder of his agent. *Greene v. Equitable F. & M. Ins. Co.* 11 R. I. 434.

The knowledge of the agent of the misrepresentations upon which the insurance was procured must be pleaded in reply if it is intended to rely thereon to defeat the defense based on such misrepresentations. *Texas Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244.

Knowledge of agent acquired in other capacity.

In *Supreme Council of A. L. of H. v. Green*, 71 Md. 263, a member of a benefit society falsely represented that the beneficiary named by him was his niece. It was held that the society was not estopped to avail itself of the false representation by hearsay information of the officer of the society who witnessed the application, but was not charged with the duty of ascertaining the qualifications of beneficiaries, that the beneficiary was not the applicant's niece but of which he had no personal knowledge.

Knowledge by the insurer's medical examiner, obtained while not acting for the insurer, that the physical condition of the applicant is different than the latter warrants in his application and policy will not estop the insurer to take advantage of the breach of warranty. *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571.

Where an agent, in transacting business not connected with his agency, acquires knowledge which might affect a policy subsequently issued by him as agent, evidence of such knowledge cannot be given against the company, where it was acquired so long before the issuance of the policy as not to justify an inference that he had it in mind and acted upon it in issuing the policy. *Stennett v. Pennsylvania F. Ins. Co.* 68 Iowa, 574.

Agent's perversion of information by the insured.

In Maine an application drawn by the insurer's agent is by statute made conclusive upon the insurer but not upon the insured, although signed by the latter. *Caston v. Monmouth Mut. F. Ins. Co.* 64 Me. 170; *Emery v. Piscataqua F. & M. Ins. Co.* 63 Me. 322.

Where the insurer's agent in writing out the ap-

595. See also *Ripley v. Aetna Ins. Co.* 80 N. Y. 186, 86 Am. Dec. 863; *Jennings v. Chicago County Mut. Ins. Co.* 2 Denio, 75; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571; *McCollum v. Mutual L. Ins. Co.* 55 Hun, 103; *Sullivan v. Metropolitan L. Ins. Co.* 36 N. Y. S. R. 38; *Cooke, Life Ins. p.* 87; *Kanyon v. Knights Templars & M. Mut. Aid Asso.* 123 N. Y. 257.

If Jacobs caused false answers to be given, he was guilty of fraudulently and collusively procuring the false warranty and the defendant is not bound.

Eilenberger v. Protective Mut. F. Ins. Co. 89 Pa. 464; *Smith v. Cash Mut. F. Ins. Co.* 24 Pa. 820; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 984; *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 168, 19 Am. Rep. 490; *Bacon,*

Ben. Soc. § 159; *Alexander, Life Ins.* 54; *United States Nat. L. Ins. Co. v. Minch*, 53 N. Y. 144; *Cooke, Life Ins. p.* 40.

Durnin's statement that he had never been rejected by any life insurance company, etc., was material.

Edington v. Aetna L. Ins. Co. 77 N. Y. 564, 1 Cent. Rep. 524, 100 N. Y. 536; *Bacon, Ben. Soc.* § 218; *London Assurance v. Mansel*, L. R. 11 Ch. Div. 863.

Where a specific question is asked, and the applicant makes an untruthful answer, the policy is avoided, whether the answers are warranties or representations, because the parties may by their contract make material a fact that would otherwise be immaterial.

Bacon, Ben. Soc. § 212; see also § 218;

plication fraudulently falsified the applicant's answers without the latter's knowledge, and forged the medical certificate, the insurer cannot escape liability to the insured after having had the benefits of the contract. *McArthur v. Home L. Asso.* 73 Iowa, 336.

Where the agent of the insurer suppressed the genuine application made by the insured and substituted a spurious one upon which the policy was issued, the insurer is nevertheless liable on the policy. *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647.

Where the untrue statement in the application originated with the agent of the insurer and was unknown to the insured when he signed the application, the insurer is estopped to set up such false statement to defeat the policy. *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 223, 20 L. ed. 617; *Lueders v. Hartford L. & A. Ins. Co.* 13 Fed. Rep. 465; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 208; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268; *Continental L. Ins. Co. v. Chamberlain*, 122 U. S. 304, 33 L. ed. 841.

Where the application which the insured signed contained an express limitation of the power of the agent to bind the company by anything not expressed therein, the insured is to be presumed to be aware of the limitation, and if he signs the application into which the agent has inserted different statements than the insured made, the latter is bound by the application. *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 984.

If the insurer's agent after being informed fully as to the facts incorrectly states them in the application, the insurer is estopped to take advantage of the error to avoid liability on the policy. *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 698; *Planters Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Combs v. Hannibal, S. & I. Co.* 43 Mo. 143, 97 Am. Dec. 363; *Campbell v. Merchants & F. Mut. Ins. Co.* 37 N. H. 35, 72 N. Dec. 324; *Clark v. Union Mut. F. Ins. Co.* 40 N. H. 363, 77 Am. Dec. 721; *Patten v. Merchants & F. Mut. F. Ins. Co.* 40 N. H. 375; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 453; *Farmers Ins. Co. v. Williams*, 39 Ohio St. 534; *Ellenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *Swan v. Watertown F. Ins. Co.* 98 Pa. 57; *May v. Buckeye Mut. Ins. Co.* 25 Wis. 291, 3 Am. Rep. 76; *Aetna L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 248, 4 Am. Rep. 438; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Planters Ins. Co. v. Borrelli*, 1 Baxt. 352, 25 Am. Rep. 730; *Ring v. Windsor County Mut. F. Ins. Co.* 51 Vt. 563; *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622, 633; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Miner v. Phoenix Ins. Co.* 27 Wis. 693, 9 Am. Rep. 479; *American L. Ins. Co. v. Mahone*, 38 U. S. 21 Wall. 152, 22 L. ed. 598; *Bennett v. Agricultural Ins. Co. of Watertown*, 8 Cent. Rep. 692, 106 N. Y. 243; *Woodruff v. Imperial F. Ins. Co.* 38 N. Y. 140; *Pitt-* 16 L. R. A.

ney v. Glen's Falls Ins. Co. 65 N. Y. 6; *O'Brien v. Home Ben. Soc.* 117 N. Y. 310, affirming 51 Hun, 495; *Commercial Union Assur. Co. v. Elliott (Pa.)* 12 Cent. Rep. 668.

And this notwithstanding a stipulation that the solicitor shall be the agent of the applicant and not of the insurer. *Miner v. Phoenix Ins. Co., Clark v. Union Mut. F. Ins. Co.* and *Hartford Protection Ins. Co. v. Harmer*, *supra*; *Beal v. Park F. Ins. Co.* 18 Wis. 241, 33 Am. Dec. 719; *Howard F. Ins. Co. v. Bruner*, 33 Pa. 50; *Hough v. City F. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 551; *May v. Buckeye Mut. Ins. Co.* and *Columbia Ins. Co. v. Cooper*, *supra*; *Planters Mut. Ins. Co. v. Deford*, 38 Md. 382; *Contra, Kabok v. Phoenix Mut. L. Ins. Co.* 21 N. Y. S. R. 203; *Bohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; *Abbott v. Shawmut Mut. F. Ins. Co.* 3 Allen, 213.

If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud on the part of the insured, the insurer is estopped to set up their error or falsity. *Baker v. Home L. Ins. Co.* 64 N. Y. 648; *Miller v. Phoenix Mut. L. Ins. Co.* 10 Cent. Rep. 38, 107 N. Y. 202; *Mowry v. Rosendale*, 74 N. Y. 360; *Bentley v. Owego Mut. Ben. Asso.* 5 N. Y. Supp. 223.

An insurance company cannot repudiate the fraud of its agent in inserting untrue answers in the application, and thus escape the obligation of its contract, merely because the assured accepted in good faith the act of the agent, without examination. *Kistner v. Lebanon Mut. Ins. Co.* 5 L. R. A. 646, 128 Pa. 553; *Rogers v. Phoenix Ins. Co.* 121 Ind. 570; *Phoenix Ins. Co. v. Golden*, 121 Ind. 524.

The insurer cannot take advantage of a breach of warranty arising out of the mistake of his agent acting within his authority and of which the insured was innocent. *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. 157; *Menk v. Home M. Ins. Co.* 76 Cal. 50.

An error or fraud on the part of an insurance agent who makes out an application, in inserting erroneous or untruthful statements, is chargeable to the insurer and will not defeat the policy. *Johnson v. Dakota F. & M. Ins. Co.* 1 N. Dak. 167; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Rockford Ins. Co. v. Seyferth*, 29 Ill. App. 513; *Roberts v. State Ins. Co.* 23 Mo. App. 92; *State Ins. Co. v. Taylor*, 14 Colo. 499, 20 Am. St. Rep. 231; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249.

Although it is provided in a policy of insurance that the statements in an application are warranties, and if any of them are false the policy shall be void, it is not forfeited if the company's own agent makes all the false statements contained in the application, and there was no fraud or attempt to deceive on the part of the assured. *State Ins. Co. v. Gray*, 44 Kan. 731; *McComb v. Council Bluffs Ins. Co.* (Iowa) June 2, 1891.

Phenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 80 L. ed. 644; *Bartau v. Phenix Mut. L. Ins. Co.* 67 N. Y. 595, citing *Bunyan, Life Ins. p. 31*; *Higbie v. Guardian Mut. L. Ins. Co.* 58 N. Y. 603; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52.

Mr. C. Morschauer, for respondent:

Defendant's agent, having full knowledge of all the facts, and he being the one who misled Durnin, the defendant cannot now take advantage of it.

O'Brien v. Home Ben. Society, 117 N. Y. 810; *Miller v. Phenix Mut. L. Ins. Co.* 10 Cent. Rep. 38, 107 N. Y. 292.

Per Curiam:

The uncontradicted evidence in this case

clearly showed that the assured, just prior to June 20, 1887, applied for insurance, by means of a written application signed by him, to the Prudential Life Insurance Company of America, and on that date his application was rejected by that company. The learned court found that the assured made no false statements in his application for insurance to the company defendant. In such last-mentioned application he stated, in answer to questions asked therein, that he had applied to another insurance company for insurance, but had not been rejected. That this answer was false cannot be disputed, upon the uncontradicted evidence. The application, and the answers thereto, were part of the contract of insurance, and were made so by the certificate. The answer was a war-

A misrepresentation of a material fact inserted by a soliciting agent, without the knowledge and contrary to the instructions of the applicant, in an application not read to or by him, although it contained a printed clause of which he did not know and to which his attention was not called, limiting the agent's powers,—does not invalidate the policy. *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646.

An insurance company is estopped by answers falsely or improperly written by its agent or solicitor to questions contained in the application, without the knowledge of the applicant, where he made true answers to such questions, even though the application was signed by the applicant without knowing its contents. *State Ins. Co. v. Gray*, 44 Kan. 731.

False statements in the written application, which was wholly prepared and signed by the insurer's agent, to whom the insured made oral application stating the facts truly, are not available as a defense to the policy issued on such application. *Baker v. Ohio Farmers Ins. Co.* 14 West. Rep. 438, 70 Mich. 199.

A warranty by an insured that his answers to the medical examiner will be true is not a warranty that such answers will be written down correctly by the medical examiner. *Equitable L. Assur. Soc. v. Hazelwood*, 8 L. R. A. 217, 75 Tex. 388.

An applicant having correctly stated the date of his birth to the insurer's agent is not prejudiced by the agent's mistake in writing it in the application. *McCall v. Phenix Mut. L. Ins. Co.* 9 W. Va. 237, 27 Am. Rep. 558; *Simmons v. West Virginia Ins. Co.* 8 W. Va. 474.

Where the insurer's medical examiner filled in blanks in the application differently than he was informed by the insured after the latter had signed it, the insurer is not relieved from liability on account of the breach of warranty so arising. *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617.

Where the applicant for life insurance certifies that the answers written by the insurer's medical examiner are correct, but which he afterwards alleges were recorded differently by the examiner than they were given to him, such certificate is conclusive unless it appears that the answers were not written when the certificate was signed, or at least were not known to the insured when he made such signature. *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372.

Where an assured correctly states to the soliciting agent all the circumstances under which property is owned or held by him, any error or neglect on the part either of the agent or company in stating the title or interest of the assured will not avoid the policy. *Burson v. Philadelphia F. Asso.* 120 Pa. 267, 20 Am. St. Rep. 919; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Crescent Ins. Co. v. Camp*, 71 Tex. 503.

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An insurance company is estopped to deny representations as to the title to the insured property, made in the application, which were written therein by its agent after a full disclosure to him of the true state of the title. *Tarbell v. Vermont Mut. F. Ins. Co.* 68 Vt. 53.

An insurance company whose agent himself prepared an application with knowledge of the fact that the insured had only a title bond for his land, which was not paid for, cannot defeat an action on the policy on the ground that the application improperly states that the insured was the sole and undisputed owner of the property, and that it was unincumbered, where this was signed by the insured after making a full statement of the facts, in accordance with the agent's theory of his title. *Key v. Des Moines Ins. Co.* 77 Iowa, 174.

Where an agent applying to plaintiff, owner of a billiard hall and tables, unfamiliar with the English language, for insurance on the hall, was referred to a tenant, who signed the application, and the policy, conditioned that the interest of a third party in the hall or contents must be stated, did not state tenant's interest in the furniture in the hall, of which fact the agent had knowledge, plaintiff can recover to the extent of his interest, upon a loss by fire. *Diebold v. Phoenix Ins. Co.* 33 Fed. Rep. 807.

An agent of a mutual insurance company, authorized to issue a policy of insurance and consummate the contract, and who is informed by the applicant that a part of the property is on the right of way of a railroad company, and with his own hand fills in the blanks in the application for a policy, and, with knowledge of the condition of the property, writes "Yes" as an answer to the question: "Do you own the land in fee simple?"—thereby waives for the company the stipulation in the policy that it shall be void if any misrepresentation be made as to title or condition of the property. *National Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161.

Where the insurer's agent although informed of any incumbrance by the applicant omits to mention it in the application which he prepares and which the applicant signs at his request, the insurer cannot take advantage of the breach of warranty so arising. *Renier v. Dwelling-House Ins. Co.* 74 Wis. 89; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249; *Commercial Union Assur. Co. v. Elliott (Pa.)* 12 Cent. Rep. 668.

Where insurer's agent falsely fills up blanks.

Where the agent of the insurer obtains the applicant's signature to a blank application and fills it up falsely without the knowledge of the insured, the insurer cannot defend because of such falsity. *Brown v. Metropolitan L. Ins. Co.* 8 West. Rep. 775, 65 Mich. 306.

An answer to an application for insurance, as to

ranty, and upon this evidence there was a breach thereof. *Root v. Aetna L. Ins. Co.* 61 N. Y. 571; *Cushman v. United States Ins. Co.* 63 N. Y. 404. It is not important that the party making the warranty really believed in its entire truth. If it be false, it avoids the contract. Nor does the mere knowledge of the agent of the company, at the time when it is made, that the warranty is false, prevent the defendant from setting up the breach as a defense to the action on the policy. *Ibid.*; *Barteau v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 595. The finding of the learned trial judge that the application of the assured to the Prudential Life Insurance Company was withdrawn was not supported by any evidence, as we think, while the finding that the facts were within the personal knowledge of the agent Jacobs, who procured this insurance, furnishes no answer to this charge of breach of warranty. Mere knowledge of the falsity is not, as we have seen, enough to prevent the defense from be-

ing set up. There is, as we think, sufficient evidence in this case to permit a jury to find that the agent of the defendant fraudulently concealed from the assured the fact that he had been rejected by another company to which he had applied, through this same agent; and that such agent, while himself aware of the fact of such rejection, procured the assured to make application to this defendant through him, as agent of the company, and to innocently state that he had not been rejected by any other company, when the agent knew such statement was false. If such were the case, we think the defendant would not be entitled to set up the breach of a warranty which had been thus procured. The case, in such aspect, would much resemble that of *Plumb v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 73 Am. Dec. 52. There is evidence on the part of the defendant which contradicts this theory, for the agent swears the assured was rejected June 20, and that within two weeks

the applicant's age, filed in by the agent, who is told that the applicant is ignorant in the matter, is binding on the insurer. *Keystone Mut. Ben. Assn. v. Jones*, 72 Md. 363.

Where an agent, after a life insurance application had been signed, leaving blank the question as to the weekly wages of the applicant, without collusion with or knowledge of the applicant, fills in the blank with an untrue statement as to the applicant's weekly income, the company is not thereby relieved from liability under a warranty that the facts stated are true. *Sawyer v. Equitable Acc. Ins. Co.* 42 Fed. Rep. 30.

Where an insurance agent, acting within the general scope of his business, has examined an applicant upon questions contained in the blank application, and received true answers thereto, but omits certain answers, and the applicant signs the application under the agent's direction, the policy is not rendered null and void by such omissions although it contains a provision that any false representation or omission in the material facts from the application shall render it void. *Kansas Prot. Union v. Gardner*, 41 Kan. 397.

Where the agent of the insurer inserts in blanks in the application after the applicant has signed it untrue answers the insurer is estopped to set up such false representations to defeat the insurance. *Phoenix Ins. Co. v. Allen*, 7 West. Rep. 407, 100 Ind. 273.

So, too, where the agent unknown to the applicant wrote down the latter's answers incorrectly. *Stone v. Hawkeye Ins. Co.* 68 Iowa 787, 56 Am. Rep. 870.

When falsity is due to misconstruction of facts by agent.

The insurer is estopped to deny the answers in an application framed by his agent without collusion or fraud by the applicant, or to give such answers a different interpretation than that adopted by the agent. *Bushaw v. Woman's Mut. Ins. & A. Co.* 28 N. Y. S. R. 524.

The applicant is not responsible if the answers given are misconstrued or recorded incorrectly by the agent of the insurer. *Kansas Prot. Union v. Gardner*, 41 Kan. 397; *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210.

Where the applicant states all the facts and the agent puts his own construction on them the insurer is estopped to question the correctness of that construction. *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. Rep. 272; *Continental L. Ins. Co. v. Thoenes*, 26 Ill. App. 495.

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The insured may show by parol that he disclosed the facts truly to the agent of the insurer and that the false statements in the application on account of which it is sought to avoid the policy were due to the misconstruction of the facts by the agent. *Hough v. City F. Ins. Co.* 29 Conn. 10, 75 Am. Dec. 551.

The agent of the insurer having upon a statement of facts by the applicant suggested the answer to the interrogatory as formally made in the application without asking for the more full or particular statement, the insurer cannot object that the answer is not such as might or should have been made. *Higgins v. Phoenix Mut. L. Ins. Co.* 74 N. Y. 6.

A former rejection of the insured on his application to a legion of honor is not a breach of a warranty that he had never applied for insurance in any other company, when the agent told him that a legion of honor was not an insurance company. *Equitable L. Assur. Soc. v. Hazlewood*, 7 L. R. A. 217, 75 Tex. 333.

Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and estopped from asserting the contrary. *Continental L. Ins. Co. v. Chamberlain*, 133 U. S. 304, 33 L. ed. 341.

Where a policy contains a notice on its back that no agent has power to bind the company by receiving any representations or information not contained in the application, an expression of opinion of an agent, that insurance in an aid and accident association is not called for by any question as to other insurance, cannot justify a false answer that the applicant has no other insurance. *McCollum v. Mutual L. Ins. Co.* 55 Hun, 108.

A false conclusion by the agent of the insurer as to the true state of the title of the applicant after being truly informed of all the facts cannot be taken advantage of by the insurer. *Key v. Des Moines Ins. Co.* 77 Iowa, 174.

Knowledge of the assured of a misrepresentation in the application, inserted by the soliciting agent with the assurance that it will make no difference, will not avoid the policy, there being no fraudulent purpose on the part of the assured. *Reynolds v. Iowa & N. Ins. Co.* 80 Iowa, 563; *Wright v. Northwestern Mut. L. Ins. Co. (Ky.)* 12 Ky. L. Rep. 350.

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thereof he so informed the assured, and returned him the premium. What the trial court states in one of the findings in this case we think amounts to merely a statement of knowledge of the agent as to the falsity of the warranty when it was made. This is not a defense. There is no finding of fraud, and there is evidence in the case which, if believed, shows there was none. We cannot draw the inference of fraud in the first instance for the purpose of supporting a judgment, even where there is evidence which would permit the in-

ference, because there is also evidence which, if believed, negatives its existence, and the judgment does not proceed upon the ground of fraud. There is no evidence that the answers to the application were truly made and erroneously taken down by the agent of the company, and hence it does not come within the *O'Brien* and other kindred cases. *O'Brien v. Home Ben. Society*, 117 N. Y. 810.

We must reverse this judgment, and grant a new trial; costs to abide the event. All concur.

TEXAS SUPREME COURT.

J. D. McCARN, *Appt.*,

INTERNATIONAL & GREAT NORTHERN R. CO.

(.....Tex.....)

An initial carrier may protect itself by contract against liability for loss not occurring on its own line whether the shipment be wholly within one state or be interstate.

(April 15, 1892.)

A PPEAL by plaintiff from a judgment of the District Court for Bexar County in favor of defendant in an action brought to recover damages for injuries to cattle which had been delivered to defendant for transportation. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward Dwyer, for appellant:

The railroad company had authority and power to contract beyond its own line.

Hutchinson, Carr. § 151, pp. 116, 117, and authorities cited.

After a through contract is entered into, as the one referred to in above assignments, the succeeding or connecting carriers then become the agents of the receiving carrier.

Hutchinson, Carr. § 273, and authorities cited.

The railroad company, having contracted to transport the cattle beyond its own line to the place of destination, as in this case it did, it could not exempt itself from liability caused by negligence of connecting carriers by a clause to that effect in the same contract, for the reason that by so doing the carrier limits its liability for negligence, and any such provision is inconsistent and against public policy and void.

Lawson, Carriers, § 235; *Whittaker's Smith*, Neg. pp. 289, 290; 2 *Redfield*, Railways, p. 144; 2 *Beach*, Railways, § 920, and authorities cited; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 347; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193; 3 Tex. Ct. App. Civ. Cas. §§ 8, 84; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221; *Orti v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *Jennings v. Grand Trunk R. Co.* 59 Hun, 227;

Condit v. Grand Trunk R. Co. 54 N. Y. 500; *Toledo, P. & W. R. Co. v. Merriman*, 52 Ill. 123; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

Messrs. Barnard & Green, for appellee:

Although a common carrier has the power to unconditionally bind itself to transport and deliver freight at any point far beyond its own road, yet it does not owe to the public any duty to transport or deliver any freight beyond its own road, and when shippers desire it to do so, it can do it upon any contract containing such reasonable terms, conditions, and limitations as the shipper and carrier may agree to, and such contract is valid and binding upon the parties to it.

The contract in this case contained the following clause: "The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the International & Great Northern Railroad Company, excepting to protect the through rate of freight named herein."

Ft. Worth & D. O. R. Co. v. Williams, 77 Tex. 121; *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256; *Harris v. Howe*, 5 L. R. A. 777, 74 Tex. 534; *Morse v. Brainard*, 41 Vt. 550; *Stewart v. Merchants Dispatch Transp. Co.* 47 Iowa, 229, 29 Am. Rep. 476; *Detroit & M. R. Co. v. Farmers & M. Bank*, 20 Wis. 122; *Irwin v. New York Cent. & H. R. Co.* 59 N. Y. 653; *Lawson*, Carriers, § 286, and cases there cited; *Shelton v. Merchants Dispatch Transp. Co.* 59 N. Y. 258; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Erie R. Co. v. Wilcox*, 84 Ill. 289, 25 Am. Rep. 451.

Stayton, Ch. J., delivered the opinion of the court:

This action was brought by appellant to recover damages for injury alleged to have been caused to sixty head of cattle while in transit from San Antonio, Tex., to Chicago, in the state of Illinois. The cause was tried without a jury, and the court found that "the contract for shipment was a through contract from San Antonio, Texas, to Chicago, Illinois," but that the contract, among others, contained the following stipulation: "Twelfth. And it is further stipulated and agreed between the parties hereto that, in cause the livestock mentioned herein is to be transported over the road or roads of any other railroad company the said party of the

NOTE.—The authorities on the question involved in the above case are too fully presented in the opinion to need any further attention in a note.

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first part [appellee] shall be released from liability of every kind after said livestock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the International & Great Northern Railroad Company, excepting to protect the through rate of freight named herein." The court further found that no injury occurred to appellant's cattle while on appellee's line of railway, but that the cattle were injured while on a connecting line, to which they had been delivered by appellee, and on these findings rendered a judgment against the plaintiff. There is no statement of facts, and under the findings it must be conceded that appellee received the cattle under an agreement that they should be transported from San Antonio to Chicago; and the inference is that to do this it was necessary they should pass over road or roads other than that of appellee. That in such a case a carrier may by contract protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within this state or be interstate, we had deemed a settled question in this court. *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256; *Ft. Worth & D. O. R. Co. v. Williams*, 77 Tex. 121; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Texas & P. R. Co. v. Adams*, 78 Tex. 372; *Harris v. Howe*, 74 Tex. 537, 5 L. R. A. 777.

This is the rule we understand to be recognized by nearly all of the English and American courts. *Myrick v. Michigan Cent. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Pratt v. Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 396; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22, Wall. 123, 22 L. ed. 827; *Tardos v. Chicago, St. L. & N. O. R. Co.* 85 La. Ann. 15; *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597; *East Tennessee, V. & G. R. Co. v. Brumley*, 5 Lea, 401; *Mulligan v. Illinois Cent. R. Co.* 86 Iowa, 186; *Detroit & M. R. Co. v. Farmers & M. Bank*, 20 Wis. 124; *Pendergast v. Adams Exp. Co.* 101 Mass. 120; *Berg v. Atchison, T. & S. F. R. Co.* 80 Kan. 562; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Field v. Chicago & R. I. R. Co.* 71 Ill. 462; *American Exp. Co. v. Second Nat. Bank of Titusville*, 69 Pa. 394, 8 Am. Rep. 268; *Etna L. Ins. Co. v. Wheeler*, 49 N. Y. 616; *Snider v. Adams Exp. Co.* 63 Mo. 882; *Taylor v. Little Rock, M. R. & T. R. Co.* 82 Ark. 399, 29 Am. Rep. 1; *Central R. & Bkg. Co. v. Avant*, 80 Ga. 195; *Schiff v. New York Cent. & H. R. R. Co.* 52 How. Pr. 91; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 424; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *United States Exp. Co. v. Rush*, 24 Ind. 408; *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Eris R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Aldridge v. Great Western R. Co.* 15 C. B. N. S. 582.

Authorities upon this point might be multiplied. Even the case of *Muschamp v. Lancaster & P. J. R. Co.*, 8 Mees. & W. 421, does not assert a different rule. In England and

in some of the states of the Union the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiction in which these diverse rulings are made there is a general concurrence of opinion in the proposition that the carrier may by special contract exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to destination. The ground of concurrence is contract, which in some jurisdictions it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination, while in the others it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries accruing after he has safely passed the freight to a connecting carrier.

There are, however, a few cases in which it has been held that a carrier, under such a contract as that involved in this case, is liable for an injury to freight after it has passed into the hands of a connecting carrier uninjured; and among those are found some decisions by the court of appeals of this state, with which we regret to differ. In *Gulf, C. & S. F. R. Co. v. Vaughn* (Tex. App.) 16 S. W. Rep. 775, the liability of a carrier was asserted, although the shipping contract was substantially the same as that involved in this case; and two cases are invoked as authority for the ruling in that case. One of these is the case of *Galveston, H. & H. R. Co. v. Allison*, (decided by this court,) 59 Tex. 198. In that case the plaintiff shipped from Galveston, Tex., to Chicago, Ill., five cars of melons, in cars adapted to their preservation and safe carriage, under an agreement that the melons should be transported in those cars, without change, to Chicago. The evidence tended to show that a connecting carrier, to whom the cars were delivered, placed the melons in other cars less adapted to their safe transportation, and that from this injury resulted. The shipping contract provided that the railway company should not be liable for injury resulting from some causes enumerated, and that the company should not "be liable for any damage, loss, or injury occurring not on its own railroad." In disposing of the case it was said that the averments of the petition were to the effect that there was an agreement that the melons should be carried to their destination in the cars in which they were first placed. There is a general expression in the opinion that a carrier undertaking to carry freight to a destination beyond his own line cannot contract that his responsibility shall terminate at the end of his own line; but to ascertain what a court actually does decide, the facts on which the opinion is based must be considered, and no one paragraph in an opinion ought to be considered alone in arriving at the intention of the court. What this court did decide and intend to hold is so clearly expressed in the opinion in the case

that we can but feel that, had the whole opinion been read, it ought not to have been understood to lay down any such rule as that it is cited to sustain. It is said that "the exemption from liability is, however, available only when the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route, or forwards the goods by a different conveyance from those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exception made in his behalf in the contract." *Futman v. Vincinatti, H. & D. R. Co.* 2 Disney, 248; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470. "The contract to forward the melons in this case through from Galveston to Chicago on the cars on which they were loaded was an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agents, the connecting line, when the change occurred, for the company, and it became liable, notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart v. Merchants Despatch Transp. Co.*, 47 Iowa, 229, 29 Am. Rep. 476. These goods were delivered to a transportation company at Worcester, Massachusetts, to be taken to Muscatine, Iowa, through without transfer, in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse, and consumed by fire the same day. It was held that the company was liable for the loss notwithstanding the exemption. The contract in this case, so far as the limitation of liability is concerned, was, in effect, that the defendant company was not to be liable for any damage or loss occurring beyond their own route, provided the freight should not be changed from the cars in which it was shipped." Instead of being a decision in favor of the rule for which it was cited, the direct holding in the opinion, as well as all the implications, are so strongly to the contrary that the views of this court in that case ought not to be misunderstood.

The other case cited in support of the adverse rule is *Bank of Kentucky v. Adams Exp. Co.*, 98 U. S. 174, 23 L. ed. 872, but it seems to us the opinion asserts no such rule as it was cited to maintain. That case was simply this: The Southern Express Company and Adams Express Company were engaged in the express business between New Orleans, La., and Louisville, Ky.; the former transporting a package of money from New Orleans, to Humboldt, Tenn., where it was delivered to the latter for transportation to plaintiff at Louisville. There was a contract between the express companies by which they divided the compensation for such carriage in proportion to the distance a package might be transported by them respectively. Between Humboldt and Louisville both companies employed the same messenger, who was exclusively subject to the orders of the Southern Express Company when south of the northern boundary of the state of Tennessee,

and to the orders of the Adams Express Company when north of that boundary. The shipping contract contained a clause exempting the carrier with which it was made from liability for loss "occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or storm," and it provided that this should inure to the benefit of any person or company to whom the property might be delivered for transportation. When the package was delivered at Humboldt to the Adams Express Company's messenger, who was the messenger of both companies, he took charge of it, and placed it in an iron safe, and deposited the safe in an apartment of the car set apart for the use of the express company, for transportation to Louisville. While the train to which the car containing the packages was attached was passing over a trestle, and, while the package was in the exclusive charge of the messenger, the trestle over which the car was passing gave way, and the car was thrown from the track, caught fire from the locomotive, and, with the money in the safe, these were together burned. The action was brought against the Adams Express Company, and, there being some evidence that the accident was caused by a defective trestle, the circuit court in effect instructed the jury that the exceptions from liability found in the shipping contract exempted the express company from liability, even though the accident may have occurred through the negligence of the railway company to transport the express company's messenger and packages in his possession and custody. From this statement it will be seen that no such question was presented in that case as arises in this. The claim was that the shipping contract exempted the express company from liability for a loss occurring through the negligence of the railway company if it had employed to transport its messenger and the packages in his exclusive possession. The court, in effect, held that the railway company was the servant of the express company, for whose negligence the latter was responsible, and that for this reason, among others, the exemption from liability could not be allowed. The express company had no means whereby to transport such packages as it might contract to transmit, other than such as it might hire from railway or other companies or persons engaged in the business of transportation; and, if such companies or persons were not to be deemed the servants of the express company, that liability from which the common carrier cannot escape by contract could not be fixed on either in such cases. That the express company was a common carrier in that instance was not denied, and it was declared so to be by the court; but its claim was that it was relieved from liability by the contract. This the court denied, on the ground before stated, and then proceeded to show how the case would stand as to the carrier, under the facts of the case, as follows: "Express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case.

The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the package in charge. The department in the car was the defendant's for the time being; and if the defendant retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles v. Cattle*, 6 Bing. 748; *Tower v. Utica & S. R. Co.* 7 Hill, 47, 49 Am. Dec. 36; Redf. Railroads, § 74. . . . Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiff. But, as they were not so delivered, the right of the plaintiff to the extremest constant vigilance during all stages of the carriage is lost if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading." The same court, in the subsequent case of *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 106, 27 L. ed. 826, said: "A railroad company is a carrier of goods for the public, and, as such, is bound to convey safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, — the next carrier on the route. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. . . . The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Can an obligation, based alone on contract, arise in the face of an express agreement that it shall not exist? That is the question involved in this and like cases, and to it, in

our opinion, there can be but one answer. No court will assert that a common carrier is under obligation to carry, or to contract to carry, beyond its own line; but the decision to which we have referred, and any others that may be in harmony with it, in effect hold that the reception of freight destined, and known to be destined, to a point beyond the carrier's line who receives it when the rate for through transit is fixed by that carrier, constitutes a contract by which that carrier assumes the duties and obligations of a common carrier for through transit, and thereby becomes liable for the negligence of every connecting carrier in the route, notwithstanding the initial carrier, in the paper which evidences the only contract, expressly contracts that it shall not be so bound. Such a construction of such a contract, it seems to us, violates every recognized canon of construction applicable to such a matter, and denies effect to the clearly expressed intention of the parties when the law interposes no obstacle to the enforcement of such intention based on grounds of public policy or other reason. It seems to us a mistake to assume that the initial carrier, throughout an entire route formed by two or more independent but connecting lines, becomes a common carrier when neither the rules of law nor the contract of the parties creates that relation, and upon this false assumption to base the proposition that it cannot exempt itself from liability for the negligence of a connecting carrier because the latter is the agent or servant of the former. If the relation be conceded, the proposition based on it would be a sequence, but, that failing, the conclusion drawn from it falls. Under the weight of American authority the contract in this case does not operate as a restriction on or exemption from liability; for to give that liability, it, but for the contract, must have existed, while the contract was, in effect, an express agreement that no such liability existed, or was intended or understood to exist. Under English and some American decisions the contract would operate as a restriction on the initial carrier's common-law liability, for in such a case, under that line of decisions, the liability would exist in the absence of the contract; but these decisions recognize the right of such a carrier to limit his liability to his own line; for in such cases there is always a liability resting on some one of the connecting carriers for injury resulting from the negligence of itself or servants, and in some jurisdictions the full common-law liability will rest on some connecting carrier at all times. The latter would be true where freight was carried over two or more connecting lines all wholly within this state, for no one of them could restrict its own common-law liability for contract, but the liability of connecting carriers for injury to freight while in the possession of one of them is not the common-law liability. It is unnecessary, in this case, to inquire what state of facts between connecting carriers would be sufficient to cast upon each the liability of a common carrier for the negligence of another; for no facts are found

in the record making such an inquiry necessary.

There was no error in the proceedings, and the judgment will be affirmed.

LOUISIANA SUPREME COURT.

Denis CLEMENTS *et al.*

v.

LOUISIANA ELECTRIC LIGHT CO., *Appel.*

(.....La.....)

1. The violation of a duty specified by law is negligence; therefore, when a city ordinance under which an electric lighting company is operated requires it to have the "splices" on its wires perfectly insulated, the failure to do so is negligence.
2. A person whose occupation brings him in proximity to the company's wires has a right to believe that the wires have been insulated and the ordinance complied with. He is required to look for patent defects in the insulation only. If, not aware of a latent defect, he comes in contact with the wire, and is injured without fault on his part, the company is responsible.
3. When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence.
4. This proof need not be direct, but may be inferred from the circumstances of the case.
5. Where an electric wire is stretched over a roof, and a party goes on the roof to repair it, and the wire is of that height above the roof that the chances are that he will come in contact with it by going under it, or stepping over it, it is not negligence to pursue either mode of crossing, if he exercises all necessary and prudent care to protect himself, in proportion to the danger.
6. When a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to the danger.

(May 2, 1892.)

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiffs in an action brought to recover damages for the death of their son which was alleged to have been caused by defendant's negligence. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Farrar, Jonas & Kruttschnitt for appellant.

Messrs. J. R. Beckwith and J. B. Fisher for appellee.

McEnery, J., delivered the opinion of the court:

Joseph Clements was killed on the 4th day of

*Head notes by McENERY, J.

October, 1890, by an electric current from the wires of the defendant company, while engaged in repairing the gallery roof at the corner of Gravier and Camp streets, in the city of New Orleans. The plaintiffs, the father and mother of the deceased, sue the defendant company for damages for the death of their son. There was judgment for the plaintiffs for \$5,000, and the defendant appealed.

Joseph Clements was a tinsmith by occupation. He had been employed to go on the roof of the gallery to repair the same by a contractor. He was accompanied by another young man, Alfred Anderson. In half an hour after they went on the roof Clements was killed by coming in contact with defendant's wires. Two of defendant's wires run up and down Camp street, over the roof of this gallery. They were 2 feet 4 inches above it. They were some 17 inches distant from each other, and the inside wire was about 4 feet from the Camp street edge of the gallery. The wires were fastened to a support or "horse" on the gallery, and the inside wire, to prevent its contact with other wires, was secured to the "horse" by a piece of telephone wire. Between the "horse" and the Gravier street side of the gallery there was, on the inside wire, a joint covered with insulating tape. To all appearances it was in good condition, but had been worn by the exposure to the weather, and had evidently lost some of its insulating properties. The defects, however, were not visible, but were exhibited during a storm, as shown by the testimony of S. W. Bennett. From his testimony, it is shown that the insulating tape had been defective for a considerable time. He occupied a room fronting on the roof, and forbade his employés from going on it, on account of the want of proper and safe insulation over the wires. Clements and his companion were engaged in cleaning the roof, the first in sweeping and the other in carrying off the dirt. The fatal injury to young Clements was rapid in its results; so quick in execution that no witness, not even the witness who was on the roof with him, was able to state with precision his position when he received the shock from the wire. But we think, from all the attendant circumstances, that he was either stepping over the wire or going under it. It is probable that he came in contact with both wires, making a short circuit, increasing the energy of the electric force. The unprotected or uninsulated places which were not visible on the splice in the wire came in contact with his body under the right shoulder blade. The wires were so close to the roof that, to pass from where Clements was first seen sweeping, to the gutter, he must either

NOTE.—The great rapidity with which electric wires are multiplying in all parts of the country and in almost constant proximity to people, whether in doors or out of doors, gives much importance to the above decision.

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The rule that violation of a legal duty is negligence seems manifestly just when applied to the case of such dangerous agencies as electricity, even if there should be any question about it in more trivial matters.

have stepped over or crawled under. From the distance of the wire above the roof, to step over would in all probability have brought Clements' body in contact with one or both wires. He was only of medium height, and to step two feet four inches would require not only exertion, but some skill, to keep clear of touching the wires. It is in evidence that about the time the accident occurred there was considerable leakage on defendant's line of wires, and this is urged as evidence of neglect on the part of defendant, because it showed defective insulation. But the general defect along the defendant's line cannot be evidence of want of due diligence and care. It must be shown that the accident was occasioned by some defect at the point where the injury was inflicted. *Nivette v. New Orleans & L. S. R. Co.* 42 La. Ann. 1153.

We are aware of the difficulty which confronts the defendant company in keeping its many wires, passing over a large territory, to great distances, in a condition of perfect insulation. Parts of the line will necessarily become uncovered, and all that can be expected is that the company will inspect its lines, and repair defects as early as practicable. The particular defect in insulation in this case which is complained of was one of long standing, and, by a careful inspection of its lines, it would have been brought to its notice. By city ordinance 806, council series, the legal duty of the defendant is specified. Section 8 of the ordinance provides "that all splices or joints, wherever the same may occur, shall be thoroughly soldered, after such joint or splice is made, and, in addition thereto, shall be well and thoroughly wrapped with kerite tape or other insulating material, so as to produce perfect insulation at such joint or splice." This ordinance was a contract with each and every inhabitant of the city. The defendant's standard of duty was fixed by it, and it is the same under all circumstances, and its omission is neglect. The first requirements of the plaintiffs was to show the existence of this duty which they alleged had not been performed, and, having shown this, they must show a failure to perform the duty, and thus establish negligence on the part of the defendant. It is an affirmative fact, the presumption being, until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract. *Cooley, Torts*, 659, 661. In many cases evidence of the injury done makes out a prima facie case; for instance, where a bailee returns in an injured condition an article which has been loaned to him, or where a passenger on a railway train is injured without fault on his part. The city ordinance does not specify at what particular localities splices shall be perfectly insulated. On all parts of the line of defendant company where they occur the duty is specified. The wire of defendant was spliced, and was not insulated, as required by the ordinance. It passed over a roof, to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that its lines were safe for those who by their occupations were brought in close

proximity to them. In this respect, and in this particular case, we are of the opinion that the defendant's negligence caused the death of Clements.

But notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, he cannot recover. The question is whether the act of the party injured had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If the plaintiff could, by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury. When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. *Deikman v. Morgan's L. & T. R. & S. Co.* 40 La. Ann. 787; *Kepperly v. Ramond*, 88 Ill. 354; *Beers v. Housatonic R. Co.* 19 Conn. 566; *Hale v. Smith*, 78 N. Y. 480; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390. This proof need not be direct, but may be inferred from the circumstances of the case. *Mayo v. Boston & M. R. Co.* 104 Mass. 187; *Myhan v. Electric Light & P. Co.* 41 La. Ann. 964; 2 Thomp. Neg. 1178.

The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequence of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent and not latent defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was defective. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger.

But it is urged that Clements was cautioned to keep away from the wires by his employer, Brady, and his failure to do so was gross carelessness on his part. The evidence on this point is as follows: "Question. Did you

call Clements' attention to the wires? Answer. No, sir; I cautioned him to be careful of the wires. Every man who goes over a roof must keep away from the wires. Q. It is the business of a man who goes over a roof to keep away from them? A. Yes, sir. Q. Did he understand that business? A. Yes, sir. Q. Did you caution him that morning to keep away from the wires? A. Yes, sir." Clements' attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admonition to him was only of a danger which he knew to exist, according to the statement of Brady, before he advised him to be cautious of going near the wires, or to keep away from them. There was only that instinctive dread of danger which overtakes one when he approaches a railroad track. The track in itself is not dangerous, and is only made so by the passage of a train of cars over it. They announce their approach, and hence a person, before he attempts to cross the track, must exercise great caution, stop and listen, and look up and down the track. Having done this, if a train approaches silently, without the accustomed signal, and injures him, he would be entitled to recover damages for the injury. *Curley v. Illinois Cent. R. Co.* 40 La. Ann. 817; *Brown v. Texas & P. R. Co.* 42 La. Ann. 850. The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily, and without proper precautions for his safety. It cannot be said that when Clements went on to the roof to repair it he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indications of performed

duty to which Clements' attention could be fixed, were guaranties that the defendant company had done its duty. These appearances assured him that, in the performance of his work in sweeping the roof, it was not dangerous for him to risk going over or under the wire. *Bomar v. Louisiana N. & S. R. Co.* 43 La. Ann. 988. Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. From the appearances of the wire, its wrapping with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger, except from the fault of the defendant company. This fault was the cause of his death, and his act in passing under or over the wire was too remote to give it the character of contributory negligence.

This suit was brought under the provisions of Act 71, of 1884, amending article 2815, Civil Code. The plaintiff, therefore, can only claim such damages as the deceased, Clements, could have done had he survived the injury. These would have been for mental and physical suffering and actual pecuniary loss. The deceased was almost instantly killed, and no damage can be awarded for suffering.

The next inquiry is, What have the plaintiffs suffered pecuniarily by the death of their son in the loss to them of his contributions to their support? The evidence does not show that the plaintiffs were dependent for their support upon his earnings, which were not very large, varying from \$1.50 to \$2.50 per day. The parents, although their domestic relations were pleasant, lived apart, each with a child. The deceased's father says that when he wanted anything he asked him for it, and he, if he had it, willingly gave it. From the facts as to the amount contributed by the deceased to the support of his parents, we conclude that the verdict of the jury awarding \$5,000 damages is excessive. Two thousand dollars, we think, would be a most liberal award.

The judgment appealed from is amended, so as to fix the amount of the damages for plaintiffs at \$2,000, and in other respects it is affirmed; appellees to pay costs of appeal.

INDIANA SUPREME COURT.

Lottie A. VOREIS *et al.*, *Appts.*,

v.

Lambert NUSSBAUM *et al.*

(.....Ind.....)

1. A note given by a married woman as surety for her husband is void even in

the hands of a bona fide holder unless she has estopped herself to deny its validity under Rev. Stat. 1881, § 5119, providing that a married woman shall not enter into any contract of suretyship whether as indorser or in any other manner and that such contract as to her shall be void.

2. Merely executing as principal a note

NOTE.—Rights of bona fide purchaser of note declared void by statute.

The doctrine of the above case may be regarded as well established and is supported by the following decisions in addition to those cited in the opinion:

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A statute which declares gaming contracts "void" makes a negotiable note given in such a transaction void even in the hands of a bona fide purchaser. *Tennyson v. Foote*, 4 Ill. App. 594; *Chapin v. Dake*, 57 Ill. 285, 11 Am. Rep. 15.

This is true although the statute does not make

containing an acknowledgment of receipt of consideration will not estop a married woman from showing that she gave the note as surety and therefore against the prohibition of a statute.

(McDride, J., dissents.)

(April 27, 1892.)

APPPEAL by defendants from a judgment of the Circuit Court for Marshall County in favor of plaintiffs in an action brought to foreclose a mortgage which was given to secure a note executed by defendant Lottie A. Voreis, she claiming to have executed it as surety for a debt of her husband. *Reversed as to her.*

The facts are stated in the opinion.

Messrs. McLaren & Martindale for appellants.

Messrs. Packard & Drummond for appellees.

Miller, J., delivered the opinion of the court:

The appellants contend that the court erred in its conclusions of law upon the special finding of facts. A synopsis of so much of the finding as is necessary to present the question of law involved is as follows: On the 19th day of November, 1888, the defendant Lottie A. Voreis, who was at the time a married woman, executed her promissory note of that date, payable one year after date to the order of William Bucklew, at a bank in Plymouth, and at the same time she, with her husband, George W. Voreis, executed a mortgage upon her separate property to secure the payment of the note; that George W. Voreis, her husband, received the consideration for which the note was executed, and used the same in payment of his own individual debts and for his own use, but afterwards gave his wife \$10 of the money; that no part of the consideration was used for the betterment of her separate property or business; that afterwards, but before its maturity, the note was duly assigned to one Leonard Flagg, who, before its maturity, for a valuable consideration and in the regular course of business, assigned it to the plaintiffs; that the plaintiffs as well as the

assignors, at the time of the execution of the note and of its assignment, had knowledge that the defendant Lottie Voreis was a married woman; that neither the payee of the note, the assignor, Flagg, nor the plaintiffs made any inquiry of the defendant Lottie A. Voreis, or her codefendant, George W. Voreis, as to who received the consideration for the note, or who would receive the benefit therefrom; but that neither the assignor, Flagg, nor the plaintiffs had any actual knowledge or notice whatever that the consideration for the note was not received and used by said defendant Lottie for her own special use and benefit, and had no actual knowledge or notice that said note and mortgage were executed by the wife as surety for her husband; that one of the plaintiffs, and the one who purchased the note from Flagg, and the defendant lived at the time of such purchase in Marmount, a small village in Marshall county, and were well and intimately acquainted. The court, as a proposition of law from the foregoing facts, concluded that the plaintiffs were entitled to a recovery against the defendant Lottie for the full amount of the note, and against both the defendants for a foreclosure of the mortgage, and judgment was rendered accordingly.

Since September 19, 1881, there has been in force in this state the following statute (Rev. Stat. 1881, § 5119): "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her shall be void." The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety, and not the principal in the note, notwithstanding the form of the contract. *Vogel v. Lechner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213, 1 West. Rep. 255; *Nixon v. Whitely*, 120 Ind. 380; *Crisman v. Leonard*, 126 Ind. 202. The question to be decided is, Does the statute above cited invalidate a note made payable in bank, executed by a married woman as surety, in the hands of an innocent purchaser for value, acquired in the regular course of business? It seems to be the settled

any express provision as to bona fide holders. *Snoddy v. American Nat. Bank*, 7 L. R. A. 705, 88 Tenn. 573.

So where a statute makes a contract given for a gambling or wager consideration "absolutely void and of no effect" a bona fide purchaser of a negotiable note given therefor cannot recover upon it. *Traders Bank of Chicago v. Alsop*, 64 Iowa, 97.

So under a code provision that gaming contracts are void and all evidences of debt on such a consideration are "void in the hands of any person." *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400.

Likewise a statute making usurious contracts "void" is fatal to the right of a bona fide purchaser of a note tainted with usury. *Chadbourn v. Watts*, 10 Mass. 127, 6 Am. Dec. 100; *Bridge v. Hubbard*, 15 Mass. 98; *Lowe v. Waller*, 2 Dougl. 736; *Bowyer v. Bampton*, 2 Strange, 1155.

The same rule applies to a statute providing that the plaintiff in an action on a usurious contract shall "forfeit" three times the interest. *Kendall v. Robertson*, 12 Cush. 155.

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But a statute providing that all payments or compensation for a sale of intoxicating liquors in violation of law shall be held in violation of law, does not have the same effect as if it declared the contract void and does not defeat the right of a bona fide purchaser of a negotiable note given for such payment. *Cazet v. Field*, 9 Gray, 339.

A statute declaring that notes of less than a certain amount shall be void unless wholly in writing makes them void even in the hands of a bona fide purchaser. *Bayley v. Taber*, 5 Mass. 236, 4 Am. Dec. 57.

A statute making null and void a contract between attorney and client whether in writing or otherwise if the attorney fails to attend to the suit in person or by competent attorney until judgment is rendered, and which prohibits under a penalty of forfeiting double the amount a transfer by the attorney of any note given therefor, makes a promissory note given in such case void even in the hands of a bona fide purchaser. *Weed v. Bond*, 21 Ga. 195.

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doctrine of the courts and text-writers that a note executed in violation of a statute is void, even in the hands of an innocent purchaser for value. In *Tiedeman*, Com. Paper, § 178, it is said: "But where the statute making the consideration illegal declares a contract founded on such a consideration to be absolutely void, the language of the statute must be given its proper effect, and so the courts have held that the commercial paper founded on such considerations is void, even in the hands of bona fide holders." In *Vallett v. Parker*, 6 Wend. 615, it is said: "Whenever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the court to be so, for failure of or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration." In 2 Randolph, Com. Paper, the law is laid down in these words: "Sec. 517. All contracts which violate the provisions of the statute law, either expressly or by implication, are void. And this is true although the prohibition of the statute be not expressed, but must be implied from its nature and objects. Where a statute expressly declares the contract which forms the consideration of the note or bill to be void, the note or bill is illegal and void, even in the hands of a bona fide holder for value. So, where the Legislature has prohibited a transaction, a bill or note given for it is void." See also *Sondheim v. Gilbert*, 117 Ind. 71; *Spray v. Burk*, 128 Ind. 565. The statute says that "a married woman shall not enter into any contract of suretyship," and follows this prohibition with the express declaration that any "such contract as to her shall be void." Stronger language could not have been chosen in which to express the legislative intent to prohibit the making of such contracts, and to declare that the consequence of a violation of the statute should be to declare the instrument void. The presumption is that the word "void" was understandingly used by the law-makers, and this presumption is strengthened by the fact that the term correctly expresses the status of contracts executed in violation of statute, as established by the overwhelming weight of authority. The statute was enacted to shield and protect married women from contracts from which neither they nor their estates could be benefited, and such contracts were therefore to be void as to them. We have therefore held that they alone can invoke the benefit afforded by the prohibition. *Plaut v. Storey* (Ind.) (this term); *Johnson v. Jouchert*, 124 Ind. 105, 8 L. R. A. 795. We see no reason why, when they have elected to claim the benefit of the Act, the words of the statute shall not be given the same force and effect that would have obtained if the words "as to her" had been omitted. While the statute makes the contract of suretyship void as to a married woman, she alone can claim the benefit of the statute, and being, under our statute, bound by an estoppel *in pais* like any other person, it follows logically that she may in some cases be estopped by her conduct or representations from claiming the benefit of the statute. This is not an affirmation or ratification of a void contract, but an estoppel

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against the exercise of a personal right. The cases in which a married woman has been estopped from claiming the protection of the statute are cases where some statement, affidavit or representation has been made by the party to be estopped, which have been in good faith relied upon by the other contracting party, so that to permit her to show the truth would be to assist in the perpetration of a fraud. The cases of *Ward v. Berkshire L. Ins. Co.* 108 Ind. 801, 6 West. Rep. 596; *Rogers v. Union Cent. L. Ins. Co.* 111 Ind. 343, 9 West. Rep. 828; *Lans v. Schlemmer*, 114 Ind. 296, 12 West. Rep. 922,—are of this character. In *Cupp v. Campbell*, *supra*, and *Lans v. Schlemmer* it was held that a married woman is not estopped by the mere form of the contract which she has no power to make. In this case there was no statement or representation of any kind to indicate that the appellant was the principal in the note and received the consideration, except the form of the contract. This, we are satisfied, was not sufficient to constitute an estoppel to prevent her from showing who received the consideration and who did not. To hold otherwise would be to nullify the statute, and look to the form rather than to the substance of the transaction. This was well expressed by McBride, J., in the late case of *Cummings v. Martin*, 128 Ind. 20, in these words: "It cannot be doubted that one of the principal reasons for the enactment of the statute forbidding married women to enter into any contracts of suretyship, and making such contracts void as to them, was to prevent them from squandering or incumbering their property as sureties for impoverished husbands. The courts have rightfully shown a disposition to scan closely contracts where there was reason to suspect that the transaction, while in form a contract, with the wife as principal, was in fact an attempted evasion of the statute, the consideration moving solely to the husband. Where this has been found to be true, it has uniformly been held that the contract is within the inhibition of the statute, and is void as to the wife."

Judgment reversed, with instructions to restate the conclusion of law in accordance with this opinion, and to render judgment for the appellant, Lottie A. Voreis.

McBride, J., dissenting:

The note in this case was payable at a bank in this state. It was therefore upon its face commercial paper, governed by the law-merchant. It was transferred before due to one who took it in good faith, in the ordinary course of business, and paid full value for it. The only fact shown by the record which is relied upon to invalidate it in the hands of the indorsee is that he knew the maker was a married woman, and that, although upon its face it purported to be what the indorsee in good faith supposed it was, her individual contract, it was in fact a contract of suretyship. The court expressly finds that the indorsee had knowledge of this latter fact. The rule by which the innocent indorsee of commercial paper is protected against alleged illegality in its consideration is stated by eminent authority as follows: "The bona fide holder for value,

who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed '*malum in se*,' and those founded in positive statutory prohibition, which are termed '*mala prohibita*.' The law extends this peculiar protection to negotiable instruments, because it would severely embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some court defect. There is, however, an exception to this rule,—that when a statute expressly or by necessary implication declares the instrument absolutely void it gathers no vitality by its circulation in respect to the parties executing it. . . . There are a very few cases in which the statute renders such instruments absolutely void, and the most important if not the only instances now to be met with are the statutes against usury and gaming." Dan. Neg. Inst. § 197. While the letter of the statute (sec. 5119, Rev. Stat. 1881) is that contracts of suretyship by a married woman "as to her shall be void," the spirit of the statute, as repeatedly interpreted by this court, makes them voidable, and not void. Indeed, in the case of *Bennett v. Mattingly*, 110 Ind. 197, 7 West. Rep. 912, the court expressly decided that such contracts were not void, but voidable. See also the case of *Plaut v. Storey*, (decided at this term, but not yet officially reported), deciding the same thing. The statute does not purport to declare them absolutely void, but only void as to her. The option is with her to repudiate them. If she declines to interpose the defense, no one else can do so. The defense is purely personal. The logic of *Johnson v. Jouchert*, 124 Ind. 105, also is that such contracts are voidable, and not void. See also the many cases there cited. Not even privies in estate can avoid such contracts without her co-operation. The voidable, rather than void, character of such contracts is easily demonstrable, and is logically and unerringly certain if there is any consistency whatever in the many recent decisions of this court relating to that subject. The last clause of section 5117, Rev. Stat. 1881, provides that a married woman shall be bound by an estoppel *in pais* like any other person. It has been many times decided that a married woman contracting as surety may be estopped to defend upon that ground. *Ward v. Berkshire L. Ins. Co.* 108 Ind. 801, 6 West. Rep. 596; *Rogers v. Union Cent. L. Ins. Co.* 111 Ind. 343, 9 West. Rep. 828; *Lane v. Schlemmer*, 114 Ind. 296, 12 West. Rep. 922; *Bouney v. McNeal*, 126 Ind. 541; *Cummings v. Martin*, 128 Ind. 20. This could not be true if the contract was absolutely void. A transaction which is void cannot be purged of its infirmity by means of an estoppel. *Martin v. Zellerbach*, 38 Cal. 800, 99 Am. Dec. 365; *Cook v. Walling*, 117 Ind. 9, 2 L. R. A. 769. *Cook v. Walling*, *supra*, furnishes a most forcible illustration of this doctrine. Mary C. Walling was the wife of Creed C. Walling. The husband absented himself for more than seven years. The wife, supposing him dead, married one Hughes.

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She bought land, taking the title in the name of Mary C. Hughes. She, with her reputed husband, Hughes, in the year 1875, mortgaged the land to one Kate C. Cook, for a debt due to her. At that time, and for a year thereafter, she lived and cohabited with Hughes, and claimed him as her husband, and was reputed to be his lawful wife. In 1876, Creed C. Walling returned. His wife abandoned and was divorced from Hughes, and resumed her relations as wife of Walling. It was held that the mortgage was absolutely void, because the lawful husband, Walling, had not joined in it, and that, being void, she was not estopped and could not be estopped to defend against. While the mortgage in that case was executed before the enactment of section 5117, *supra*, the same doctrine is reiterated in *Johnson v. Jouchert*, *supra*, relating to a transaction occurring in 1884, since that section became a law. I therefore feel amply justified by the authority of this court in insisting that such contracts are not absolutely void; that they are void only in a qualified sense; and that the word "voidable," instead of "void," would have much more accurately expressed the legislative meaning. To now hold otherwise would require the express overruling of *Bennett v. Mattingly*, *supra*, and *Plaut v. Storey*, *supra*, and the tacit overruling of many other well-considered cases. If this is true, it follows that bona fide holders of such notes are entitled to protection under the rule above quoted from Daniel on Negotiable Instruments, which is abundantly supported by authority. The cases seeming to assert a different doctrine are either cases where the contract is absolutely void, (in which case no estoppel can avail,) or they are cases decided in jurisdictions where, as in this state prior to 1881, a married woman cannot be estopped by matter *in pais*. This court has repeatedly decided that, as the law now is in this state, the ability of married women to contract is the rule and disability is the exception. *Miller v. Shields*, 124 Ind. 166, 8 L. R. A. 406; *Arnold v. Engleman*, 108 Ind. 512, 1 West. Rep. 482; *Ross v. Prather*, 108 Ind. 191, 1 West. Rep. 287; *Vogel v. Leichner*, 102 Ind. 55.

It has been decided that, when a married woman executes her individual note, it is prima facie her individual contract. She is presumed to have received the consideration, and, if she asserts, notwithstanding the form of her contract, that it is a contract of suretyship, the burden is on her to establish that fact. *Miller v. Shields*, 124 Ind. 166-174 *et seq.*, 8 L. R. A. 406. When a married woman executes her negotiable note alone, it will be presumed to be for her individual debt, and not a contract of suretyship, for several good reasons: (1) A person is presumed to do what is within his right and power, rather than what is beyond them. Lawson, Presump. Ev. Rule 68, p. 276; *Pool v. Morris*, 29 Ga. 375, 74 Am. Dec. 68. (2) The law forbids her to make any contract of suretyship, and the presumption is that any act was done of right, and not of wrong. Lawson, Presump. Ev. Rule 16, p. 81. (3) In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. Id. Rule 15, p. 67. (4) Negotiable paper is presumed to have been

regularly negotiated, and to be or to have been regularly held. *Id.* Rule 18, subrule 3, p. 77; Randolph, Com. Paper, § 1024. (5) The expression of consideration (which is found in express terms on the face of this note) of itself raises a presumption of consideration moving from the payee to the maker. Randolph, Com. Paper, § 178, and authorities cited; also section 562 *et seq.*, and authorities cited. (6) Every one is presumed to know the law. This applies to married women, in common with all other persons. They are therefore presumed to know that a promissory note, payable to order or bearer, at a bank in this state, is negotiable as an inland bill of exchange. They are presumed to know that one of the distinguishing and most valuable characteristics of such a note is the facility with which it may be transferred, and the protection afforded an innocent indorsee for value before maturity against equities existing between the maker and the payee. When a married woman executes her promissory note, payable at a bank in this state, she is chargeable with knowledge of all the legal incidents of such a contract. When her note thus executed is offered for negotiation in the ordinary course of business, she is bound to know that it carries with it all

of the foregoing presumptions. When a married woman thus executes and puts in circulation her note, which she must know carries with it to an innocent indorsee for value such presumptions, she has done an act which partakes of the character of an estoppel *in pais*, and which should estop her to say to such innocent indorsee that it is not what it purports to be, and what she has deliberately authorized him to believe it was. When an act is done or a statement made by a person which cannot be contradicted or contravened without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel attaches to it. *State v. Pepper*, 81 Ind. 76; *Ray v. McMurtry*, 20 Ind. 807, 808, 88 Am. Dec. 822, and many other authorities. However, a proposition so fundamental and elementary in the law of estoppel *in pais* needs no citation of authority to support it. With all deference to my colleagues, in my opinion the conclusion reached by the majority of the court mistakes the law, cannot be sustained by valid reasoning, and will simply serve as a barricade, behind which dishonesty may entrench itself. I cannot concur.

PENNSYLVANIA SUPREME COURT.

Borough of SAYRE, *Appt.*,

v.

Harry PHILLIPS.

(.....Pa.....)

A borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is

fixed at so high a figure that it amounts to prohibition, but which excepts residents of the borough from its provisions, is void.

(April 12, 1892.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Bradford County in favor of defendant in an action brought to recover the prescribed penalty for

NOTE.—*Discrimination by municipality between its own residents and other residents of the same state.*

The above decision does not seem to be based alone on the objection that the ordinance discriminating against nonresidents might interfere with interstate commerce or with the rights of citizens of other states, but to hold also that a municipal corporation cannot by ordinance discriminate between its own residents and other residents of the same state.

This doctrine seems to be uniformly held also by other courts which have rendered decisions on the subject.

Thus in *Nashville v. Althorp*, 5 Coldw. 554, an ordinance discriminating between dealers within the city and the same classes of persons outside of the city in respect to a license for sales by sample was held to be void.

The same principle was applied in *Charleston v. State*, 2 Speer, L. 719, in respect to a municipal tax on the slave of a nonresident employed within the city where the tax attempted was greater than that on slaves of residents.

Again, in *Ex parte Frank*, 59 Cal. 806, an ordinance requiring a greater license for the sale of goods not then within the city or in transit toward it than for the sale of goods within the city was held void for illegal discrimination against nonresidents.

In *Graffy v. Rushville*, 5 West. Rep. 858, 107 Ind. 502, an ordinance requiring a license for hawking

and peddling except in a case of a resident peddler or of goods grown or manufactured within the county was held void, not only as an interference with interstate commerce, but as a denial of the right of citizens of the state under the Indiana Constitution to equal privileges and immunities.

So in *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679, it was held that a city could not require a license even without a money payment as a condition of the running of a omnibus in the city by an inhabitant of another town. This decision however, seems to be based on the lack of power of the city over an employment which was not territorial rather than upon any objection as to discrimination against nonresidents. The court said that the by-law was an unnecessary restriction on the business of those carrying passengers for hire and was not binding on the inhabitants of other towns.

In *Hayden v. Noyes*, 5 Conn. 391, a by-law of a town prohibiting all persons except inhabitants of the town from taking shell-fish from that part of a navigable river within the limits of the town was held void, but the decision in this case is based on the fact that fishing in the river was a matter of common right and that the town had no right to take it away.

See also the decisions of the lower courts of Pennsylvania cited above in brief of counsel for appellee.

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an alleged violation of an ordinance forbidding peddling without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. B. Niles, DeLoss Rockwell, J. C. Horton and H. F. Maynard for appellant.

Messrs. D' A. Overton, John C. Ing-ham and Rodney A. Mercur, for appellee: Defendant was not a hawker or peddler.

Com. v. Gardner, 7 L. R. A. 666, 133 Pa. 289; *Com. v. Farnum*, 114 Mass. 270; *Com. v. Ober*, 12 Cush. 495; *Com. v. Smith*, 6 Bush, 803; *Com. v. Jones*, 7 Bush, 502; *Ex parte Seibenhauer*, 14 Nev. 365; *Re v. McKnight*, 10 Barn. & C. 784; *Kansas v. Collins* (Kan.) 11 Am. & Eng. Corp. Cas. 414; *Com. v. Edison*, 2 Pa. Co. Ct. Rep. 882; *Com. v. Eichenburg*, 140 Pa. 158; *Fisher v. Patterson*, 13 Pa. 339.

There is no statute authorizing the passage of an ordinance prohibiting the sale by a hawker or peddler of certain articles, or discriminating in favor of certain individuals.

Sharon v. Golden, 4 Pa. Co. Ct. Rep. 857.

An ordinance discriminating in the imposition of a license tax between resident and non-resident merchants is invalid.

Conshohocken v. Fennel, 5 Pa. Co. Ct. Rep. 65; *Easton v. Easton Beef Co.* Id. 68.

A clause in an ordinance excepting all citizens of the borough from the operation of such ordinance will make it void because of discrimination.

Sansford v. Brode, 7 Pa. Co. Ct. Rep. 231.

An Act providing that persons residing out of the county shall pay a greater license fee than those residing therein is void under the Constitution of the United States.

Groh v. Com. 6 Pa. Co. Ct. Rep. 180; *Com. v. Standard Oil Co.* 101 Pa. 146.

A borough ordinance may regulate but not restrain trade.

1 Dillon, Mun. Corp. § 823; *Northern Liberties Comrs. v. Northern Liberties Gas Co.* 12 Pa. 821; *Kneedler v. Norristown*, 100 Pa. 878, 45 Am. Rep. 384; *Millerstown v. Bell*, 123 Pa. 155.

Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury.

1 Dillon, Mun. Corp. § 327; *Com. v. Worcester*, 3 Pick. 462; *Vandine, Petitioner*, 6 Pick. 187; *Austin v. Murray*, 16 Pick. 121; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Boston v. Shaw*, 1 Met. 180; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Dunham v. Rochester*, 5 Cow. 462; *Buffalo v. Webster*, 10 Wend. 100; *Brooklyn v. Breslin*, 57 N. Y. 591; *Paxson v. Sweet*, 13 N. J. L. 198; *Ex parte Frank*, 52 Cal. 606; *Northern Liberties Comrs. v. Northern Liberties Gas Co. and Kneedler v. Norristown*, *supra*; *Pittsburgh's App.* 6 Cent. Rep. 225, 115 Pa. 4; *Millerstown v. Bell*, *supra*; *Lévingston v. Wolf*, 136 Pa. 519.

The following cases are conspicuous ones, examples of ordinances declared void, because they were unjust, unequal and unfair:

Ex parte Frank, *supra*; *Conshohocken v. Fennel*, 5 Pa. Co. Ct. Rep. 65; *Easton v. Easton Beef Co.* 5 Pa. Co. Ct. Rep. 68.

Congress is the only power that has authority to regulate interstate commerce, and any ordinances passed by municipal authorities restricting that right are invalid.

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Robbins v. Shelby County Tax. Dist. 120 U. S. 489, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 687; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618; *Ex parte Stockton*, 32 Fed. Rep. 95; *Ex parte Kimmel*, 41 Fed. Rep. 775; *Re White*, 43 Fed. Rep. 918; *Ex parte Spain*, 47 Fed. Rep. 208; *Re Nichols*, 48 Phila. Leg. Int. 474.

Williams, J., delivered the opinion of the court:

The business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. The Legislature has forbidden it to all unlicensed persons, and has prescribed the conditions on which licenses may be obtained from the courts. The necessity for such legislation is a question for the law-makers. The validity of any particular statute relating to the subject is a question for the courts. The Act of 1784, and the supplementary Acts, relating to the business of peddling, have been held to be valid, as an exercise of the police power, in many cases, among the more recent of which are *Warren v. Geer*, 117 Pa. 207, 9 Cent. Rep. 807; *Sharon v. Hawthorne*, 123 Pa. 106; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666; *Titusville v. Brennen*, 148 Pa. 642, 14 L. R. A. 100. By the organization of a city or borough within its borders the state imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported as an exercise of the police power residing in the municipality, be directed in like manner as the business. If a statute or a municipal ordinance is in reality directed only against certain persons who are engaged in a given business or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade, regulation; and it has no right to shelter itself behind the police power of the state or the municipality. A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation, discriminating between the productions

of this and sister states, and would be incapable of enforcement, because in violation of the Constitution of the United States. So a law that should forbid the courts to grant a peddler's license to any person resident in another state, but should authorize the granting of licenses to citizens of this state, would be bad for the same reason. When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character. Only in matters of local government is its situation changed. It can have no better right to adopt discriminating trade regulations than the state has.

We come now to consider the ordinance on which this case depends. It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious, but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of profes-

sional labor, and protect the village lawyer and doctor as well as the village grocer and peddler.

We are reminded by the appellant that this ordinance is like that which came into notice in *Warren v. Geer*, *supra*; and it is urged that the question now under consideration ought, therefore, to be regarded as ruled by that case. That case was well decided on the only issue presented by it. The plaintiff set out in the declaration the ordinance of the borough, and charged that the defendant had violated it by canvassing from house to house within the borough. The defendant demurred, thus admitting the acts charged and denying the power of the borough to require one engaged in canvassing to take a license. The court below held that the defendant was entitled as of common right to pursue his business, and that the borough was without the power to forbid it. The question came to this court in the form that it had been disposed of in the court below, as a question of power in the borough to require a license from peddlers and canvassers, and we held that the power existed under the Act of incorporation, and under the General Borough Law of 1851. Our Brother Green, who delivered the opinion of this court, stated the point in controversy thus: "The only question, therefore, is whether the borough of Warren possesses by either express grant or necessary implication the right to enact the ordinance" forbidding the exercise of defendant's employment without a license. We adhere to the doctrine of that case. The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side.

We are very clear in our convictions that this cannot be done, and for this reason *the judgment is affirmed*.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Sarah P. INGALLS *et al.*, *Appts.*,
v.

Warren D. HOBBS.

(.....Mass.....)

1. **Bugs infesting a summer-house at a watering place** which is hired already furnished for the season may render it so unfit for habitation that the tenant may be relieved from the agreement.
2. **In a lease of a completely furnished dwelling-house for a summer season** at a summer watering place there is an implied agreement that the house is fit for habitation without greater preparation than the tenant might reasonably be expected to make.

(May 9, 1892.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to recover rent alleged to be due and unpaid. *Affirmed*.

The facts are stated in the opinion.

Mr. George E. Smith, for appellants:

A careful examination of *Smith v. Marrable*, 11 Mees. & W. 5; *Sutton v. Temple*, 13 Mees. & W. 52; and *Hart v. Windsor*, Id. 68, will convince one that the same judges who decided in favor of an implied condition were, upon re-examination immediately after, very doubtful of the wisdom of that decision. They repudiated the authorities on which originally it was decided.

In *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 48, the defendant asked for an instruc-

NOTE.—On the question of an implied agreement that a furnished house leased for a short time is fit for occupation the authorities are sufficiently presented in the report of the case. But see, as 16 L. R. A.

showing the narrow limits of the rule followed above, the case of *Franklin v. Brown*, 6 L. R. A. 770, 118 N. Y. 110.

tion to the jury: "That there was an implied warranty, in the letting of a house for a private residence, that it is reasonably fit for occupation." And Metcalf, J., in the opinion says: "The court refused to instruct the jury that there is any such implied covenant in such a case. And it is well settled by authority that there is not."

The same principle was applied to the lease of a dwelling-house, in *Stevens v. Pierce*, 151 Mass. 207.

Messrs. Choate & Dana, for appellee:

In England the doctrine is now well established, that there is such an implied agreement or warranty.

Smith v. Marrable, 11 Mees. & W. 5; *Wilson v. Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507; *Bird v. Greville*, 1 Cababe & E. 317; *MacLean v. Currie*, Id. 361; *Chester v. Powell*, 52 L. T. 722; *Charlesley v. Jones*, 58 J. P. Q. B. Div. 280. See also *Dutton v. Gerriah*, 9 Cush. 89, 55 Am. Dec. 45; *Edwards v. McLean*, 122 N. Y. 302.

Knowlton, J., delivered the opinion of the court:

This is an action to recover \$500 for the use and occupation of a furnished dwelling-house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of \$500, with interest from the date of the writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered on an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. Stat. chap. 152, § 10; *Rand v. Hanson*, 154 Mass. 87; *Mayhew v. Durfee*, 138 Mass. 584; *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Hecht v. Batcheller*, 147 Mass. 335, 6 New Eng. Rep. 610; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Charlton v. Donnell*, 100 Mass. 229.

The facts agreed warrant a finding that the

house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling-house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton v. Gerriah*, 9 Cush. 89, 55 Am. Dec. 45; *Poster v. Peyser*, 9 Cush. 242, 47 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68.

In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507; *Sutton v. Temple* and *Hart v. Windsor*, *supra*; *Bird v. Greville*, 1 Cababe & E. 317; *Charlesley v. Jones*, 58 J. P. Q. B. Div. 280. In *Dutton v. Gerriah*, 9 Cush. 89, 55 Am. Dec. 45, *Chief Justice Shaw* recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302; *Smith v. Marrable*, and *Wilson v. Hutton*, cited above, are referred to with approval, although held in inapplicable to the question then before the court. See *Oleaves v. Willoughby*, 7 Hill, 88; *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770. We are of opinion that in the lease of a completely fur-

nished dwelling-house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it

for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

GEORGIA SUPREME COURT.

GEORGIA SOUTHERN & FLORIDA R.
CO., *Piff. in Err.*,

v.

Anthony ASMORE.

(.....Ga.....)

***A passenger on a railway train, who refuses to accede to a wrongful demand for fare, is entitled to be carried on acceding to the demand, though the train**

*Head note by BLECKLEY, Ch. J.

(February 15, 1892.)

NOTE.—*Right of passenger to pay fare after train begins to stop for purpose of ejecting him.*

After the ejection of a passenger for factious refusal to pay fare, he has not the right to pay and continue his passage on that trip. *Pease v. Delaware, L. & W. R. Co.* 11 Daly, 385; *People v. Jillson*, 3 Park. Crim. Cas. 284.

This is true although the stop is within the limits of the ordinary stopping place of the train. *Pease v. Delaware, L. & W. R. Co. supra*.

The same rule applies even before the ejection if the train has stopped for the express purpose of ejecting the passenger. *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 445; *Hibbard v. New York & R. R. Co.* 15 N. Y. 455; *O'Brien v. Boston & W. R. Co.* 15 Gray, 30, 77 Am. Dec. 347; *Hoffbauer v. Delhi & N. W. R. Co.* 52 Iowa, 343, 35 Am. Rep. 273.

But where the train has stopped at a regular stopping place an offer to pay fare before a passenger is ejected must be accepted. *O'Brien v. New York Cent. & H. R. R. Co.* 80 N. Y. 233.

Yet even if the place where a train is stopped is a regular station at which tickets are sold, if the particular train on which a passenger is traveling would not have stopped there except for the purpose of expelling him he is not entitled to prevent his expulsion and to continue his passage on that train by tender of fare after the train is stopped. *Pickens v. Richmond & D. R. Co.* 104 N. C. 312; *O'Brien v. New York Cent. & H. R. R. Co. supra*; *Nelson v. Long Island R. Co.* 7 Hun, 140.

A passenger who has refused to pay fare may change his mind and pay while the train is stopped at a station although the conductor has commenced to put him off, if he has not compelled the conductor to stop the train for that purpose or to resort to extreme measures, as for instance by force to pull him from his seat. *Gould v. Chicago, M. & St. P. R. Co.* 13 Fed. Rep. 155.

A valid ticket which a passenger had kept back and not shown until after he was ejected at a station for refusal to pay fare and insisting on his right to ride on a worthless ticket, will not entitle him to re-enter the train. *State v. Campbell*, 33 N. J. L. 309.

A passenger is not entitled to readmission to a train from which he has been ejected for nonpayment of fare by reason of a ticket which he purchases at the place where he is ejected, at least without paying fare for the distance already ridden. *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 53, 29 Am. Rep. 453.

The rules above laid down are not without some 16 L. R. A.

may have been stopped with a view to his expulsion; but if the demand upon him is rightful he cannot avoid expulsion by tendering the fare while the train is being stopped, or after the stoppage.* Where the failure of the passenger to have a ticket is due to the non-attendance of the agent at the ticket office, or to other fault or default of the company, the passenger is entitled to be carried at the ticket rate of fare; but where his failure is attributable to any other cause he has no right to be carried without paying the higher lawful rate exacted by the rules of the company.

limitations as clearly shown in the main case. Thus it is said that to bring a case within the rule that a person is not entitled to pay when being put off the train after refusal to pay fare there must be a willful or at least a positive refusal to pay proper fare. *Texas & P. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532.

So the rule that a passenger who has refused to pay his fare cannot pay after ejection or after the train is stopped to eject him and thus claim the right to continue on that train, it is said in *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180, 72 Am. Rep. 668, ought to be limited to willful violation of his duty to pay.

A conductor is bound to receive fare from a third person if offered before the ejection of a passenger who has no ticket or money, whom he is about to eject for nonpayment of fare. *Louisville & N. R. Co. v. Garrett*, 8 Lea, 433, 41 Am. Rep. 640.

A New York case lays down the same rule, at least where the train is stopped at a station. *Guy v. New York, O. & W. R. Co.* 30 Hun, 399.

Where a conductor hastily pulls the bell and takes steps to eject a passenger who honestly disputes the correctness of the amount demanded, without giving the passenger reasonable time to consider, he must accept a tender of fare offered thereafter. *Texas & P. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532.

The same rule applies where the passenger is obliged to borrow money to pay the extra fare. He is entitled to a reasonable time for that purpose. *Curl v. Chicago, R. I. & P. R. Co. (Iowa)* 11 Am. & Eng. R. R. Cas. 85.

In California it is decided that a tender by a passenger of the remainder of his fare is in time although the train has stopped for the purpose of ejecting him, where the money which he had already paid to the conductor had not been returned to him. *Bland v. Southern Pac. R. Co.* 55 Cal. 570, 36 Am. Rep. 50.

In South Carolina *R. Co. v. Nix*, 68 Ga. 572, it is held that a conductor is not bound to receive fare after a train is in motion, from a passenger who has been ejected for nonpayment of fare, but it is said that he ought to do so if tendered while the train is not in motion or before the passenger is actually ejected. This last statement it will be seen is not in accord with most of the decisions cited above.

For note on payment of back fare for distance already traveled as a condition of being carried further, see *Manning v. Louisville & N. R. Co. (Ala.)*, reported next after the main case. B. A. R.

ERROR to the Superior Court for Houston County to review a judgment in favor of plaintiff in an action brought to recover damages for his alleged wrongful ejection from defendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. Gustin, Guerry & Hall and R. N. Holtzclaw for plaintiff in error.

Mr. A. S. Giles for defendant in error.

Blackley, Ch. J., delivered the opinion of the court:

The testimony was in some conflict. It raised the question of fact whether the failure of the passenger to have a ticket was due to the fault or default of the company, or to the omission of proper diligence by the plaintiff to supply himself with a ticket. Another question of fact on which the testimony differed was whether the passenger offered to pay at the conductor's rate before or not until after the train was stopped or being stopped for his expulsion. That he made the offer before he left the car, there is no dispute. The court charged the jury that, if he started to leave the train, and before doing so honestly changed his mind, and in good faith determined to remain and pay the amount charged, he had a right to do so; and, if he tendered that amount before he left the car, the conductor was bound to receive it, and ejection after such tender would be illegal and wrongful. Was this instruction correct? Tested by the letter of the decision in *South Carolina R. Co. v. Nix*, 68 Ga. 572, it was correct. Permission was granted in the argument here to review that case in respect to this question, and we have reviewed it. Our conclusion is that it is not sustainable, either on principle or by sound authority, and we feel constrained to overrule it in so far as it lays down in universal and unqualified terms the proposition, or its equivalent, that a passenger, by making a tender at any time before his ejection, may acquire the right to remain on board and be carried. Whenever a passenger refuses to accede to a just and lawful demand made upon him by the conductor for the payment of his fare, after being allowed reasonable time and opportunity to comply, he renounces his right to the position and the privileges of a passenger, and subjects himself to expulsion from the train. If he changes his mind, and tenders the fare before anything is done towards bringing the train to a stop in order to eject him, his refusal will be retracted in time, and his right to remain and be carried will stand unaffected. If he haggles and hesitates until he becomes a proper subject for ejection, and until steps have been taken to that end, he is too late. Any rule which would allow one passenger to play fast and loose with the conductor would allow all the passengers to do so, and a train might thus be kept halting and alternating between running at ordinary speed and stopping throughout the whole of its journey; and to this embarrassment not only one train, but every train run for the carriage of passengers, would be exposed. See the observations of Denio, J., in *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455; *Hutchinson*, Carr. 2d ed. § 589. The Code, § 2082, declares that "carriers of passengers may refuse to admit, or may eject from their convey-

ances, all persons refusing to comply with reasonable regulations, or guilty of improper conduct." It is certainly improper conduct for a passenger to delay the payment of his fare beyond the time when he ought to pay it, and a regulation that he shall pay on demand of the conductor is reasonable, and so necessary for the orderly conduct and transaction of business that it may fairly be presumed to be a regulation which all railway companies carrying passengers adopt and expect to enforce. This method of dealing with passengers who travel by railroad is so universal as to be a matter of general public observation and experience, and we apprehend that it would be a very rare instance in which a passenger would be surprised to find it in use. In the present case the passenger, when called upon, did not object to paying promptly what he admitted to be due. In fact, he put into the hands of the conductor money more than sufficient for the payment of his fare at the higher rate. Touching what immediately followed, the testimony is conflicting; but it is clear that a discussion arose as to whether payment should be made at the ticket rate or at the train rate, in consequence of which none of the money was retained, but all of it was returned. The plaintiff contended for the ticket rate, upon the ground that he tried to get a ticket, and that the agent was not at his place. The conductor insisted upon the higher rate, which was the usual and legal one exacted of passengers who had not procured tickets. According to sound legal principle, the right of the plaintiff to remain upon the train and be carried on payment or tender of the ticket rate should depend alone upon the fact whether the non-attendance of the ticket agent at the office, or any other fault or default of the company, was the true reason why the plaintiff was not supplied with a ticket. If his failure to have it was due to his own neglect, or to any cause not chargeable to the company, its agents or employees, the tender of the ticket rate had no relevancy whatever to the right of the plaintiff to be carried, or to shun ejection from the cars. He might as well have tendered nothing as not enough. On the other hand, it was the company's omission or fault that prevented the plaintiff from having a ticket, the conductor had no right to demand the payment of fare at a higher than the ticket rate; no right to reject that rate when tendered; and after its tender he could not lawfully expel the passenger for not complying with his unlawful demand of payment at a higher rate. This test of the respective rights of the passenger and the carrier goes to the foundation and rests upon the actual state of facts, and not upon mere belief or good faith either of the passenger or of the conductor. It requires them to know their respective rights, and to act accordingly. A passenger always knows why he fails to obtain a ticket. A conductor represents the company, and, if the company has failed in any of its duties to afford passengers opportunity to obtain tickets, he should be so informed. If the company will not allow him to take the word of the passenger, it must adopt some other means of informing him; as, for instance, requiring him to ascertain at each station, before leaving it, whether the ticket office has been properly kept open, and attended

for the sale of tickets or not. What the company, by any of its proper agents or employes, knows on that subject, the conductor, as representing the company on the train, may be presumed to know, and this presumption, as a general rule, should be treated as conclusive. The respective legal rights of the parties being as we have just announced, can those rights be changed by either without the consent of the other? It is clear to us that they cannot. Either may waive his own rights, but neither can compel any waiver by the other. If the passenger has the necessary state of facts to back him, nothing which the conductor can do will justify his expulsion. So, if the conductor, on the other hand, has at his back the necessary state of facts, he may enforce the

rule of expulsion over any tender whatever which the passenger may make after steps have been rightfully taken to stop the train in consequence of the refusal to pay. Of course, this applies only to instances occurring between stations, and where the sole reason for stopping the train is to effect expulsion. We desire to restrict our ruling to what is necessary for a decision of the case before us. The sum of the matter is that a passenger cannot force a railroad company to reject him as a patron, and then force it, by making a tender which he ought to have made before, to cancel the rejection, and perform service the same as if there had been no failure to agree originally.

Judgment reversed.

ALABAMA SUPREME COURT.

James MANNING, *Appt.*,

LOUISVILLE & NASHVILLE R. CO.

(.....Ala.....)

Refusal to pay fare for the distance already ridden without a valid ticket will justify the ejection of a passenger although on notice that he must pay such fare or be put off at the next station he has procured at that station a ticket for the remainder of his trip.

(April 23, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bowman & Harsh for appellant.

Messrs. Hewitt, Walker & Porter for appellee.

Stone, Ch. J., delivered the opinion of the court:

Plaintiff purchased an excursion ticket to and from New Orleans from defendant's ticket agent at Birmingham. He obtained it at reduced rates, but on certain conditions as to its use, which were printed on the ticket, and subscribed by him. Plaintiff testified that he had read the conditions. Among them are the following: "In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree with the Louisville & Nashville Railroad Company as follows: That on the date of my departure, returning, I will identify myself as the original purchaser of this ticket, by writing my name on the back of this contract, and by other means, if required, in the presence of the ticket agent of the Louisville & Nashville Railroad Company at the point to which this ticket was sold, who will witness the signature, date and stamp the contract; and that this ticket and coupons shall be good returning only for a continuous passage from such date, and in no case later than the date canceled in the margin of this contract." Plaintiff conformed to all the requirements of this

NOTE.—*Payment of back fare for distance already ridden as condition of being carried further.*

In *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 120, it is held, in conflict with the main case, that a passenger expelled from a train at a station for refusal to pay the amount of fare demanded may get on again and continue his journey on the same train on payment of the lawful fare from that point without paying fare for the distance previously ridden.

This distinction is based on his right to again become a passenger for a distinct trip, and it is held that he can do so on that train as well as any other.

But the majority of the cases agree with the main case above reported.

A passenger who has been expelled at a station for refusing to pay fare cannot continue his passage by paying fare from that point only, but must pay for the whole distance. *Swan v. Manchester & L. R. R.* 122 Mass. 116, 43 Am. Rep. 432; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95.

The purchaser of a ticket from the station at which a passenger is ejected for nonpayment of fare does not entitle him to ride on the same train without payment for the distance already ridden 16 L. R. A.

even if he could claim the right to be admitted to that train on any terms. *Stone v. Chicago & N.W. R. Co.* 47 Iowa, 82, 20 Am. Rep. 458.

So on the same principle a tender of fare from a station where a passenger secures a seat, although he has already ridden for some distance, will not be sufficient without paying fare for the whole distance. *Davis v. Kansas City, St. J. & C. B. R. Co.* 68 Mo. 317, 14 Am. Rep. 457.

But where a passenger has a ticket not limited to any particular time or to the day on which it was purchased, and after it is punched stops over at a station and takes another train, if the conductor of the latter refuses to accept the ticket and threatens to eject him at the next station, he is entitled on procuring a ticket there to proceed upon it without paying fare again for the distance already ridden on that train as he has previously paid for the whole ride. *Ward v. New York Cent. & H. R. R. Co.* 30 N. Y. S. R. 604.

For note on the right of a passenger to pay fare after the train begins to stop for the purpose of ejecting him, see *Gulf, C. & S. F. R. Co. v. Asmore* next preceding the main case. B. A. R.

contract until he reached Mobile on his return trip. At that place he stopped off one day. At the end of that time he boarded another train of the railroad at midnight, and took a berth in a sleeping car. He proceeded unmolested on his homeward trip until he passed Montgomery, and was nearing Calera, less than forty miles from Birmingham. At that stage of his journey the conductor in charge of the train discovered he was traveling on a forfeited ticket, but possibly did not learn he had so traveled before he reached Montgomery. As a condition of his proceeding further the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or, failing, that he would be put off the train at the next station, which would be Calera. Reaching Calera plaintiff procured from the ticket agent at that place a ticket to Birmingham, and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that under the road's regulations he could not permit him to proceed unless he would also pay the back fare from Montgomery. This he failed to do, and was ejected from the train. The present action is brought to recover damages for such ejection.

A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad? The regulation needs no argument to uphold its reasonableness. The authorities are uniform, and very abundant, that the conductor was authorized to de-

mand fare, not only for the portion of the road yet to be traveled, but equally for that part of the road plaintiff had been carried, after his ticket had become *functus* by virtue of his stop over. And the conductor was fully justified in ejecting Manning from the train on his refusal to pay the fare as demanded. 8 Wood, *Railway Law*, § 861, p. 1483; Wheeler, *Carr.* 174; Hutchinson, *Carr.* 2d ed. § 580a; *Hill v. Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101; *State v. Campbell*, 83 N. J. L. 309; *Swan v. Manchester & L. R. Co.* 183 Mass. 116; *Davis v. Kansas City, St. J. & C. B. R. Co.* 53 Mo. 817, 14 Am. Rep. 457; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 57; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95; *Pickens v. Richmond & D. R. Co.* 104 N. C. 812; *Atchison, T. & S. F. R. Co. v. Ganta*, 88 Kan. 629; *Johnson v. Concord R. Corp.* 46 N. H. 213; *Rose v. Wilmington & W. R. Co.* 106 N. C. 168. Plaintiff (appellant here) relies on *Ward v. New York Cent. & H. R. R. Co.*, 80 N. Y. S. R. 604, as an authority in his favor. The ticket in that case was an ordinary one, and had no clause or stipulation requiring or looking to continuous passage. The decision is rested on the absence of that provision. It refers to and approves many of the decisions we have referred to above, pronounced on contracts requiring continuous passage. Properly interpreted, that case is an authority against appellant. In *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19, 9 L. R. A. 388, we took occasion to comment on the great importance, the public necessity, of wisely observing regulations in the running of trains on railroads. We need not repeat what we there said. We hold that in the charge given to the jury the circuit court strictly followed the law.

Affirmed.

LOUISIANA SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INS. CO.

BOARD OF ASSESSORS, *Appt.*

(.....La.....)

***1. Foreign companies, being required, in order to carry on business in this state, to have an authorized agent upon whom process may be served, do not, in appointing a board of directors to act as their agent, localize their business any more than those companies which manage their affairs through agencies not organized into boards, the duties of each agency being about the same.**

2. A nonresident creditor of a state cannot be said to be, in virtue of a debt which a resident owes him, a holder of property within its

***Head notes by BREUX, J.**

NOTE.—For an apparent modification of the doctrine that a debt due to a nonresident creditor cannot be taxed at the domicile of the debtor, see note to *Detroit v. Rentz* (Mich.), which is reported next following the above case.

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limits. The credit is not within the state's jurisdiction, and of no value to the debtor, and is not property within the state, but property of the creditor, taxable at his place of residence.

3. Tangible movable property may be taxed where situate, under a special statute which provides for its taxation.

(May 2, 1892.)

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to procure the cancellation of a certain tax assessment. *Affirmed.*

The facts are stated in the opinion.

Mr. Carleton Hunt, City Atty., for appellant:

It is true that the doctrine of the international jurists, in relation to the *situs* of movables, forms part of the *ius gentium*, but this statement is, beyond all doubt, to be accepted, subject to the limitation that there is no positive law to the contrary of the country where the property involved happens in point of fact to be. For if there is, the law of the owner's

domicil must necessarily yield to the law of the place where the property is actually situated.

Burroughs, Taxation, §§ 40-42; *Alcany v. Powell*, 55 N. C. 51; *Catlin v. Hull*, 21 Vt. 161; *State v. St. Louis County*, 47 Mo. 594; *People v. Home Ins. Co.* 29 Cal. 538; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Wilcox v. Ellis*, 14 Kan. 602; *Tazewell County Suprs. v. Davenport*, 40 Ill. 198; *Douglas v. New York*, 2 Duer, 110; *People v. Ogdensburgh*, 48 N. Y. 390; *Oliver v. Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Atty-Gen. v. Bay State Min. Co.* 99 Mass. 148.

All the laws of the state of Louisiana relative to assessment and the taxation of property under the present Constitution, will be searched in vain for the expression of any legislative purpose to assess or to tax income.

See *Forman v. Houston*, 85 La. Ann. 825; *Parker v. North British & M. Ins. Co.* 42 La. Ann. 429.

The contention of the plaintiff, that the assessment involved, of \$40,000, on money loaned on interest, credits, etc., and of \$10,000, money in possession, is not liable to taxation in the state of Louisiana, but can be taxed at the domicil of the company only, Liverpool, England, is unmaintainable.

Every state, in view of the law, is equal to every other state, and every state possesses an exclusive sovereignty and jurisdiction within its own territory.

Story, *Confl. Laws*, par. 18.

The right of the State of Louisiana to direct her own course of policy regarding taxation is not to be questioned, nor does it suffice to defeat that policy, to criticise it as being narrow or illiberal.

Burroughs, Taxation, §§ 40-42.

The theory that personal property attends the person, and is where the owner lives, is a mere fiction, whose restricted application rests on the comity of nations, and the fiction itself is inapplicable in this case of Revenue Statutes.

Alcany v. Powell, 55 N. C. 51; *Catlin v. Hull*, 21 Vt. 161; *Smith v. Burley*, 9 N. H. 428; *State v. St. Louis County*, 47 Mo. 594; *People v. Home Ins. Co.* 29 Cal. 538; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Wilcox v. Ellis*, 14 Kan. 602; *Tazewell County Suprs. v. Davenport*, 40 Ill. 198; *People v. Ogdensburgh*, 48 N. Y. 390; *Oliver v. Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Atty-Gen. v. Bay State Min. Co.* 99 Mass. 144; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1081.

While the money in possession and credits of the Liverpool & London & Globe Insurance Company, involved in the present case, as subject to taxation, are personal property, and in part intangible and incorporeal, it was perfectly competent for Act 106 of the Acts of 1890 of the state of Louisiana to separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own.

Tappan v. Merchants Nat. Bank, 86 U. S. 19 Wall. 499, 22 L. ed. 198.

Messrs. E. A. O'Sullivan, City Atty., and Henry Renshaw, Asst. City Atty., in support of petition for rehearing:

Said debts are embraced within the exercise 16 L. R. A.

of jurisdiction and power by the state over non-residents, and petitioners cite garnishment process under writs of attachment and execution as an illustration of the exercise of jurisdiction as to credits due nonresidents.

C. P. 248; *Miller v. United States*, 78 U. S. 11 Wall. 297, 20 L. ed. 142; *Brown v. Kennedy*, 82 U. S. 15 Wall. 599, 31 L. ed. 195.

The legal fiction expressed by the maxim, *mobilia personam sequuntur* must yield to express law, where the credits sought to be taxed arise from business carried on within the state, by the plaintiff through its local agent.

The statute referred to is a lawful exercise of the legitimate power of the state.

See *Alcany v. Powell*, 55 N. C. 51; *Catlin v. Hull*, 21 Vt. 161; *State v. St. Louis County*, 47 Mo. 600; *People v. Home Ins. Co.* 29 Cal. 538; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Wilcox v. Ellis*, 14 Kan. 602; *Tazewell County Suprs. v. Davenport*, 40 Ill. 198; *Oliver v. Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1081; *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 499, 22 L. ed. 198.

In the case of *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186, the United States Supreme Court held: "Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

The Legislature having expressed its will through the statute, there is no difficulty in carrying out the enactment.

Miller v. United States, 78 U. S. 11 Wall. 296, 20 L. ed. 141; *Brown v. Kennedy*, 82 U. S. 15 Wall. 599, 21 L. ed. 196.

Messrs. E. W. Huntington and Horace L. Dufour, for appellee:

The *situs* of a debt as property is at the domicil of the creditor.

Burroughs, Taxn. 186; *Cooley, Taxn.* chap. 1, pp. 14, 15; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186. See also *Kirtland v. Hotchkiss*, 100 U. S. 496, 25 L. ed. 561; *Meyer v. Pleasant*, 41 La. Ann. 646; *Barber Asphalt Pav. Co. v. New Orleans*, 41 La. Ann. 1015.

A corporation retains the domicil of its birth, and, like natural persons, it is at that domicil "that its obligations for, and its liability to, taxation for debts or other incorporeal rights, which it owns, must be tested and settled."

Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co. 104 U. S. 71, 26 L. ed. 700; *Yuba County v. Pioneer Gold Min. Co.* 82 Fed. Rep. 183.

The assessment is one on income, which is not permissible under our state Constitution.

Burroughs, Taxn. p. 159, § 82.

Annual premiums received by an insurance company constitute a part of its income.

Burroughs, Taxn. p. 160; *Parker v. North British & M. Ins. Co.* 42 La. Ann. 429; *Dubugue v. Northwestern L. Ins. Co.* 29 Iowa, 9.

An income tax does not come within the meaning of the word "property" as used and designated in the Constitution.

Glasgow v. Rouse, 48 Mo. 479.

The absence of any express reference to income and of all appropriate provisions for defining and ascertaining the income to be taxed negatives the legislative intention to levy such tax.

Forman v. Houston, 85 La. Ann. 825. See also *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 42 Fed. Rep. 90.

Breaux, J., delivered the opinion of the court:

This suit was brought by the Liverpool & London & Globe Insurance Company for the cancellation of an assessment against the company for the taxes of 1891, which reads as follows: "Money loaned on interest, all credits and all bills receivable from money loaned or advanced or for goods sold, \$40,000;" "money in possession, on deposit or in hand, \$10,000." It is admitted by the plaintiff company that it has the above amount of cash and open accounts in this city. The validity of the assessment is denied; also the legality of the tax claimed. The grounds of defense are that the premiums of insurance companies are its income, and that no law authorizes the imposition of any income tax, or makes any provision for its assessment and collection; that the cash, open accounts, credits, premiums, or gross receipts due by insurers in this state, or collected from insurers in other states, are not taxable in this state, as they are not retained at the office of the company, but are forwarded to the main office, at its domicile in Great Britain where they can be taxed. The evidence discloses that plaintiff is a foreign insurance company, carrying on business in this city through the agency of a secretary and a local board of directors; that the functions of this board and of said officer are the collection of premiums and the payment of losses. The answer of the defendants pleaded the general issue. The district court decreed that the assessment of 1891 (on money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold) of \$40,000 is null and void, and that the assessment of 1891 against plaintiff on money in possession, on deposit or in hand, to the amount of \$10,000, shall remain undisturbed, and in full force and effect. The appellee in the answer to the appeal prays that the judgment be amended by striking out and annulling the assessment against the company for the year 1891 for \$10,000 on money in possession, on deposit and in hand, and that the judgment of the district court, as thus amended, be affirmed. The assessment was levied under Act 106 of Acts of 1890, section 7 of which provides that in assessing mercantile firms the purpose of the Act is that such value shall be placed upon the stock in trade or cash, whether forwarded or not, money at interest, open accounts, credits, as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties. It is also provided in this section of the Act that nonresidents carrying on business in this state through agents shall pay a similar tax to that exacted of residents; and this section further provides that,

all bills receivable, obligations, or credits arising from business done in this state is assessable at the business domicile of the non-resident owner, his agent or representative.

Business residence. The defendant urges upon our consideration that the Liverpool & London & Globe have here a business residence, an independent center of business, represented by a local board of directors, made up of well-known residents of the city; that they direct the affairs of the company, and are paid for so doing. The testimony shows that the local board and the secretary conduct the affairs of the plaintiff company in New Orleans under the direction of the head office; that the members of the board are paid \$10 for each meeting they attend. Foreign companies are required to have, in order to carry on business in this state, one or more known places of business, and an authorized agent or agents in the state upon whom process may be served. Instead of carrying on business through a personal agency, the Liverpool & London & Globe has a board of directors and secretary appointed by itself. The business carried on by this board does not have the effect of localizing the company itself to a greater extent than if the business were conducted by an agency not organized into a board. The premiums of foreign companies are all collected through local agencies, and the losses are adjusted by these agencies. Whether represented by a board of their selection or by agents, they remain foreign companies, and, in so far as relates to residence, the same rule applies. The companies are the owners of the assets. Payments of losses made here in cash, or by drafts sent by the home companies, do not change their status, in so far as relates to business residence.

Debts to foreign companies not taxable. With reference to the first heading of the assessment the evidence shows that plaintiff has no money loaned on interest, nor bills receivable for money loaned, nor credits for goods sold. The issues are limited to all credits assessed for premiums due. A debt to a nonresident of a state is not liable to be taxed by a state in which he does not reside. His credits are not within the state's jurisdiction. They are of no value to the debtor. All the value there is in them belongs to the creditors, and is taxable at his domicile. *Cooley, Taxn. 2d ed. p. 21; State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300-319, 21 L. ed. 179-186; *Olier v. Washington Mills*, 11 Allen, 268; *De Vignier v. New Orleans*, 4 Woods, 206; *Dow v. Sudbury*, 5 Met. 78; *Herriman v. Stowers*, 48 Me. 497; *People v. Chenango County Suprs.* 11 N. Y. 563; *St. Paul v. Morrill*, 7 Minn. 258 (Gil. 198); *Catlin v. Hull*, 21 Vt. 152; *Phelps v. Thurston*, 47 Conn. 477. All corporations are taxable on property within the state. Debts are not property when the creditor is not a resident of the state. We conclude, says Burroughs, (*Taxation*, p. 59,) "that the *situs* of personal property for the purpose of taxation depends in a great measure upon the nature of the property." As to debts, a number of trustworthy decisions hold that "corporations, it is also conceded, may be taxed, like natural persons, on their prop-

erty and business; but debts owing to foreign creditors, either corporations or individuals, are not the subject of taxation. The creditor cannot be taxed because he is not within the jurisdiction; and the debts cannot be taxed in the debtor's hands through any fiction of the law, which is to treat them as being for this purpose the property of debtors. They are not property of the debtors in any sense; they are the obligations of the debtor, and only possess value in the hands of the creditor. With them they are property, but to call them property in the hands of the debtors is simply a misuse of terms." *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 844; *Oliver v. Washington Mills*, 11 Allen, 268; *Macon v. Jones*, 67 Ga. 489; *San Francisco v. Mackey*, 22 Fed. Rep. 602; *Goldart v. People*, 106 Ill. 25; *Kirkland v. Hotchkiss*, 100 U. S. 496, 25 L. ed. 561.

"The mere right of a foreign creditor to receive from his debtor within the state the payment of his demands cannot be subjected to taxation within the state." Cooley, Taxn. p. 15. The proposition of counsel for defendants that the Statute No. 106 of 1890, under which the taxes here claimed are levied, authorizes the taxation of credits held by nonresidents, is true. The statute must be applied, in so far as relates to tangible movables belonging to nonresidents, and as to them the general rule recognized by the comity of states, *mobilia personam sequuntur*, must yield. The Supreme Court of the United States says upon that subject: "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of the owner, will in many cases determine the

state in which it may be taxed. The same thing is true of public securities consisting of state and municipal bonds and circulating notes of banks. These, by general usage, have acquired the character of and are treated as property in the place where they are found, though removed from the domicile of the owner." *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300, 21 L. ed. 179. We are dealing exclusively with the question of credits as assessed, and we hold, as decided in *Meyer v. Pleasant*, 41 La. Ann. 645; and *Barber Asphalt Pav. Co. v. New Orleans*, 41 La. Ann. 1015, "that debts have their *situs* at the domicile of the debtor," because debts are property, and have a value which is inseparable from the creditor, and because the state had no greater power or jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresident which is not situated in the state. The want of jurisdiction and power would render it useless to maintain the general rule applying to tangible movables.

Situs of the capital for taxation purposes. With reference to the second heading of the assessment, "Money in possession," the evidence shows that plaintiff is correctly assessed. It is property within the state and subject to taxation. It is visible and tangible, and expressly made taxable by statute, and is taxable where situated. The authorities we have referred to as maintaining that debts cannot be assessed against nonresidents have established the rule that nonresidents owning tangible movable property within the state may be taxed.

Judgment affirmed, at appellants' costs.
Rehearing refused.

MICHIGAN SUPREME COURT.

COMMON COUNCIL of the City OF DETROIT, Relator,

v.

Theodore RENTZ *et al.*, Board of Assessors of the City of Detroit.

(.....Mich.....)

1. The bound volumes of the legislative journals containing matter not

contained in the journal as published from day to day, certified by the clerk, will be presumed to have been properly amended in such respect by authority of the Legislature in determining whether a statute was duly passed.

2. Discrepancies between a copy of a bill as printed in a supplement to the legislative journal and the bound volume of the journal containing the bill assigned will not invalidate the statute where it affirma-

NOTE.—Power to tax mortgages.

In *Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist.* No. 1, 19 Fed. Rep. 369, it was decided that the contract between mortgagor and mortgagee was not impaired by a statute passed after the mortgage was given requiring the mortgagee to be assessed for the amount of the mortgage and a corresponding amount deducted from the assessment of the mortgagor. As in the main case it was held that such tax on the mortgagee was the exercise of the governmental power and as between him and the state a loan not relating to his contract with the mortgagor although the latter was in effect relieved from taxation *pro tanto*. So in the state court of Oregon it was held that a statute taxing mortgages does not impair the obligation of a contract as to a prior mortgage. *Mumford v. Sewall*, 11 Or. 70.

And an agreement by the mortgagor to pay

taxes is not binding on the state so as to prevent it from taxing the mortgagee. *People v. Whartenby*, 38 Cal. 461.

But in *Cleveland, P. & A. R. Co. v. Pennsylvania*, ("State Tax on Foreign-Held Bonds") 82 U. S. 15 Wall. 300, 21 L. ed. 179, the Supreme Court of the United States held that a tax on bonds held by a nonresident although secured by mortgage on real property within the state, impaired the obligation of the contract at least where the statute authorizing the tax was passed after the bonds were issued, and it seems both from this case and *Pittsburgh, Ft. W. & C. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 326, 21 L. ed. 189, *note*, that it is the same where the contract was made after the passage of the statute.

Credits, although secured by mortgage, are not "property" within the California Constitution, which requires all property to be taxed in propor-

tively appears from the journals that the Legislature finally dealt with and passed some other bill than that contained in such supplement.

3. A vote of the House to print a bill in the journal as a supplement makes the bill when so printed a part of the journal.
4. A provision that in case the mortgagee fails to pay his share of the tax it shall be paid by the mortgagor and the amount applied in reduction of the mortgage debt, contained in an Act providing for the separate taxation of the different interests in mortgaged real estate, is not void as requiring one man to pay the debt of another.
5. A mortgagor's right to ask for the correction of the assessment of his interest under a statute providing for the separate assessment of the different interests in mortgaged real estate is sufficiently preserved by a clause providing for a correction of the assessment on sufficient cause shown by any person whose property is assessed.
6. Permitting a sale of the fee upon nonpayment of taxes upon the mortgagee's interest in land without any provision for distinguishing the assessment under which the sale is made, although it may result in loss to the mortgagor because of the mortgagee's default, is not unlawful where the mortgagor may prevent a sale by paying the tax and the sale is limited to a parcel sufficient to pay the tax.
7. The obligation of a prior mortgage contract is not impaired by a statute providing for the assessment to the mortgagee of taxes which had previously been paid by the mortgagor and permitting the mortgagor, in case he pays such taxes, to deduct the amount from accrued interest on the indebtedness, and if it exceeds the interest due, then from the principal, even though the effect of the latter

would be to extinguish a part of the interest-bearing debt.

8. A mortgage upon realty is sufficiently an interest in real estate to make it taxable in the state where the land is situated although owned by a nonresident.
9. Taxation of mortgages as real estate does not create illegal double taxation although held by savings banks and representing deposits, upon which the depositors are taxed.
10. Failure to provide a method for apportioning the tax upon a mortgage covering lands lying in different taxing districts, will not invalidate an Act providing for the separate taxation of the different interests in mortgaged real estate; the mortgage will be taxable in each district in proportion to the amount of land lying therein.
11. An agreement by a mortgagor to pay all assessments on all interests in the land will not be abridged or abrogated by subsequent statute providing for the separate taxation of the different interests in mortgaged real estate.
12. An agreement by a mortgagor to pay all taxes upon the land in addition to full legal interest upon the mortgage is not usurious.

(Grant and Long, JJ., dissent from propositions 1, 4, 7 and 10. Morse, Ch. J., dissents from proposition 5.)

(March 14, 1892.)

APPPLICATION for a writ of mandamus to compel defendants as the board of assessors of the city of Detroit to make assessments according to the provisions of Act No. 200 of Public Acts of 1891, relating to the taxation of property, which respondents had re-

tion to its value. *People v. Hibernia Sav. & Loan Soc.* 51 Cal. 254, 21 Am. Rep. 704.

This case seems to overrule earlier California cases, including *People v. Eddy*, 43 Cal. 381, which decided that the Legislature could not exempt solvent debts secured by mortgage. One of the judges puts his decision also on the ground that the taxation of a mortgage upon land which is also taxed is double taxation and void for that reason. This question of double taxation was also extensively discussed in *Savings & Loan Soc. v. Austin*, 46 Cal. 415, in which, however, the court was too much divided to decide it.

Double taxation.

Notwithstanding the position taken by some judges in the California case last cited, the general doctrine seems to be explicitly or tacitly established nearly everywhere that a mortgagee may be taxed on his mortgage although the land is also taxed for its full value to the mortgagor. *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Lamar v. Palmer*, 18 Fla. 147.

Where taxable.

The decisions are not harmonious on the question of the place where mortgages may be taxed. Some hold that a mortgage in land is a mere chattel interest taxable only in the county where the mortgagee resides although recorded where the land lies. *Gallatin County v. Beattie*, 3 Mont. 173; *Latrobe v. Baltimore*, 19 Md. 12.

Also that a tax on "money at interest secured by mortgage or otherwise" is a tax on the debt and should be made where the mortgagee resides. 16 L. R. A.

People v. Whartenby, 88 Cal. 461; *People v. Eastman*, 26 Cal. 601; *People v. Park*, 23 Cal. 138.

But in *State v. Runyon*, 41 N. J. L. 96, it is said that the Legislature may select as the situs of taxation of mortgages either the political division where the owner resides or that in which the mortgaged premises are situated. It does not appear, however, that the rights of nonresidents were in question in this case.

So under the Massachusetts statutes the interest of a mortgage is assessed as real estate where the land lies. *Firemen's F. Ins. Co. v. Com.* 137 Mass. 80.

So in *Mumford v. Sewall*, 11 Or. 70, it is said that a real-estate mortgage is local, as the land is, in the state where the land lies.

To the contrary is *Cleveland, P. & A. R. Co. v. Pennsylvania*, *supra*.

The New Jersey statute, by which a mortgagee is not assessable for the mortgage where he resides in case the premises lie in another township or county, does not relieve him from tax thereon at his residence if the lands lie in a city or place where by special law the land is taxed without regard to incumbrances. *State v. Massaker*, 25 N. J. L. 531.

Nonresident owners.

A mortgagor cannot be taxed on a mortgage due to a nonresident of the state because the mortgage is not property within the state. *Davenport v. Mississippi & M. R. R. Co.* 12 Iowa, 539.

A nonresident mortgagee is not taxable on his mortgage where the land lies unless the mortgage is there in the hands of an agent. *Goldgart v. People*, 106 Ill. 26.

fused to do because of the alleged unconstitutionality of the Act. *Writ granted.*

The facts are stated in the opinions.

Messrs. Charles W. Casgrain and Charles S. McDonald, for relator:

Since *Taggart v. Sanilac County Supra.*, 71 Mich. 16, the competency of the Legislature to assess and tax real-estate mortgages and other securities representing values will not be questioned in this state.

It is competent for the Legislature to direct that mortgages, for the purpose of assessment and taxation, be treated as an interest in real estate pledged.

It is customary to classify property for taxation as real and personal, and to assess the two classes on somewhat different principles. The classification is commonly made on common-law distinctions, but this is not necessarily the case, and it will frequently be found that enumerations of property in statutes as real or personal for the purpose of taxation differs considerably from what it would be for other purposes in the same state.

2 Cooley, Taxn. 366, 367, and cases there cited; *Johnson v. Roberts*, 103 Ill. 655; *Steers v. Walling*, 7 R. L. 817.

The law must be held operative on mortgages executed before it went into effect, equally with mortgages given subsequently.

This is not an attempt to impair the obligations of contracts, and it therefore in no wise violates the constitutional prohibition on that point.

McCoppin v. McCartney, 60 Cal. 367; *State v. Runyon*, 41 N. J. L. 98.

The law applies to real-estate mortgages held by persons not residents of this state.

Persons and property not within the territorial limits of a state cannot be taxed. In such a case the state affords no protection, and there

is nothing for which taxation can be equivalent.

Cooley, Taxn. p. 55.

But it is not necessary that both person and property should be within the jurisdiction in order to be taxed; it is sufficient if either is.

Cooley, Taxn. p. 55.

Under some circumstances personal property has for some purposes a different *situs* from that of the owner, and such is the case in regard to taxation.

Irvin v. Nashville, C. & St. L. R. Co. 93 Ill. 105; *State v. Falkinburge*, 15 N. J. L. 820.

The Legislature may select, as the *situs* of the taxation of mortgages, either the political division where the owner resides, or that in which the mortgaged premises are situate.

State v. Runyon, 41 N. J. L. 105; *Tappan v. Merchants Nat. Bank of Chicago*, 86 U. S. 19 Wall. 490, 22 L. ed. 189.

The right is frequently exercised in taxing notes, bonds, and mortgages in the hands of an agent in the state where investments are made, while the domicile of the owner may be elsewhere.

People v. Comrs. of Taxes, 23 N. Y. 224; *Poppleton v. Yamhill County*, 18 Or. 377; *Catlin v. Hull*, 21 Vt. 152; *People v. Smith*, 88 N. Y. 576; *Tazewell County Supra. v. Davenport*, 40 Ill. 197; *Redmond v. Rutherford*, 87 N. C. 122.

The value of real-estate mortgages owned by savings banks and insurance companies, should not be deducted from the value of the capital stock of such bank or insurance company in determining the value of the shares of stock for assessment and taxation to their owners.

Lenawee County Sav. Bank v. Adrian, 9 West. Rep. 697, 66 Mich. 277.

Mr. A. A. Ellis, Atty-Gen., for the state:

The court cannot go beyond the legislative

But mortgage securities in the hands of a non-resident agent cannot be assessed to a resident owner as "personal estate within the state." *People v. Smith*, 88 N. Y. 576; *People v. Gardner*, 51 Barb. 362.

So notes and mortgages securing them on real estate in another state where they are left with an agent for collection, and which have never been in the state where the owner resides, cannot be taxed there. *Fisher v. Rush County Comrs.* 19 Kan. 414.

The same rule is applied even to notes given for purchase price of lands although not secured by mortgage. *Wilcox v. Ellis*, 14 Kan. 583, 19 Am. Rep. 107; *Catlin v. Hull*, 21 Vt. 152.

A state Legislature has power to tax residents on money invested in bonds secured by deed of trust, of lands in another state and held by a trustee in that state. *Kirkland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546.

This decision was not based on any distinction between debts with real estate security and other debts, but declared the general power to tax residents on loans in other states.

So the amount due on a contract for a sale of land which is in the hands of an agent for a non-resident may be taxed to the agent. *People v. Ogdensburgh*, 43 N. Y. 300; *Redmond v. Rutherford*, 87 N. C. 122.

But contracts for the sale of lands in the hands of an agent for a resident of another county in the same state are not taxable to the agent as personal estate in his possession or under his control, where the statute provides that every person shall be as-
16 L. R. A.

essed where he resides for all personal estate owned by him including that which is in his possession or under his control as agent. *Lord v. Arnold*, 18 Barb. 104.

Abandoning altogether the theory that a mortgage on real estate is purely personal property, it is held in *Mumford v. Sewell*, 11 Or. 70, as in the main case, that a state may tax real-estate mortgages where the land lies without regard to the domicile of the owner or the *situs* of the debt or note secured thereby.

The fact that the owner is a foreign corporation does not affect the right of a state to tax mortgages where the land lies although held by nonresidents. *Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist.* No. 1, 19 Fed. Rep. 350.

It would seem that the above cases could be reconciled with *Cleveland, P. & A. R. Co. v. Pennsylvania*, *supra*, if at all, only by distinguishing between a tax on mortgages and one on bonds secured by mortgage. But the opinion of the United States Supreme Court in the latter case is based in part on the doctrine that a mortgage is a mere chose in action having no locality independent of the owner's residence and that this had been the law in Pennsylvania.

The correctness of this doctrine would not seem to be in itself a Federal question, and it might perhaps be decided by the same court that a tax on a mortgage owned by a nonresident, although under a statute passed subsequent to the mortgage, did not violate the Federal constitution where the state law had not previously treated the mortgage as mere personality.
B. A. R.

journals in determining whether or not this is a valid Act.

Auditor General v. Menominee County Supra. (Mich.) Dec. 30, 1891.

In England and in some of the states in this country the courts hold that the Act could only be tried by itself, its enrollment in chancery in England, and in the states of this country, by its filing in the office of the secretary of state.

Rez v. Arundel, Hob. 110; *Colledge of Physicians & Cooper or Hubert*, 8 Keb. 587; *State v. Young*, 32 N. J. L. 42; *Pacific R. Co. v. Governor*, 28 Mo. 353; *Fouke v. Fleming*, 18 Md. 412; *Duncombe v. Prindle*, 12 Iowa, 1; *People v. Purdy*, 2 Hill, 31; *Eld v. Gorham*, 20 Conn. 16.

Where the journals are to be regarded they cannot be rebutted by parol proof.

State v. Moffitt, 5 Ohio, 363; *Koehler v. Hill*, 60 Iowa, 545; *Wise v. Bigger*, 79 Va. 269; *People v. Mahaney*, 18 Mich. 492; *Atty-Gen. v. Rice*, 7 West. Rep. 642, 64 Mich. 385; *People v. McElroy*, 2 L. R. A. 609, 72 Mich. 446; *People v. Zilwaukee Twp. Board*, 10 Mich. 274; *Green v. Graves*, 1 Dougl. (Mich.) 851; *Sackrider v. Saginaw County Supra.* 79 Mich. 59.

Neither the original bill as introduced, nor the amendments attached to it, nor parol evidence can be received in order to show that an Act of the Legislature, properly enrolled, authenticated, and deposited with the secretary of state, did not legally become a law.

Sherman v. Story, 30 Cal. 253, 39 Am. Dec. 93; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721.

Section 17 of the Tax Law of 1891 is substantially a verbatim statement of the Tax Law of California, and it is presumed that in adopting the provisions of the statute the Legislature was aware of the judicial construction they had received in that state, and that the intent was in accordance with such construction.

Stadler v. Moore, 9 Mich. 264; *Drennan v. People*, 10 Mich. 169; *Harrison v. Sager*, 27 Mich. 476; *Greiner v. Klein*, 28 Mich. 12; *Campau v. Gillette*, 1 Mich. 416, 53 Am. Dec. 78; *Daniels v. Clegg*, 28 Mich. 82; *Risser v. Hoyt*, 53 Mich. 185.

In California, as well as in this state, a mortgagee has no interest in the real estate until forfeiture and foreclosure.

McGurran v. Garrity, 68 Cal. 566.

The purpose and object of a state constitution are not to make specific grants of legislative power, but to limit that power where it would otherwise be general or unlimited.

Sears v. Cottrell, 5 Mich. 257.

Without any limitation of the legislative power in our Constitution, that power would have been, at least, as absolute and unlimited, within the borders of the state, as that of the parliament of England, subject only to the Constitution of the United States.

See 1 Kent, Com. 448; *Sill v. Corning*, 15 N. Y. 303; *Scott v. Smart*, 1 Mich. 306; *Williams v. Detroit*, 2 Mich. 560; *People v. Gallagher*, 4 Mich. 244.

A statute cannot be declared void on the ground that it violates sound political principles when it does not come in conflict with constitutional provisions.

People v. Mahaney, 18 Mich. 481; *Green v.* 16 L. R. A.

Graves, 1 Dougl. (Mich.) 851; *Tyler v. People*, 8 Mich. 320; *Atty-Gen. v. Preston*, 56 Mich. 177; *People v. Gallagher*, 4 Mich. 244; *Sears v. Cottrell*, 5 Mich. 251; *Inkster v. Carver*, 16 Mich. 484.

The Constitution seeks to avoid double taxation, and the old law as it existed, taxing the land at its full value, and at the same time taxing the mortgage at its full cash value, was double taxation.

Taggart v. Sanilac County Supra. 71 Mich. 26.

It is competent for the Legislature to assess and tax securities representing values.

Ibid.

The statutes of the state of Michigan have always declared what should be considered as real estate, and what should be considered as personal property.

Westinghausen v. People, 44 Mich. 265;

Firemen's F. Ins. Co. v. Com. 187 Mass. 81.

It is competent for the Legislature to determine what shall be real estate, and what shall be personal property for the purposes of taxation.

Ibid.; *Mumford v. Sewall*, 11 Or. 67; *Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist. No. 1*, 19 Fed. Rep. 359; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618.

The state has also power to provide methods for collecting its revenue, and so long as they are general and impartial the courts will not be disposed to limit the exercise of the power merely because they seem harsh, unreasonable, and arbitrary.

Robertson v. Land Comr. 44 Mich. 279; *Sears v. Cottrell*, 5 Mich. 251; *Cowles v. Brittain*, 9 N. C. 204; *Stats v. Allen*, 2 McCord, L. 55; *McGregor v. Montgomery*, 4 Pa. 237; *Henry v. Horstick*, 9 Watts, 412.

The Legislature has the power to authorize and require the taxation of mortgages on real property irrespective of the residence of the owner of the debt thereby secured, and such an act in no way impairs the obligation of the contract between the parties thereto.

Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist. No. 1 and *Mumford v. Sewall*, *supra*.

If the mortgage contained a stipulation that the mortgagor should pay all the taxes assessed on the real estate, such contract will remain unaffected.

Hammond v. Lovell, 186 Mass. 185; *Codman v. Johnson*, 104 Mass. 491; *Walker v. Whittemore*, 112 Mass. 187.

Nonresidence of the mortgagee is immaterial.

Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist. No. 1, 19 Fed. Rep. 369; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618; *Mumford v. Sewall*, 11 Or. 67; *Duer v. Small*, 4 Blatchf. C. C. 263; *Com. v. Lehigh Valley R. Co.* 129 Pa. 457.

Montgomery, J., delivered the opinion of the court:

This proceeding brings before us for examination Act 300 of the Laws of 1891, being a revision of the general tax laws of the state. It is claimed—first, that this purported statute, as it appears upon the statute-

book, was not duly enacted; and *second*, that the law as promulgated is in parts unconstitutional.

1. It has been repeatedly held that the court may look beyond the engrossed bill to the legislative journals with a view to ascertaining whether the Legislature enacted the statute. This has long been a recognized power of the court, frequently invoked. *People v. Mahaney*, 13 Mich. 492; *Atty-Gen. v. Joy*, 55 Mich. 94; *People v. Burch*, 84 Mich. 408. In many of the states the court has denied that this power rests with the judiciary, and have held that the engrossed bill, duly authenticated, is final, and cannot be impeached. This court, while adhering to the view that the journals are open to inspection, has frequently, and particularly in the later cases, held that every intendment is in favor of the due enactment of the statutes which have received the executive sanction, and that to overcome this legal presumption the journal must show conclusively that the statute which received the signature of the governor was not duly passed. *People v. Burch*, 84 Mich. 408; *People v. McElroy*, 72 Mich. 450, 2 L. R. A. 609, and cases cited.

The history of the present statute, so far as it is important to be noted, is as follows: On June 29th, after the bill had been amended, it was voted "that the bill be laid on the table, and ordered printed as a supplement in to-day's journal." The bill had the file number 340, and was a substitute for House Bill No. 178. A supplement to the house journal was printed as of the date June 29th, with the heading: "File No. 340. House of Representatives. Substitute for Senate Bill No. 178. (Introduced by Mr. Doremus.) Ordered printed for use of the committee on judiciary. Lansing, June 29, 1891,"—followed by the title. The bill contained 116 sections. On June 30, Mr. Doremus moved that house substitute for Senate Bill No. 178 (file No. 340) be taken from the table and placed on its immediate passage, which motion prevailed. The question being on the passage of the bill, the bill was read a third time, and pending the vote on the passage thereof, on motion of Mr. Doremus, the bill was laid on the table. On July 1st Mr. Doremus moved that house substitute Bill No. 178 (file No. 340) be taken from the table and put on its immediate passage, which motion prevailed. Numerous amendments were then made to the bill, and after such amendments the bill duly passed the House, which was the final action taken by the House on the bill. If it be the fact that the bill as printed was the bill with which the House was dealing on July 1, it is entirely clear that the bill as it passed the House is not the bill engrossed and signed by the governor, as it appears that the bill as printed contains numerous entire sections which were not eliminated by amendment, but which do not appear in the law as signed, while the engrossed bill contains numerous provisions which are not contained in the printed bill as it would stand amended by incorporating the amendments made on July 1.

16 L. R. A.

It is claimed, however, that the journal itself furnishes on its face evidence that after the bill in question was printed in the journal the House dealt, not with the printed bill, but with some other instrument, and that it is fairly to be inferred from what appears on the face of the journal that there were errors in the printing of the bill which the House discovered and which led to the abandonment of the printed copy appearing in the journal. These evidences are as follows: (1) It appears that the House took up the bill by its title and reference as printed in the journal, and before taking action on it laid it on the table, and that, when the bill was again taken up, it was referred to, not as a substitute for Senate Bill 178, but as a substitute for House Bill 178, which it really was. (2) The amendments offered from time to time do not correspond with the bill as printed. As, for instance, one amendment offered was by inserting in line 1, of section 88, after the word "time," the words "or upon any mortgage or other obligation taxed as an interest in lands owned by such persons as provided by this Act." Not only does it appear by section 83 as printed that the word "time" does not appear in line 1, but it further appears that there is no provision in section 88 to which the proposed amendment is in any way germane. Without tracing all the instances through, it appears beyond cavil that the amendments could not have been offered with reference to the printed copy. (3) The bill as printed had its sections numbered consecutively, and was not after being printed considered at all in committee of the whole; and yet we find on July 1, the following in the journal: "Mr. Doremus stated that certain sections in the bill had been stricken out and some added in the committee of the whole, which, with the above amendments, would not leave the sections in consecutive order; and thereupon Mr. Doremus further moved to amend the bill by directing the engrossing and enrolling committee to renumber the sections of the bill so that they should be numbered as near as may be by consecutive numbers, which motion prevailed, and the sections of the bill were thereupon accordingly renumbered." This action of the House makes it entirely clear, not only that the House was not dealing with the bill as printed in the journal, but also that they were not dealing with an exact copy of the same. It appears, however, that this last-quoted section does not appear in the house journal as it was printed from day to day; and it is suggested, therefore, that this must be disregarded. But it does appear in the bound volume published by authority and certified by the clerk of the House. The daily journal, as printed, is subject to amendment. Are we at liberty to infer that this emendation is a forgery? It seems to me that the case of *People v. Burch*, 84 Mich. 408, furnishes a decisive answer to this question. In that case the journal as printed from day to day, and as printed in the bound volume, showed the following: "Mr. Wesselius moved to reconsider the vote by which the Senate passed the bill, which motion prevailed. The question being on

the passage of the bill, on motion of Mr. Wessellius, the bill was ordered returned to the House." At the close of the senate journal, and preceding the certificate of the secretary, which bore date July 8, 1891, is a page headed: "*Errata* in the Record of Bills. . . . On page 811, lines ten and eleven, the vote reconsidered was not the passage of the bill, but the vote by which the Senate concurred in the house amendments to the bill on page 797." The court says: "It does not affirmatively appear at what time the secretary made this correction of the record, but it is to be presumed, from the place where the *errata* is found, that he made it on or before the date of his certificate, July 8, 1899, as the certificate follows the correction. The Legislature adjourned *sine die* upon that date; and, as every intendment is to be taken in favor of the correctness of legislative action, it must also be presumed that the correction was made before the adjournment of the Senate. If it was done, as we must presume that it was, before the final adjournment of the Legislature, we must also presume that it was authorized by the Senate, and that the true journal entry of the proceedings is as corrected by the '*errata*.'" So in the case of the law under consideration. The house adjourned July 8, 1891. The certificate of the clerk bears date July 8, 1891, and as the correction to the daily journal as originally printed appears before his certificate, and indeed as of a prior date, we must presume that it was made before the final adjournment of the Legislature, and we must also presume that it was authorized by the House.

In *McCulloch v. State*, 11 Ind. 424, the court in speaking of such records said: "This journal must be held conclusive evidence of the facts which appear upon its face, because it must be presumed that the members as a body inspected it and made all necessary corrections before they allowed it to assume the character of a journal of their proceedings. As well might evidence be received to contradict a statute to show that it contains certain provisions inserted through mistake as to contradict an entry made upon the journal. The house keeping the journal is the only tribunal by which it can be corrected, and, until corrected by such authority, it must be considered conclusive as to the facts which it contains." In the case of *Turley v. Logan County*, 17 Ill. 151, it was held that the journals must show that the constitutional requirements have been observed; but in that case the journals having been produced; and it appearing from the minutes of the clerk that the same Legislature had corrected their journals at a subsequent session so as to conform to the constitutional requirements, this was held to be sufficient, and the law was sustained. In *Post v. Kendall County Suprs.*, 105 U. S. 870, 26 L. ed. 1205, it was said: "By virtue of the Statute of Illinois of February 12, 1849, the copies of the original daily journals kept by the clerks of the two Houses made by persons contracted with or employed for the purpose, as authorized and directed by that Act, (though not sworn public officers,) in well-bound books furnished by the sec-

retary of state, pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which certified by him are admissible, upon settled rules of evidence, as well as by the decision of the Supreme Court of Illinois in *Miller v. Goodwin*, 70 Ill. 659; and neither the competency nor the effect of such copies is impaired by the loss and destruction of the daily journals or minutes." In *Atty-Gen. v. Rice*, 64 Mich. 385, 7 West. Rep. 642, *Mr. Justice Morse* uses the following language: "Are these journals kept by the clerk of each House, and read and corrected each day by each body, and duly certified by the proper officers to be correct, to stand as conclusive evidence of their proceedings, or are they liable to be disputed and overthrown by parol testimony, either of individual officers and members, or of strangers who may be interested in nullifying legislative action? It would seem that there could be but one answer. The legislative record must prevail. Any other rule would necessarily lead to dangerous and alarming results."

Without passing upon the effect of a mere omission of parts of the journal as printed from day to day from the bound journal, I think it is entirely clear that as such journal is always subject to amendment by the House itself, both on the authority of *People v. Burch*, and the other cases above cited, and on principle, we are bound by an amendment appearing in the bound volume.

Some of my brethren are of the opinion that the supplement referred to cannot be treated as a part of the journal; that, as there is no requirement that bills shall be printed in the journal, the order entered on June 29 for the printing of the bill in question should have been construed as having been made for the convenience of the members, and not with the intent that the bill when printed should become a part of the journal. While not assenting to this view, I think it is clear that, if it be treated as a part of the journal, yet, for the reason stated, it is not possible to say that the bill with which the House was dealing was the one printed in the supplements.

Attention has been directed to an unbound portion of the journal, with paging corresponding to that in the bound volume, and it is suggested that this demonstrates that the statement purporting to have been made by Mr. Doremus was inserted after the Legislature adjourned. But as well might it be said that the printer's proof-sheet, before correction, is more authentic than the corrected publication. No such view can be adopted, unless we reverse the usual doctrine in such cases, and start out with the presumption that the clerk of the House has falsified instead of correctly certifying the record. This I am not prepared to do.

2. It is claimed that so much of the statute as provides for the taxation of the mortgage interest in lands, and points out the method of collection, is unconstitutional for various reasons. The provisions of the law, so far as necessary to be noted, are: "Sec-

tion 2. Any real-estate mortgage, deed of trust, contract, or other obligation, by which a debt is secured, when land within this state is pledged, shall for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." Section 17 provides "that the value of the property affected by such mortgage, . . . less the value of the security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." Section 15 provides that in making the assessment roll the value of the interest in such real estate represented by a mortgage, deed of trust, or other obligation shall be set opposite the name of the owner, and the value of the interest of the owner of the fee, less the value of the mortgage or other interest, shall be set down opposite the name of the owner or occupant, and that the taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the mortgagor or holder of the real property, such portion as was assessed to the mortgagee shall be considered and treated as payment of any interest that may be due, or if there is no interest due, then as payment of so much of the principal. If paid by the mortgagee or holder of the security, such portion as was assessed to the mortgagor or owner of the fee shall become a lien upon the land, and be added to all other obligations. It is further provided that neither the mortgagee nor the mortgagor shall be at liberty to pay so much of the tax as is assessed against the other until the warrant has been in the hands of the collector thirty days,"—thus affording the party assessed the opportunity to himself pay the tax in the first instance.

(1) The first criticism passed upon these provisions is that the law requires the mortgagor to pay the mortgagee's tax; but it should not be overlooked that the statute contemplates an assessment of the entire interest in the land, both that of the mortgagor and mortgagee, by separate assessments, it is true, but still an assessment of the entire interest. It cannot be doubted that it is entirely competent for the Legislature to cause this entire value to be assessed to the mortgagor. This has been the law of Michigan for many years. This Act, then, is in relief of the mortgagor, and it cannot be held to be invalid because it relieves him only on condition that the owner of the mortgage interest shall within a stated time pay the tax.

(2) It is said that the mortgagor would have no right under the law to appear before the board of review to ask for a correction of the assessments of the mortgage interest. But I do not so read the statute. Section 20 provides that "at the request of any person whose property is assessed, . . . and on sufficient cause shown, the board shall correct its assessment as to such property." The owner of the fee can under this provision be heard as to the amount of both the mortgage interest and his own; for the assessment of the mortgage interest is to be deducted from his own, and, if the mortgage

interest be too small, his own assessment is too large. If the mortgage interest is assessed at too high a figure, his assessment will be too low, and he would have the right to have it increased.

(3) It is next suggested that where the interest of the mortgagee is assessed and remains unpaid, a sale is made of a fee simple, and the deed conveys an absolute title; and while it is conceded that it may be competent for the Legislature to provide for the sale of the fee under the assessment of the mortgagee's interest, yet it is claimed the law is defective in not pointing out how the two interests sold are to be distinguished, if the mortgagor and mortgagee fail to pay their respective taxes. It is said, if the fee simple is sold, the mortgagor will lose his land, although he may have paid his own tax. I have already pointed out that the mortgagor will, as under former statutes, be bound to pay the entire tax, on the value of the property, subject only to the relief afforded him, if the tax assessed against the mortgage interest shall be paid by such mortgagee, and, while I quite agree with respondent's counsel that the Legislature intended a fee to be sold, I think that the provision of section 62 "that no greater interest [portion] of any parcel shall be sold than is sufficient to pay the tax for which the same is sold" is sufficient protection to both mortgagor and mortgagee. The land is by the provisions of this law, as under the former statute, made subject to the entire tax assessed on its full value. The mortgagor or mortgagee can either prevent a sale by payment of the tax.

(4) It is next claimed that the provision that the mortgagor may pay the tax assessed against the mortgage interest in case of the mortgagee's default, and deduct the same from the amount owing on the mortgage, impairs the obligation of contracts. But in my judgment this view is not tenable. The contract between the mortgagor and mortgagee remains the same. The mortgagee may and should pay the tax, and if he fails to do so the state appropriates so much of the fund which the mortgage represents—so much of the mortgagee's estate in the land—as is necessary to pay the tax. It is true the state interposes between the mortgagee and the mortgagor, and excuses the latter from making a payment to the former which, by the terms of his contract, he would otherwise be bound to make; but this is not because of any interference with contract relations, or by virtue of any abrogation of the contract rights of the mortgagee. It is because the state has attached or seized so much of the mortgage debt before it has reached the mortgagee. The cases are numerous in which a law providing that agents of a corporation might withhold from the party entitled to the same so much of declared dividends as shall be necessary to satisfy taxes imposed by the state has been upheld. *Cooley, Taxn.* 299, and cases cited. These cases are entirely analogous. The case of *Robertson v. Land Comr.*, 44 Mich. 274, does not conflict with these views. What was held in that case, in effect, was that authorizing the one party to the contract to refuse performance until

evidence should be produced of the payment of the tax was in the nature of a penalty, and not a means of collecting the tax directly. But the court says: "It must no doubt be admitted that the state may provide modes for collecting its revenues that will seem harsh, unreasonable, and arbitrary. Some such are to be found in the laws of Congress, as well as in the legislation of the states. The judiciary would not venture to indicate limits to the power of the sovereign in this regard, so long as its laws were general and impartial."

(5) It is further suggested that as, in certain cases, a portion of the principal debt secured by the mortgage is appropriated, it interferes with the contract obligation of the mortgagor to pay interest upon this sum, and to that extent, at least, is an impairment of the contract. But it is equally true that if the money was paid by the mortgagee in hand, or was seized by the tax collector, he could not thereafter receive interest on the fund. This would be no hardship. If he refuses to pay the tax, the state appropriates so much of the fund within its control to that purpose. It no more interferes with his contract relation with the mortgagor than would the seizure of personal property in the hands of a bailee by a taxing officer interfere with the contract existing between the bailor and the bailee. In such cases, doubtless, the bailee would be relieved from his agreement to return the property, just as under this law the mortgagor is relieved from the payment of so much of his debt as is thus appropriated by the state.

(6) It is strenuously insisted that the provision which makes the mortgagor liable for the tax assessed against the mortgagee is unconstitutional; and it is said that it is not within the constitutional power of the Legislature to compel one man to pay another man's debt,—a proposition safe enough in itself, but not conclusive as to the right to provide that the mortgagor or occupant of lands shall be liable for the tax on such lands. It is not necessary to go to the length to which the majority of the court went in *Sears v. Cottrell*, 5 Mich. 251, in order to sustain this provision. The relation of the owner of the fee to the property is such that the right to assess the whole property to him is undoubted, and to my mind it would be an unsound doctrine, resting upon shadow rather than substance, which would deny the power of the Legislature to relieve him conditionally on the pretense that by so doing his constitutional rights are being infringed.

(7) It is, again, urged that the law is unconstitutional, in so far as it attempts to tax mortgages owned by nonresidents, for the reason that the mortgage is personal property and a mere security for a debt, and is of that character of personal property which must be held to attach to the person, and to have no other *situs* for any purpose; and the case of *State Tax on Foreign-Held Bonds*, 83 U. S. 15 Wall. 800, 21 L. ed. 179, is cited in support of this contention. It is further said in support of that position that in Michigan a mortgage is a mere incident to the debt, and

conveys no title to the land. *Caruthers v. Humphrey*, 12 Mich. 270; *Ladue v. Detroit & M. R. Co.* 18 Mich. 380; *Wagar v. Stone*, 86 Mich. 364. And it is urged that as this is so the taxation of such mortgage interest amounts to a taxation of the debt, and brings the case within the *Case of State Tax on Foreign-Held Bonds*. But, while it is true that the mortgage is a mere security for the debt, yet it conveys a qualified property in the land. While it is not an estate which entitles the mortgagee to possession before foreclosure, it is nevertheless an estate or interest in lands which is protected by our registration laws as fully as any other title or interest. It is held that the mortgage interest so far partakes of the character of real property as to require administration in the state of its location, and that neither a foreign administrator nor his assignee can maintain an action to foreclose a mortgage in the state where the mortgaged property is situate. *Outer v. Davenport*, 1 Pick. 81, 11 Am. Dec. 149; *Dial v. Gary*, 14 S. C. 578, 37 Am. Rep. 787; and the opinion of Cooley, J., in *Reynolds v. McMullen*, 55 Mich. 568. It has also been held that the Legislature may select as the *situs* of the taxation of mortgages either the political division where the owner resides, or that in which the mortgaged premises are situated. *State v. Runyon*, 41 N. J. L. 105; *Mumford v. Sewall*, 11 Or. 70. See also *Firemen's F. Ins. Co. v. Com.* 187 Mass. 81; *Providence Sav. Inst. v. Boston*, 101 Mass. 575. The *Case of State Tax on Foreign-Held Bonds* is apparently in conflict with these cases. The doctrine of that case was announced by a bare majority of the court, and ought not to be treated as binding authority, except as to the precise questions before the court. The law which the court had under consideration provided "that the president, treasurer, or cashier of every company, except bank or savings institutions, incorporated under the laws of this Commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall before the payment of the same retain from said bondholders or creditors a tax of five per centum of the interest upon every dollar paid as aforesaid." In the opinion of the majority of the court *Mr. Justice Field* states the question before the court as follows: "The question presented in this case for our determination is whether the eleventh section of the Act of Pennsylvania of May, 1868, so far as it applies to the interest on the bonds of the railroad company made and payable out of the state, issued to and held by nonresidents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interference, under the name of a tax, with the obligation of a contract between the nonresident bondholders and the corporation." It will be seen that the court was not dealing with a statute which in terms imposed a tax upon a mortgage interest in lands. This statute was a clear attempt to tax credits distinctively as such, and applied alike to mortgages secured by bonds, and to those which were not so secured. In that respect it is distinguishable from the statute of

Michigan, as our statute, in all its provisions relating to the subject, imposes a tax upon an interest in real estate as such. It seems to me that the case is not given any added force as authority here by the fact that the particular bonds in question were secured by mortgage, for the attempt was not to tax the mortgage interest in lands, but to impose a tax upon the bond itself which the court held to have a *situs* at the domicile of its owner. So in *Latrobe v. Baltimore*, 19 Md. 20, it was held that the *situs* of the mortgage was the domicile of the owner, and that such owner could not be taxed where the property covered by it was located. But in the opinion it is said: "We are not aware that the action of the assembly regulating the imposition and collection of taxes has effected any modification of the rules of law, which otherwise must govern the determination of this question." So it will be seen that the question of the power of the Legislature to fix the *situs* for the purpose of taxation has been determined, and that, even though held by nonresidents, they may be given a *situs* in the place where the mortgage property is situated. This the Act in question purports to do, and it should be sustained.

(8) The question is presented whether the mortgages held by savings banks and insurance companies are to be treated as real estate, and deducted from the amount of capital stock, or whether the tax on mortgages is over and above the tax on capital. The law provides for the assessment as personal property of "all shares in banks organized in this state under any law of this state or of the United States at their cash value, after deducting the value of the real estate taxed to the banks." As to insurance companies, it is provided "that in computing taxable property of insurance companies organized under the laws of this state the value of the real property on which a company pays taxes shall be deducted from its net assets above liabilities, as ascertained at the last report." I think the intent is clear to treat mortgages as real estate, and that the interest in real estate so taxed to banks and insurance companies may be deducted from the shares of stock as assessed. See *Firemen's B. Ins. Co. v. Com.*, 187 Mass. 80. It is said that the amount of mortgages held by savings banks in many cases greatly exceeds the capital stock. So, if the amount for which such mortgage is assessed is deducted, there will be no tax on their shares, and this state of things is urged as a reason why the Legislature could not have intended to tax mortgages held by these institutions. But, on the other hand, it must have been known to the Legislature that the exemption of the mortgages held by such corporations from the burdens imposed upon like securities in the hands of individuals would give to such bank a practical monopoly of the business of loaning money on mortgages in this state. This is a result so manifestly unjust as that it would not be inferred unless such a construction of the statute is made necessary by its plain provisions. This, I think, is not the case here. It is also contended that

if the statute be construed so as to admit of taxation of mortgages of saving banks as real property the result is double taxation in many cases, inasmuch as the mortgages represent deposits, and the depositors are required to pay a tax. I do not think this amounts to double taxation, in any objectionable sense. If the banks hold property subject to taxation in excess of their actual capital, the case is no harder for them than it is in the case of any individual taxed for the value of property owned by him, though he may at the time be indebted to the amount of nearly or quite its full value. In *Cooley on Taxation*, (page 160,) it is said: "Now whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly if not quite unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctively borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and, if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back on arbitrary exactions." It is not within the power of this court, as I understand it, to declare that the Legislature, in enacting a statute, has exceeded its constitutional authority, except in a case where it clearly appears, by a comparison of the terms of the statute with the Constitution itself, that some provision of the fundamental law has been violated. I do not assert that the court may not construe the Constitution as well as the statute, or that we may not hold that what is by clear implication inhibited is beyond legislative power; but in my opinion this fixes the extreme limit of judicial control over the legislative department. The pernicious notion that courts may scrutinize legislation with a view to ascertaining how far it accords with some uncertain, shadowy spirit of our institutions, when such spirit is not expressed in our Constitution, cannot be too early or too definitely or too absolutely denied. *Robinson v. The Red Jacket*, 1 Mich. 171; *Green v. Graves*, 1 Dougl. (Mich.) 351; *People v. Mahoney*, 18 Mich. 481; *Atty-Gen. v. Preston*, 56 Mich. 177, opinion of Cooley, J., in *State Tax Cases*, 54 Mich. 446.

It is suggested that, where lands covered by mortgage lie in two or more taxing districts, it will be impossible to properly apportion the tax. I do not consider that there will in many cases be such difficulty. The mortgage being treated as an interest in lands, the proportion which is properly taxable in each district will be that proportion which the land lying in such district bears to the whole; and, when the taxing officer can inform himself as to these values, there is no reason why he cannot properly make the assessment. There may be instances where this will not be possible, but it is a difficulty which will not often occur. There

must be, are, and always will be, difficulties in the way of taxing all the property that ought to bear the burdens of taxation; but this cannot obstruct taxation altogether, or even taxation upon any species of property. And this defect, where it exists, is not beyond remedy by subsequent legislation; and the difficulties under the present law will be found insurmountable only in a few extreme cases. In my opinion, such a defect ought not to invalidate the whole scheme involved in the provisions relating to taxing mortgages. *Atty-Gen. v. Detroit*, 29 Mich. 108; *Robison v. Miner*, 68 Mich. 549, 18 West. Rep. 471.

(9) The question has been suggested as to whether the statute is to be so construed as to relieve mortgagors from the obligation of paying the tax in cases where there were agreements on their part to do so, in force at the time when the law took effect; and also as to whether it is competent for the mortgagor to engage to pay the taxes which may be assessed against the mortgagee's interest in the lands, in addition to paying the full legal rate of interest allowed by statute. The first question would of necessity depend upon the terms of the contract, but it is clear, both on reason and authority, that if the engagement of the mortgagor is sufficiently broad to cover any assessment which may be made on all interest in the land mortgaged, his undertaking is in no way interfered with or abridged by the present statute. *Hammond v. Lovell*, 136 Mass. 185. Nor is there any obstacle, either in Act 200 or in the Usury Law, (Act No. 156,) to an agreement by the mortgagor to pay all taxes which may in the future be assessed against all interest in real property owned by such mortgagor, including the interest granted to the mortgagee. Such an agreement does not amount to a reservation of interest, but is in the nature of an agreement to preserve the estate which constitutes the security, and is no more unlawful than an agreement to keep the property insured with a similar purpose. See *Banks v. McClellan*, 24 Md. 62. That it was not the purpose of the Legislature to limit the power of parties to contract as they may choose in this regard is made clear by the fact that a clause of the tax law, as originally drafted, prohibiting such contracts, was struck out by amendment before its final passage.

I think the *mandamus* should *issue* as prayed, commanding the board of assessors (1) to assess the value of any land contract to the owner of such security as real estate; (2) to assess as real estate, to the owner thereof, the value of any real-estate mortgage executed either before or after the law of 1891 took effect, and whether held by residents or nonresidents of this state; (3) to assess to savings banks or insurance companies, as real estate, the value of any real-estate mortgages owned by such banks or insurance companies, and to deduct the value of all real-estate mortgages owned by any savings banks or insurance companies from the value of the capital stock of such banks as determined for assessment purposes.

16 L. R. A.

Morse, Ch. J., and McGrath, J., concurred with Montgomery, J.

Morse, Ch. J.:

There is no better settled rule of law in this state than that, in the investigation of a question whether a law has been properly and constitutionally passed by the Legislature, every presumption and intendment are strongly in favor of its due enactment; and if the journals are resorted to, the law can only fail where it conclusively appears from such journals that constitutional methods were lacking in its passage.

In the law before us, we have: *First.* The law published in the Public Acts which are made presumptive proof that the laws therein contained were duly enacted, and which are received as such without further evidence of their authenticity than they bear upon their face. *Second.* We find in the office of the secretary of state, where it is provided it shall be kept, the duly enrolled and engrossed manuscript Act, signed by the speaker of the House, the president of the Senate, and the governor. This engrossed Act agrees entirely with the published law. Here we have, again, another strong presumption in support of the proper passage of the Act, which we thus find enrolled and certified by the proper officers. *Third.* We now go to the journals of both Houses, published by authority of law and certified to be correct by the proper officers, and the only journals that the Constitution or laws prescribe shall be kept and preserved as journals of the Legislature, and find nothing in such official journals militating against the proper and constitutional passage of the Act in question. These journals are also presumed to be correct, and it is doubtful if they could be overthrown by parol proof. *Fourth.* This bill was read section by section, at length, just before its passage. It is to be presumed that the Legislature knew what was being voted upon. *Fifth.* It was reported to the House as correctly enrolled and engrossed, and the presumption is that it was. *Sixth.* Fortunately, although not required by law to be preserved, the original bill itself, as passed, with its emendations, amendments, and riders is found in the office of the secretary of state, and upon examination is found to be identically the same as the published law. This bill could not be resorted to in order, by its discrepancies, if any there were, to defeat the law, yet it establishes the fact that there is no difference between the law as published and the Act as passed. I refer to it simply to show how easily, by reasoning from false premises and using all presumptions against the validity of the Act, it is apparently conclusively shown that a falsehood is the truth. For instance, in this case, assuming that the so-called "supplement" presented to us upon the last argument is a part of the journal, and further assuming that the bill was correctly printed therein as of the condition it was in when the motion to print the supplement was carried, and then, again, assuming that this bill as printed in such supplement

was the bill thereafter acted upon, amended, and passed by the two Houses, it is made to conclusively appear that the law as published is not the Act passed by the Legislature, but a radically different one; having, as shown by the opinion of Mr. Justice McGrath, thirteen sections not found in the supplement, nor put there by subsequent amendment, and the supplement having eight sections not found in the law, nor eliminated from said supplement by amendment. Yet the bill in the secretary's office, the one handled and preserved by the clerk of the House, and to which all amendments were attached in its progress, is the identical law as published; and the only suspicion resting upon it is that one clause erased therein has written upon its margin the words, "Richardson says this is stricken." When this writing was done does not appear, but the presumption must be that it was done before the passage of the Act. The trouble with the argument against the constitutionality of the passage of this Act is that it abounds in presumptions against the regularity of the proceedings, when the law holds that all presumptions must be strongly the other way. Without these false presumptions, there is no standing for an argument against the validity of the passage of this law.

1. This supplement has no place in the journals except by false presumptions. It was not made a part of the journals by those authorized to publish and certify to their correctness. It must be presumed that the journals were corrected and approved, as certified by the clerk of the House and secretary of the Senate, before the Legislature adjourned, and the certificates attached to the same on the last day of the session, as shown by such certificates *People v. Burch*, 84 Mich. 408. This supplement is not the only one ordered published by the House. There were two others, to wit: Senate Substitute Bill No. 64, (file No. 464,) the General Election Law. "On motion of Mr. Diekema the bill was ordered printed as a supplement to to-day's journal." House Jour. 2143. And House Bill No. 583, (File No. 269,) charter of the City of Detroit. "The bill was then ordered printed as a supplement to the Journal, referred to the committee of the whole, and placed on the general order." House Jour. 2081. Neither of these supplements is found in the published volumes of the house journals. This effectively disposes of the claim that the supplement of July 29 was left out of the published journals for fraudulent purposes, and also establishes the fact that, under legislative practice, these supplements are not considered as parts of the journal, but that they are the mere printing of bills for the convenience of the members, and can be no more used to stultify or contradict the journals than can any other printed copy of a bill laid upon the desks of members and used by them for reference during the session. The natural as well as the legal presumption is that these supplements were printed, as other bills are printed, for the convenience and use of the members, and that it was not the intention of the Legislature to

make them a part of the journals. This natural and legal presumption accords with the fact as to legislative practice, as shown above; and any presumption to the contrary is not only a forced and illegal one, but contrary to the truth, as shown by the custom of the Legislature since the Constitution of 1850. No such thing as a supplement to the journal has ever yet found its way into the legislative journals, and probably never will, unless inserted by this court. To enforce the argument against the law, this legal and natural presumption is disregarded, and the custom of the Legislature ignored, in order to declare this supplement a part of the journal; and the clerk of the House is also presumed to have disregarded his duty, and committed a fraud or grave mistake, in leaving it out of the corrected and printed journals. Other presumptions are also necessary, to wit, that the supplement presented to us is the supplement ordered printed June 29, with the further presumption that it was laid upon the desks of the members of the House the next morning, and with still another presumption, that it was correctly printed. Every step taken in the argument must necessarily be based upon presumptions which are unlawful under our previous holdings. There is no law providing that the secretary of state shall file or keep copies of the daily journals, as they are published from day to day, in his office, and none are kept there. The law provides only for printed and bound volumes to be preserved. How. Stat. § 15. The supplement presented to us was found in the files of legislative journals kept by one Frank A. Potter, chief clerk in the office of the secretary of state. It also appears that no files of the legislative journals have heretofore been kept in said office for all these years, and that there are no files there at the present time, except such as are the personal property of clerks in the office. It is also shown by a resolution of the Legislature that copies of the daily journal were mailed and distributed to the people entitled to them, outside of the Legislature, directly from the state printer, and that such copies were never before either House of the Legislature. This supplement found in Potter's file had no place even in that file with the journal of the 29th, but was found at the end of the legislative daily journals with other supplements and miscellaneous documents. If this supplement can be used here, then any other purported supplement, or any paper purporting on its face to be a portion or a part of the printed daily journals of the Legislature, can be brought into court at any time to dispute and impeach the authenticity of the official journals published and bound by the state printer by authority of the Legislature, and certified to be correct by the clerk of the House and the secretary of the Senate. It will not be necessary, under the reasoning of the argument in favor of this supplement, to inquire where the paper came from. It will be conclusively presumed that it is an exact copy of those that it will also be presumed were laid upon the desks of the members of the

Legislature; and whether picked up in the street, or found in the files preserved by some one, by whom it was received in the mails, it will, by presumptions never before indulged in in favor of any document, and without proof, because no proof can be received, stand in the courts as the journal of the Legislature for the day or days it purports to cover, and, if it conflicts with the published journals the latter must fall. It is to be hoped that no such dangerous precedent as this will ever be established by this court. As for myself, from the beginning, I have regarded this supplement—as the Legislature evidently regarded it—as no part of the journals; and a patient and laborious investigation of the journals in connection with it, and treating it as a part of such journals, has, as conclusively shown by the opinions of my Brothers McGrath and Montgomery, proven that the Legislature, in their action upon the bill before them, paid no attention to it, and utterly disregarded it. To now make it a part of the journal, and to impeach and destroy legislative action by virtue of it, would be a usurpation by this court of power which belongs to the Legislature, under our Constitution, and would be a declaration of law which, in this case, would evidently lead to a false determination, and a denial of the truth as to the action of the Legislature in the passage of the law before us. This case is not at all like the case of *Rode v. Phelps*, 80 Mich. 598. In that case the bill under consideration was found printed in the body of the journal as it came from the Senate. "The bill as amended was ordered printed at length in the journal." "The bill is as follows." (Then follows the bill in full.) See House Jour. 1889, p. 1792. Every subsequent alteration of the bill as printed appears upon the journals, and it was never read again in the House, and it was finally passed by a concurrence in the report of the conference committee of the two Houses. No presumptions were indulged in in that case, because everything appeared plainly and conclusively in the official journals, and there was no possible escape from the fact that the bill, as signed by the governor, never passed either House of the Legislature.

As to the law itself, I think it valid, as shown by the opinion of *Mr. Justice Montgomery*, in which I concur. The writ must issue as prayed.

McGrath, J.:

I concur in the views expressed by *Mr. Justice Montgomery* as to the constitutionality of the Act in question. Respecting the enactment of the law, I do not regard it as important whether the supplement referred to is or is not to be treated as a part of the house journal. If regarded as a part of the journal, in the absence of anything upon the face of the journal pointing away from that print of the bill, the presumption would be that it was the print acted upon; but if it affirmatively appears from the journal that the action of the House was not aimed at that print, but was directed to some other

print, the supplement print has no more weight than any other print ordered by the House, whether printed in the journal or elsewhere, for the convenience of the House. The bill was originally ordered printed for the use of the committee. House Jour. 1247. The committee reported a substitute on June 19th, which was also printed for the use of the House. Id. 2050. This print was known as "Substituted for House Bill No. 178, (File No. 840.)" On June 29th after it was again reported, it was ordered printed in a supplement to the journal. Hence, we have three distinct prints of the pending bill, two of which were presumably in the usual form of printed bills, with numbered lines and wide spaces between the lines, and the other printed in double columns on daily journal size paper, without numbering of lines, and with ordinary spacing. On June 30, *Mr. Doremus* moved that the bill be laid on the table, and ordered printed as a supplement in to-day's journal. Prior to this time the several prints of the bill had been considered in committee, reported with amendments, and had been considered in committee of the whole. In the supplement the print was entitled, "Substitute for Senate Bill No. 178." On June 30, *Mr. Doremus* moved that house substitute for Senate Bill No. 178, entitled, etc., be taken from the table, and on motion by same party said bill was again laid upon the table. It is significant that in this instance *Mr. Doremus*, who had charge of this legislation, referred to this print as "house substitute for Senate Bill No. 178," and that in no other instance is there any evidence upon the journal that this print was again before the House. It is significant, too, that at this time this bill was read a third time, and that subsequently, on July 1, the bill then taken up and passed was also read "a third time."

On July 1, on motion of *Mr. Doremus*, House Substitute Bill No. 178, (file No. 840,) was taken from the table and put upon its passage. A large number of amendments were offered by Messrs. *Doremus*, *Dafoe*, *Connor*, and *Richardson*: (1) To strike out of line 9 of section 11 the words "to hire." Line 9 of section 11 of the supplement print is as follows: "Procuring any such property to be manufactured upon contract shall be." (2) By adding to section 11, line 33, after the word "assessment," the words, etc. Line 33 of section 11 reads thus: "Any shed shall not be deemed in transit, but shall be assessed to the." (3) To insert in line 13 of section 15, after the word "properly," the words, etc. Line 13 of section 15 reads as follows: "The quantity of land comprised in any town, city, or village." (4) To insert in line 1 of section 33, after the word "time," the words, etc., and to insert in line 10 of section 33, after the word "necessary," the words, etc. There is no such word as "time" in the first ten lines of section 33, and no such word as "necessary" in the tenth line. (5) To strike out of line 40 of section 34 the word "assessment," and insert, etc. Line 40 of section 34 reads: "Collected as hereinafter provided, and shall give his receipt therefor. The." (6) To strike out of line

5 of section 38 the word "a;" but line 5 of section 38 contains no such word. (7) To strike out of lines 8 and 9 of section 38 certain words; but the words do not occur in lines 8 and 9, and do occur in lines 9 and 10. (8) To insert in line 18, § 40, after the word "lien," certain words; but the word "lien" does not occur in line 18, but does occur in line 20. (9) To insert in line 7 of section 48, after the words "and the;" but no such words are contained in line 7. (10) To insert in line 10, after the words "state and;" but line 10 has no such words. (11) To strike out all of section 48 between the words "each year" in line 15; but line 15 contains no such words. (12) To insert in line 17 of section 55, after the words "sold for the," etc.; but line 17 of section 55 contains no such words. (13) To strike out of line 21 of section 60 the words "auditor general," and insert, etc.; but the words "auditor general" do not occur in line 21 of section 60. (14) To strike out of section 71, commencing with the word "shall," in line 5, etc.; but the part stricken out commenced in line 6. (15) To strike out lines 9 to 28, inclusive, of section 71; but the part actually stricken out includes 14 other lines which appear in the supplement. The journal strikes out fifteen lines, whereas thirty-nine lines, as they appear in the supplement, were actually stricken out.

It does not appear that the bill was considered in committee or in committee of the whole after it was ordered printed in the supplement. The California mortgage tax system, and the county system for the collection of delinquent taxes, refer to provisions which at the time were already incorporated in the bill, as indicated by the resolutions themselves. House Jour. 2167, 2168. The supplement print, however, contains sections 43, 44, 64, 65, 66, 67, 68, and 69, which do not appear in the law as published, and sections 20, 21, 51, 68, 67, 74, 75, 76a, 78, 79, 81a, 81b, and 82, contained in the law do not appear in the supplemental print; and nowhere does the journal after the print was ordered in the supplement to the journal on June 29th refer to any amendment striking out either of the sections 43 to 69 above named or to the incorporation of sections 20 to 82 inclusive above named either by number or matter; nor does the journal after the supplemental print was ordered contain any intimation that the bill was referred to or reported by any committee or that it was considered in committee of the whole. The journal does show, however, that at the same morning session at which the amendments referred to were adopted the bill was read the third time as amended, and passed, (House Jour. 2203;) that it went to the Senate, and was there passed with amendments, and the amendments were afterwards concurred in by the House, (Id. 2242, 2243;) and that afterwards the committee on engrossment and enrollment reported as correctly enrolled, signed, and presented to the governor, House Bill No. 178, (file No. 840) being an Act, etc. (House Jour. 2284.) The journal nowhere intimates that this print of the bill was before the House for amendment or adoption

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nor does it show that a single amendment was directed to or aimed at it but the journal conclusively shows that some one of the other prints was before the House; and, this fact appearing, it must be presumed, I submit, that it was such other print that was finally read the third time, put upon its passage and passed. It cannot be presumed that four different members of the House, each offering amendments, had before them this supplemental print, when every amendment that was offered refers to some other print of the bill. The supplement print contained no numbered lines. The numbered lines appeared only in the other prints of the bill, which existed before the print was ordered in the supplement to the journal. If either of the four members offering amendments had before him a copy of the bill which was being considered by the House, in which the lines were numbered, he must have had a copy previously made. If the clerk had a copy in which the lines were numbered, he too must have had a copy of some other print. If the members had a copy in which the lines were numbered, they too must have had a copy of some previous print. It must be recollected that each of the other prints, having numbered lines and wide spaces between the lines, were, when printed, distributed to the members, and each member of the House had before him a file of the bills which had been ordered printed by the House. It will not do to say that this supplement print received certain amendments which appear upon the journal; for none of the sixteen amendments above referred to are directed to or aimed at the said print, and none of the other amendments offered necessarily refer to said printed copy. There is not a figure, line, or sentence in the journal of July 1 that necessarily refers to the print contained in the journal supplement. On the other hand the sixteen motions to amend, enumerated above, refer to some other print which was then before the House, in the hands of the members offering amendments, before the clerk, and understood by the members of the House generally. The House had the undoubted right to disregard this print in the supplement. So far as we know it may have been incorrectly printed. Some other copy than that intended may have been printed. The House had a clear right to discard this print for any reason, and to take up either of the other prints. They had been presented, referred to the committee, reported with amendments, and considered in committee of the whole. No house rule or parliamentary precedent can be invoked to defeat legislation. Every amendment offered can be found in the Act as passed in its proper place, with the proper context. Sixteen of the amendments offered cannot be associated with the supplemental print without doing violence to the express language of the journal. If the validity of the Act passed is to be tested by this print, then the law is defective, not simply because it does not contain the clause relating to agreements for the payment of the tax by mortgagors, but for the additional reason that sections 43, 44, 64, 65, 66, 67, 68, and 69 of the supplemental print are not con-

tained in the law, and sections 20, 21, 51, 63, 67, 74, 75, 76a, 78, 79, 81a, 81b, and 82 are contained in the law, and are not contained in the supplement. If a portion of section 17 was surreptitiously stricken out, then why have not the sections above named, from 43 to 69, inclusive, been surreptitiously eliminated, and why have not the other sections, 20 to 82, inclusive, been surreptitiously interpolated? It must be clear to every one who examines the matter carefully that the House had before it some copy of the bill, other than the bill printed in the supplement,—some copy that had been amended by the substitution of the sections appearing in the law, which do not appear in the supplement print, and by striking out, if ever in, the sections which appear in the supplement print and do not appear in the law,—some copy in which section 17 had been amended. Thus is explained every word in the Act, and every word in the journal which records the action of the House. It being clear that some copy of the bill other than the supplement print was before the House when the amendments were offered, the natural presumption is that the House kept that copy in sight, and that this is the same copy that was read a third time and passed. The committee on engrossment and enrollment report the bill "as correctly engrossed and enrolled, and presented to the governor," and the governor approves the bill so engrossed and enrolled. The passage of the Act intervened between amendments and enrollment. The same theory, and the only theory that explains the journal entries when the bill was before the House for amendment, accounts for the bill as passed and enrolled. Any other theory renders senseless and nugatory sixteen amendments which appear upon the face of the journal, emasculates both supplemental print and Act, and makes a dupe of the governor, dolts of the members of the Legislature, and knaves of the members of the committee on engrossment and enrollment, and the clerk of the House.

Grant, J., dissenting:

This is an application for the writ of mandamus to compel the respondents, who are the assessors of the city of Detroit, whose duty it is to assess at its true cash value all the real and personal property in the city, and to make out the assessment rolls, to comply with the provisions of Act No. 200 of the Public Acts of 1891, which require them—*first*, to assess the value of any land contract to the owner of such security as real estate; *second*, to assess as real estate, to the owner thereof, the value of any real estate mortgage executed before the tax law of 1891 went into effect; *third*, to assess to any savings bank or insurance company as real estate, the value of any real-estate mortgage owned by such bank or insurance company, executed since said tax law took effect; *fourth*, to assess the value of any real-estate mortgage executed since said tax law took effect to the owner thereof, as real-estate; *fifth*, to assess the value of any real estate mortgage executed since said tax law took effect, and owned by a nonresident of this state, to such

nonresident owner, as real estate; *sixth*, to deduct the value of any real-estate mortgage owned by any savings bank or insurance company from the value of the capital stock of such bank or insurance company, as determined for assessment purposes by the statute in such case made and provided. The respondents answered, alleging various reasons against the constitutionality of the Act.

The first question for determination is whether the Act approved by the governor and deposited with the secretary of state is the Act which passed the Legislature. Courts will not go behind the legislative journal for any evidence touching the validity of an Act of the Legislature. We must be able to determine from an inspection of the journal that the Act as signed did not pass, in order to declare it void. The history of this Act, as found in the journal, is as follows:

Early in the session a joint special committee of the Senate and House was appointed, to which were referred the recommendations of the retiring and incoming governors on taxation, with instructions to prepare and report a general tax bill. Three general tax bills were introduced,—two in the House and one in the Senate,—and referred to this committee. The house bills were numbered 178 and 984, and the senate bill, 325. April 17 this committee reported a substitute for House Bill No. 178, which was concurred in, ordered printed, and referred to the committee on judiciary. House Jour. 1246. June 19, the judiciary committee reported to the House Bill No. 178, (file No. 340,) entitled "A Bill to Provide for the Assessment of Property, and the Levy of Taxes thereon, and for the Collection of Taxes heretofore and hereafter Levied, and to Repeal Act No. 195 of the Session Laws of 1889, and all Other Acts or Parts of Acts in Any Wise Contravening Any of the Provisions of the Same;" reported a substitute therefor; recommended the substitute be concurred in and passed. This report was accepted, the committee discharged, and the substitute ordered printed, and made the special order for the next Tuesday. House Jour. 2050. June 23, which was the following Tuesday, appears another report from this same committee, and in precisely the same language, upon the same bill, which report was accepted and the committee discharged. The bill was then made the special order for June 24. Id. 2066. June 24 appears another report from the same committee upon the same bill, and in precisely the same language. Again the report was accepted and the committee discharged. A vote was taken, and the House did not concur in the substitute. The original bill was then referred to the committee of the whole, and placed on the general order. Id. 2082, 2083. The bill was considered in committee of the whole June 27, which reported that they had had under consideration "substitute for House Bill No. 178, (file No. 340,) entitled 'A Bill,' etc.," (giving the same title as above;) that they had not gone through therewith, and asked leave to sit again, which was

granted. Id. 2156. The same bill was further considered in committee of the whole on the same day, and the committee asked leave to sit again. Id. 2157. The same bill was again considered in committee of the whole June 29, but its consideration was not completed, and leave was granted to sit again. Id. 2163. The like proceedings were repeated the same day upon this same bill. Id. 2164. At the evening session of the same day the bill was further considered in committee of the whole, when the same was reported back to the House with sundry amendments thereto, in which the House was asked to concur, and its passage recommended. The House concurred in the amendments, and the bill was placed on the order of third reading. Subsequently the vote by which they concurred in the amendments was reconsidered, and a motion was made to concur in all the amendments, except the amendments made to section 17 and section 12, which motion prevailed. A motion was then made to concur in the amendments made to section 17, which motion prevailed. A motion was also made to concur in the amendments made to section 12, which motion did not prevail. The motion by which the House concurred in the amendments to section 17 was then reconsidered, and pending the motion to concur in these amendments the following motion was made: "That the bill be laid on the table, and ordered printed as a supplement in to-day's journal." This motion prevailed. Two resolutions were then passed by the House,—one declaring that it was desirable to incorporate into the tax laws of this state the California mortgage tax system, as provided in House Bill No. 178, (file No. 840;) the other declaring that it was desirable to incorporate the county system for the collection of delinquent taxes, as provided for in the same bill. House Jour. 2164-2168. The bill was printed in the journal as directed, under the heading: "Supplement to House Journal. File No. 840. House of Representatives. Substitute for Senate Bill No. 178. (Introduced by Mr. Doremus.) Ordered printed for the use of the committee on judiciary. Lansing, June 29, 1891." It is conceded that the expression, "Substitute for Senate Bill 178," should read: "Substitute for House Bill No. 178." This was a clerical error, and corrects itself, since no tax bill by that number was pending in the Senate. A statement of this clerical error is made in the index to the journal. The bound volumes of the journal are now produced, and this bill, which the House ordered printed in that day's journal, is omitted therefrom.

July 1st it appears from the journal that, "on motion of Mr. Doremus, House Substitute Bill No. 178, (file No. 840,) entitled," etc., "was taken from the table and put upon its immediate passage." Several amendments were then made to the bill by the House, which appear in the bound volumes of the journal on pages 2199 to 2201, and on pages 1481 and 1432 of the journal as issued daily. I do not consider it necessary to state them here. The bill was then

passed and sent to the Senate and on the same day the Senate returned the bill to the House, reporting that it had passed the bill with some amendments. These amendments were concurred in by the House, appear upon the journal, and are in the Act as signed by the governor. July 1, while the bill was being considered by the House, and just before its passage, the journal contains the following: "Mr. Doremus moved to further amend the bill as follows: (1) By striking out sections, 109, 110, 111, 112, and 116; (2) by inserting in line 3 of section 114, after the word 'such,' the word 'blank,' and after the words 'forms of' the words 'delinquent tax record, certificates, deeds, and other necessary papers;' (3) by inserting in line 5 of section 115, after the word 'accrued,' the words 'or may hereafter accrue,'—which motion prevailed. The question recurring to a passage of the bill, pending the taking of the vote thereon, Mr. Doremus moved that there be a call of the House, which motion prevailed." After the roll of the House was called the pending bill was laid on the table. Shortly after this, on the same day, by unanimous consent, the bill was taken from the table and placed upon its immediate passage. Here, again, a clerical error was committed, by referring to the bill as "house substitute for Senate Bill No. 178;" but it was also referred to as file No. 840, and the title given identical with the one just before laid upon the table. There is no doubt that the bill then passed was the same as that which had just before been laid upon the table, nor does any one contend that it is not. It also affirmatively appears that the bill taken from the table was the identical bill which had been laid upon the table, ordered printed, and printed in the journal. The record last above stated is taken from the daily journal of the House, as it was issued and published at the time, and sent to the various state, county, and township officials as containing the records and proceedings of the House. See page 1432 of the Daily Journal. The bound volume, No. 8, of the journal, is now produced, with the certificate of the clerk of the House of Representatives attached thereto, certifying that it is a correct journal of the proceedings of the House of Representatives for 1891. There now appears at page 2201 of this bound journal, after the three amendments above given, and between the words "which motion prevailed" and "the question recurring to the passage of the bill," the following: "Mr. Doremus stated that certain sections of the bill had been stricken out and some added in the committee of the whole, which, with the above amendments, would not leave the sections in consecutive order; and thereupon Mr. Doremus further moved to amend the bill by directing the engrossing and enrolling committee to renumber the sections of the bill so that they should be numbered, as near as may be, by consecutive numbers, which motion prevailed, and the sections of the bill were thereupon accordingly renumbered." It is apparent that the numbering of the sections might have been done by the committee on engrossment and enrollment

without any instruction from the House, and without in any manner affecting the validity of the bill.

It must first be determined whether the bill ordered printed, and actually printed in the journal as a supplement, constitutes a part of the journal. If it does, then the clerk of the House had no authority to leave it out of the bound volume. He possesses no power under the Constitution, or under any legislative action, to add to or take from the journal which the House has made and published. He can only make corrections under the authority and direction of the House. After the Legislature has adjourned, the sole authority possessed by him is to see that the journals, as made, corrected, and approved from day to day, are correctly published and bound, and given to the people of the state for preservation in a lasting form, as the correct and exact proceedings of that body. He may possibly have the right to correct grammatical or clerical errors which appear upon the face of the journal. To hold that he may do more would be not only absurd, but it would be monstrous. If clothed with that power, he might change and control legislation at his will. His certificate, made after the Legislature has adjourned, possesses no such sanctity. Courts will go behind the Acts of the Legislature, published by authority, to the written Act, as signed by the governor and found in the office of the secretary of state, to ascertain what the law is. For the same reason, they will go behind the bound volumes of the journal, to the record made and approved by the Legislature, to ascertain what that journal is. The language of this court in *Rode v. Phelps*, *infra*, speaking through my Brother Morse, at page 609, 80 Mich., applies with equal force to the facts of this case, viz.: "If the rule prevailed here which is adopted in some of the states of the Union, that the courts have no power to go behind the authentication of a law by the presiding officers of the Legislature and the approval of the governor to ascertain whether or not it was legally passed, under the requirements of the Constitution, we should always be in danger of having laws upon our statute-books which, although the courts would be obliged to hold them valid under such a rule, were never passed by the Legislature, and were really created by the carelessness or corruption of some member, clerk, or employé of that body, or perhaps by the interpolation of a member of what is sometimes facetiously called the 'Third House,' but which is nothing more nor less than an organized and generally unscrupulous lobby." Courts will take judicial notice of the methods of procedure in the Legislature. No written journal is kept by the House or Senate. The journal, as published and placed upon the desks of the members every morning, is the only record kept of its proceedings. By resolution of the House, the record of its proceedings, called the "Journal," was sent daily to the various township, county, and state officials, including the secretary of state and the members of this court. For what purpose, other than to be received and acted upon as

the official record of its proceedings, and the original record thereof?

Rule 8 of the House rules is as follows: "Upon the announcement by the clerk that a quorum of the House is present, the journal of the preceding day shall be read, unless otherwise ordered by the House, and any mistake therein corrected." It is provided by Rule 11 that "after correcting the journal of the preceding day the order of business shall be as follows," etc. In practice, under these rules, the record of each day's proceedings, as it appears in this journal, which is in the hands of every member, stands approved, unless a correction is suggested and made, which will then appear in the journal the next day. Section 15 of Howell's Statutes provides for printing and binding, in volumes of convenient size, "the official journal of the Senate and House of Representatives." The Legislature of 1891 provided, by concurrent resolution No. 12, "that secretary of the Senate and the clerk of the House of Representatives be and are hereby directed to compile and prepare for publication, make indexes, and superintend the publication of the journals," etc. What constitutes this "official journal" mentioned in the statute, and "the journal" mentioned in this resolution? Has there been no official journal before this time? Can there be none until one is compiled, indexed, and bound into volumes, which do not and cannot appear for months afterwards? Is there no official journal in existence, of which courts will take judicial cognizance? If a question arises as to the passage of a law enacted early in the session, and given immediate effect, to what "official journal" will the courts resort to determine it while the Legislature is in session? Ample opportunity is now offered to test such questions in the courts before the adjournment of the Legislature.

The Constitution also requires each House to keep and publish a journal of its proceedings. The decision in *Peoples v. Burch*, 84 Mich. 408, went no further than to hold that the clerk, under a resolution directly authorizing him, might make corrections before the Legislature adjourned. In the present case the clerk omitted this part of the journal from the copy he certified, not by any direction of the house nor to correct any error, but upon his own motion, and apparently because he did not consider it a part of the journal. The Liquor Tax Law of 1889 was printed in the journal of the House under precisely the same language as was used in the present case, except the words "as a supplement." The term "in the journal" means what it says, and has but one meaning. To print "in the journal, as a supplement," has the same legal significance as to print "in the journal." In *Rode v. Phelps*, 80 Mich. 598, the bill which was printed in the journal was considered by this court as the bill then pending before the House, and from an examination of the journal, taking that as the pending bill, it appeared that the bill passed by the Legislature was not the one signed by the governor. It is true that in that case the bill "as amended" was ordered printed, but

I do not regard those words as possessing any significance. By "the bill," when laid on the table and ordered printed, is meant, not the bill as it was introduced but the bill then in possession of the House, under consideration, and as amended. Any other construction would be doing violence to the plain meaning of language. The object of printing it was to place it, as it then stood, before each member of the House, for his personal examination and guidance, by reason, undoubtedly, of the short time remaining for the consideration of so important a measure. This supplement is brought into court by the secretary of state, in whose office it is found, and to whom it was sent when published, and who has preserved it there ever since, as a part of the legislative journal, issued by authority. Its identity cannot be, and is not, denied. Upon reason, common sense, and grounds of public policy, this supplement must be taken and considered a part of the journal.

But it is insisted that the words, "ordered printed for the use of the committee on judiciary," appearing on the supplement, show that it was not published for the use of the House. The fallacy of this claim is apparent when it is considered that the committee on the judiciary had before this reported the bill to the House, had been discharged from its further consideration, and that it was at no time thereafter referred to them. Those familiar with legislation will know that these words were on the original bill before it was reported by the committee to the House.

It is also urged that this daily journal may be produced from a supervisor, or from any person to whom it was sent, and who has taken the pains to preserve it, and be received to contradict the bound volumes. This position might be tenable if the bound volume was the original record. But it is not. No one original is made or kept. Each number issued is an original. This journal, issued daily to its members and to the people of the state, purports to be made and published by authority, is in fact made and published by authority, and bears upon its face its own authentication. It and the bound volumes are both published by authority, are open to the examination of the courts, and it is of no consequence whether they are found in public or private libraries, in public or private offices, in the possession of members of this court or of private individuals. When produced, each authenticates itself. The Legislature has provided that both shall be sent to the members of this court. When so sent and received, by which are they to be governed? We are not pointed to, nor can I find, any statute which makes this bound volume conclusive evidence of the proceedings of the Legislature. It follows in the present case that this journal, as issued daily, preserved by the secretary of state, and produced to this court, is one of the original, official journals of the House, and to it we must look to determine what action the House took, and what it did not take, upon the Act in question.

The following cases are cited in support of 16 L. R. A.

the position taken by relator, viz.: *McCulloch v. State*, 11 Ind. 424; *Turley v. Logan Co.* 17 Ill. 151; *Post v. Kendall County Suprs.* 105 U. S. 670, 26 L. ed. 1205; *Atty-Gen. v. Rice*, 64 Mich. 385, 7 West. Rep. 642. An examination of these cases shows that the question now under consideration was not either directly or indirectly involved. In *McCulloch v. State* evidence was offered to show that two members who were shown by the record as having voted for the bill were not present and did not vote for it, and that another member, who was recorded as having voted for it, in fact voted against it. It was with reference to this state of facts that the language in that opinion was used. No dispute arose as to what was in fact the journal. It is there said: "The House keeping the journal is the only tribunal by which it can be corrected, and, until corrected, by such authority, it must be considered conclusive as to the facts it contains." Applying this language to the present case, and where is found any correction of the journal by the only tribunal which can correct it? In *Turley v. Logan County* a correction was made at a subsequent session by the Legislature itself, and in the decision is this language: "We cannot doubt the power of the same Legislature, at the same or a subsequent session, to correct its own journal by amendments which show the true facts as they actually occurred, *when they are satisfied that by negligence or design the truth has been omitted or suppressed.*" (The italics are my own.) So far as this language is applicable to the present case, it is clear that the Legislature alone can make the correction, and that it must appear on the journal as made by its authority. In *Post v. Kendall County Suprs.* the law was held void because the journals did not show it to have been enacted in conformity with the requirements of the Constitution; and *Mr. Justice Gray*, in delivering the opinion, says: "If the journals, being produced or proved, fail to show that an Act has been passed in the mode prescribed by the Constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the Act is void." Under the statute of Illinois, "the copies of the original daily journals kept by the clerks of the two Houses, made by persons contracted with or employed for the purpose, as authorized and directed by that Act, in well-bound books furnished by the secretary of state, pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which, certified by him, are admissible upon settled rules of evidence. . . . And neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes." It is further said: "The copies of the journals, certified by the secretary of state and the printed journals, published in obedience to law, are both competent evidence of the proceedings in the Legislature." If in that case the daily "journals" or "minutes" had been "produced" or "proved," and they had differed from the bound books, by

which would the court have been guided? See same case, reported in 94 U. S. 260, 24 L. ed. 154. In *Atty-Gen. v. Rice*, Mr. Justice Morse, speaking for the court, referred to these "journals kept by the clerks of each House, and read and corrected each day by each body, and duly certified by the proper officers to be correct. If the bound volumes differ from these journals 'kept, read, and corrected each day,' which should govern? The offer in that case was to contradict the journal, which showed that a certain bill was introduced, by showing that it was a skeleton bill, with a head but no body. I cite also, in this connection, *Miller v. Goodwin*, 70 Ill. 659. In that case the statute of Illinois required the secretary of state to record in a bound volume prepared and kept in his office for that purpose the daily proceedings of the Legislature. The proper officers of the respective Houses kept the minutes of their proceedings upon blanks furnished to them. These were daily sent to the secretary of state, recorded in this book, which was called the "Journal Record," and, after they were so transcribed, he sent them to the public printer, and they were never returned. Objection was made that the journal record was not the original record, and parol proof was offered of the proceedings of the Legislature to contradict this record. This was held incompetent. In that case this record was made by law the official record. In the present case, as already stated, the journal published daily is the official record. The court in that case said: "Public information of the proceedings is required to be furnished by publication; and, if this record is not designed to be a permanent depository of the evidence of the proceedings required to be copied into it, then we must presume that the law requires the making and preservation of a public record with no end in view."

The next question for determination is whether the statement and motion appearing in the bound volume, and above given in full, are a part of the official journal of the House. As already stated, they do not appear in the journal of July 1st, as it was published at that time. The Legislature continued in session July 2 and 3, and neither in the journals of those days, as they were then published, nor as they appear in the bound volume, is there found any correction of the journal of July 1, nor any reference whatever to any such statement or any such motion as a correction. The Legislature adjourned without making any such record. That it was inserted after the adjournment is beyond dispute. Its effect is to contradict the official record, which had then been made and published to the people of the state. No record of it having been made anywhere in the journal prior to the adjournment, the legal presumption follows that no such action was taken. That courts, on the ground of public policy alone, should not recognize them as a part of the journal, is, in my judgment, too clear to require argument. If the clerk may add to the record, as left in his hands to compile, he may also take from it; and thus he, either alone or in combina-

tion with others, may defeat the will of the people. Suppose he, either intentionally or inadvertently, should leave out of the bound volume the record of the vote by which a bill had passed the House by a yea and nay vote, as required by the Constitution, § 19, art. 4. Can it be possible that courts are not clothed, not only with the right, but the duty, to examine the original journals, and thus enforce the people's will?

The conclusion that no such proceedings took place can safely rest upon the records as above given. But they are not the only evidence within our reach. Whatever of credit is to be given to these bound volumes is not derived from the fact that they are bound, but from the certificate of the clerk, attached thereto, that it is a correct journal of the proceedings, and the fact that they are published by the Legislature as its official journal. That is what gives it its official character contemplated in the statute and resolution above referred to, and determines its prima facie authenticity and correctness. Courts, in their search for the truth as to what the proceedings actually were, will examine an unbound as well as a bound copy. The compilation and publication of the official journal required a repaging, different from that of the journal as issued daily. The record of the proceedings now under discussion is found on page 1432 of the original journal issued at the time, and on page 2201 of the bound volume. Since the argument a printed copy has been handed to me by counsel for respondent, as prepared by the clerk of the House, for printing and binding into volumes, with pages the same as those in the bound volume, and with the clerk's certificate attached thereto, in which, on the same page, viz., 2201, is found a record of these proceedings; and it corresponds exactly with the record of the journal as issued daily at page 1432. It thus appears that this journal covering, as bound, 2296 pages, was prepared by the clerk, certified to by him, placed in the hands of the printer, repaged and printed, without the disputed proceedings appearing in it, and without any reference whatever thereto. Now, then, is it possible to reach any other conclusion than that this statement and motion were inserted after the Legislature had adjourned, by some one without authority? Of the right of this court to examine this copy, there is no doubt. When the case of *Auditor General v. Menominee County Suprs.* (Mich.) 51 N. W. Rep. 483, was heard, October 29 and 30, 1891, this court was referred to the unbound numbers of the senate journal, certified to by the secretary of the Senate, for the official record of the Senate on the Act then in question, and they were accepted without objection as an official record of the proceedings of that body. If, when bound, that record should be found to differ from the record then before the court, by which should it be governed, in the absence of any evidence upon the journal of a correction by the Senate? It is established beyond controversy that the bill, as printed in the journal July 29th, was the identical bill then under consideration, the one to which amend-

ments were made by the House, and which, as amended, should have been engrossed and enrolled, and signed by the governor. There is no claim that any amendments were made by the House after the bill was printed in the journal which do not appear upon the journal. Putting the bill and these amendments together, it is impossible to make up the bill which was afterwards signed by the governor and printed in the Public Acts. There was no other substitute for House Bill No. 178, except this one, and no other which was known as "File No. 840." The first nineteen sections of the Act, as printed, are identical in subject-matter with the first nineteen sections of the printed bill in the journal, and are also identical in language, except in so far as they are in a few instances modified by the amendment shown to have been passed by the House, and a few provisions which the journal nowhere shows to have been stricken from the bill then pending. Sections 84 to 106 of the Act, inclusive, are also identical, both in subject-matter and in language, with sections 85 to 108, inclusive, of the bill, while sections 109, 110, 111, 113, and 116 of the bill as printed, and which the journal shows were stricken out, do not appear in the Act as signed. Another conclusive evidence that the bill printed in the journal was the identical bill under consideration, and to which amendments were made, is the fact that the bill as printed contained 116 sections, 5 of which, as already shown, were stricken out, while the bill signed by the governor contains 111 sections, just the 5 sections less.

It is said by counsel for relator, in his brief: "Every affirmative amendment proposed [referring to the amendments found in the journal] is found in the Act as now enrolled." This is undoubtedly true, and these amendments can all be traced to their proper place in the bill printed in the journal. The lines as printed in the journal were not numbered. It is well known that the lines of the sections of bills printed for use in the Legislature are numbered. All the amendments made to the bill by the House, except four, were made by Mr. Doremus, who evidently had charge of the bill. Of these four, three were proposed by Mr. Richardson, and one by Mr. Conner. In proposing these amendments, reference was made to the sections and lines by number, except in case of the amendment proposed by Mr. Conner. Evidently, those proposing these amendments had before them a printed copy of the bill, with the sections and lines numbered. This was evidently for convenience in directing the attention of the members, as well as the clerk, to the place where the amendments were to be made. But it cannot be argued from this that the House had before it a bill different from that which they had laid upon the table two days before, and ordered printed. Nor is there, in my judgment, any foundation in fact for even a supposition to that effect. When a bill by order of the House is printed in its journal, as the bill then pending, is shown by the same journal never to have been referred to any committee, but to have received

certain amendments, which appear in full upon the journal, and then, as thus amended, to have passed both branches of the Legislature, such bill, as thus amended, is the one that has become enacted into law, as having received the solemn sanction of the Legislature. If the bill when engrossed and enrolled and signed by the governor contains other provisions, it is null and void, and must be set aside. This I believe to be the rule founded upon authority and reason. See authorities above cited; also *Ryan v. Lynch*, 68 Ill. 160, and authorities there cited. Tested by it, the tax law of July cannot be sustained. It differs from the Act which passed the Legislature, as appears by the house journal, in several essential particulars. I deem it necessary to mention but one. It was the intention of the Legislature to incorporate into this law the California system of taxing mortgages. For this purpose the law declares that mortgages shall be considered real estate; that the value of the mortgage shall be deducted from the value of the land, and each assessed accordingly. Section 17 of the bill and section 17 of the Act cover this subject. Section 17 of the bill printed in the journal contains this clause: "Every contract hereafter made, by which a debtor obligates himself to pay any tax assessed on the interest of the holder of any mortgage, deed of trust, or other lien, shall, to the extent of such obligation, be null and void." This provision does not appear in the bill signed by the governor, nor in the Act as published in the Public Acts. The house journal does not show even an attempt to strike it out. The only record to be found anywhere in regard to it is on the printed copy of the bill, with riders attached, found in the office of the secretary of state, and which is claimed to be the bill as passed and from which the engrossed copy was made; and there, opposite this clause is found the following pencil memorandum: "Richardson says this was struck out." But I do not consider this as competent evidence. It is to the journal that we must look. By the absence of this provision from the law, it is shorn of all force and effect, so far as taxing mortgages is concerned; for it is now conceded by counsel for the relator that under the Act as it is the mortgagor and the mortgagee may make a valid contract, by which the mortgagor must pay the taxes. Common experience tells us that every mortgagee would insist upon such a contract, and that, therefore, no relief is afforded in this respect to the mortgagor by the Act as it now appears. This was an important and radical provision. We cannot assume that the Legislature intended to leave it out. The journal records that they did not, and it must prevail. It is of no avail to say that certain sections of the bill printed in the journal are not contained in the law, nor that the law contained certain sections which do not appear in the printed bill. This may seem strange, as was said in *Atty-Gen. v. Joy, infra*; but this furnishes no basis for courts to infer that amendments were made which its journal does not show. The journal must control. In *Atty-Gen. v. Joy*, 55 Mich. 94,

the bill under consideration required the vote of two thirds of the members to secure its passage. The journal showed one vote short of this number, but the bill was declared carried by the requisite majority, and the parties interested acted upon that assumption. It was urged that there was evidently a mistake in the journal, but the court said, speaking through *Chief Justice Cooley*: "There was a considerable vote in opposition to the Act in question, and, if the vote in its favor was insufficient, it seems strange that attention was not challenged to the fact immediately; . . . and it seems incredible that, if a mistake was made in declaring a bill passed which had not received the necessary vote, the mistake should not have been discovered as early as the day following. . . . But we cannot now determine judicially that there was any such mistake. The legislative journals furnish no proof of it, and it remains merely a plausible conjecture."

The Act in question should be held void and the writ of mandamus denied. It would follow that the pre-existing tax laws are in force, and that the assessment and collection of taxes must proceed under them.

I concur in the conclusion reached by my Brother Long, that the law is unconstitutional.

Long, J., dissenting:

I fully concur in the view expressed by my Brother Grant, in which it is held that the Act signed by the governor is not the Act which passed the Legislature, and is therefore void. Aside from that, conceding that the Act signed is the one which passed the Legislature, as held by the majority of the court, there are many provisions which in my opinion should be held unconstitutional.

The whole scheme of the Act for taxing mortgages is that the owner's interest and the mortgagee's interest shall be taxed separately. Section 17 provides that "if the mortgagee shall neglect or refuse to pay the tax assessed to him as the holder of any such mortgage, deed of trust, contract, or other obligation, the treasurer shall proceed to collect the same from the mortgagor or holder of said real estate in the same manner as provided by law for collecting other taxes; and any delinquent tax accruing by reason of the failure to collect the tax assessed upon any such mortgage, deed of trust, contract, or other obligation may be returned against the land in the same manner as other delinquent taxes." The Act applies as well to existing mortgages as those hereafter given, and to mortgages held by nonresidents as well as to those held by residents. The scheme for taxation is as follows: The assessing officer, in the first column of his roll, is to set down a description of the land. In the second column, and opposite to the description, he gives the name of the owner or occupant, if known, and, if not known, the words "Owner unknown." He is then to assess the owner or occupant, known or unknown, the true cash value of the land, less the value of the mortgage or other interest therein. He shall also set down the name of

the owner of the mortgage or other such interest, and opposite thereto the value of such interest; and the taxes to be apportioned and carried out upon the roll in accordance with such assessment. At first blush, this would seem to be just and equitable. But let us look at the means of collection. It often happens that taxes are not paid. The mortgagee may be a nonresident and fail to pay the tax, or the mortgagor may be a nonresident and fail to pay upon his interest. If the tax is not paid, and there can be found no personal property of the owner of the land from which the tax can be collected by distress, the whole tax upon the land and upon the mortgage interest is made a lien upon the land, for which it can be sold; and thus the land of the owner is sold to pay a debt of the mortgagee. It is also provided that, if the owner of the fee has personal property, not only his portion of the tax may be collected from him, but the taxes upon the mortgage interest may also be collected from him by distress and sale of his personal property. The tax upon the mortgage interest is not against the mortgagor, but against the mortgagee, and yet the personal property of the mortgagor may be seized and sold for such tax. It is true that the law provides that the mortgagor, upon payment of the mortgagee's tax after thirty days from the time the roll goes into the hands of the collecting officer, or upon the payment by distress and sale of the goods and chattels of the mortgagor, may have the same treated as a payment upon the interest that may be due on the mortgage, and, if no interest is due, then as a payment upon the principal. It is also provided that, if the mortgagor's tax is paid by the mortgagee, "it shall become a lien upon the land, and be added to his other obligation, and be subject to the same terms and conditions as such mortgage," etc. It will be seen from this that whatever the contract may be, as stipulated in the mortgage, between the mortgagor and the mortgagee, and though not a dollar is due upon the principal or interest of the mortgage, and not a dollar to become due for five years thereafter, yet the collecting officer is authorized and empowered under the Act to seize for the debt of the mortgagee the last piece of personal property the mortgagor has; for there are no exceptions from seizure and sale from taxes under this Act. Under certain circumstances, it is distressful enough for a man to be compelled to surrender the last article of personal property he possesses to pay his own tax; but to say that this distress may be visited upon him to pay the debt of another is not only monstrous, but clearly beyond the constitutional power of the Legislature. The Constitution, by article 4, § 48, provides: "The Legislature shall pass no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Under the circumstances above stated the mortgagor would be compelled to pay upon his mortgage the amount of the mortgagee's tax, five years before any amount was due thereon. This compulsion of payment precipitates the maturity of the obligation, and changes the contract between the

parties, in violation of the above provision of the Constitution.

In *Lyon v. Guthard*, 53 Mich. 281, it appears that a tax was assessed against Cornwell, Price & Co., a corporation doing business in Detroit, and after the assessment and levy of the tax the corporation made a common-law assignment for the benefit of the creditors to Mr. Lyon, who accepted the trust and entered at once upon his duties. On the day of the assignment, and after it was made, efforts were made by the defendant, as receiver of taxes, to collect the same. On December 22, he entered the store of plaintiff, and threatened to take possession and sell the assigned property to pay the tax, which amounted to \$677.78. The plaintiff, to prevent this, paid the tax under protest, and on the following day brought suit in assumpsit to recover this amount. The city charter of Detroit provided that the city taxes should be a lien upon the property assessed until paid. This court held that that provision did not apply to personal property. The defendant claimed that it was his duty to enforce the collection of this tax against the plaintiff's property under the assignment; that his act in so doing was official, and had the color of right; therefore he was not personally liable. It was said by this court: "Several cases decided by this court have been referred to as supporting this position, but they are not applicable to the facts in the present case. This was not the case of a person whose property had been illegally seized, and against whom the collector's warrant ran, but an attempt to take the property of one person to pay another person's taxes. This cannot be done, under our Constitution or laws. It would be the grossest injustice, and finds no support in the decisions of this court."

But, again if the mortgagee does not pay the tax, and it is not collected of the mortgagor by distress, it becomes a lien upon the land of the mortgagor, and, thus the property of the mortgagor is taken to pay the mortgagee's taxes. Under this law the assessment or listing and valuing of property is made in April or May, but no taxes are levied until after the October meeting of the board of supervisors, and they become a lien upon real and personal estate only on and from the 1st day of December. Mortgages are often accompanied by a note to which the mortgage is collateral. The note may be negotiable paper, which passes from hand to hand by delivery or indorsement, and in equity carries with it the mortgage security, without actual assignment. It may have been purchased in reliance solely upon the responsibility of the maker or indorsers. A purchaser of such paper, in good faith and for value, before maturity and before the tax becomes a lien upon the mortgage, has a right to enforce it against the maker for the full extent called for by the promise upon its face; and it is not subject to offset for taxes assessed against the payee and paid by the maker. The mortgagor cannot, by payment of the tax assessed against the mortgagee, offset it against the bona fide assignee, who under the law was not liable to pay the tax. The

mortgagor paying the tax of the mortgagee, under such circumstances, would have no means of enforcing repayment by an offset against the mortgage. *Mr. Justice Campbell*, in *Taggart v. Sanilac County Suprs.*, 71 Mich. 31, says: "A mortgage, under our legislation, conveys no legal or equitable estate in land. It is no more and no less than a collateral security upon land, and which has no value in itself, but depends entirely upon some outside obligations, from which it is inseparable. If it is given to secure a debt, it belongs to the owner of that debt, and passes with it to any lawful holder, with out assignment. If the debt is negotiable, it passes to any one to whom the paper belongs. If it is given to secure several debts or several installments, it belongs ratably to as many persons as there are owners of these. It may be given by way of indemnity, and in that case it may never have any money value. It may be given for a debt amply secured by other mortgages on other property, or it may be on property already so heavily incumbered as to make it no security at all. So the mortgagee may be a mere trustee, with no interest himself in it." There are many other circumstances which might be stated, where it would be impossible to separate these interests and enforce the payment of the tax out of the goods of the mortgagor without violating the obligations of the contracts.

The obligation of a contract is the law which binds the parties to perform their agreement. *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 157, 4 L. ed. 589. In *Green v. Biddle*, 21 U. S. 8 Wheat. 84, 5 L. ed. 568, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. A deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposes conditions not expressed in the contract, or, dispensing with those which, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." "One of the tests," says the court in *Planters' Bank of Mississippi v. Sharp*, 47 U. S. 6 How. 327, 12 L. ed. 458, "that the contract has been impaired, is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. There is no question of degree or cause, but of encroaching in any respect upon its obligation, dispensing with any part of its force." In *Bourgette v. Williams*, 73 Mich. 214, it was said: "The obligation of a contract is said to consist in its binding force on the party who makes it. This depends upon the law in existence when it was made. These laws are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by one party and the right acquired by the other; and, if any subsequent law affects to diminish the duty or to impair the right, it necessarily bears upon the obligation of the contract in favor of one party to the injury of the other." At the time these prior mortgages were made, the law then in force did not permit

the mortgagor's property to be seized to pay the tax of the mortgagee. It is now sought by the present law to authorize such seizure. To my mind, no plainer case could be stated where an attempt is made by the Legislature by subsequent enactment to impair the obligation of existing contracts, and these unconstitutional provisions are so interwoven in the law that no part of it can be carried out.

This position is sought to be answered by the proposition that, inasmuch as it would be competent for the Legislature to cause the entire value of the land to be assessed to the mortgagor, therefore it does not impair the obligation of the contract between the mortgagor and the mortgagee to compel the mortgagor to pay that part of the tax assessed to the mortgagee. The illustrations of the workings of the law before given are sufficient answers to this proposition. Under the present law the mortgage interest is not assessed to the mortgagor at all. It is assessed to the mortgagee, and then the tax may be collected by distress of the property of the mortgagor; and in the last illustration used the assignee of the mortgagee, if he procures it before the tax becomes a lien, and for value, takes it freed of any obligation to pay to the mortgagor after payment by him of the tax. Again, let it be supposed that one class of mortgagees pay their taxes, and thus relieve the mortgagor of the burden. Another class of mortgagees fail to pay, and the mortgagors are compelled by distress to make the payments. We have the anomaly of the Legislature compelling in one instance the payment of a part of the tax upon the land by the mortgagee, and in another case, where the mortgagee does not pay, compelling the mortgagor to make the payment, which, we have seen, he may not always be in a position to collect back. This destroys the uniformity of taxation which is provided by the Constitution in article 14, § 11.

It is also said that the imposition of this burden upon the mortgagor does not impair the obligation of contracts, for, if the mortgagee does not pay, the state simply appropriates so much of the fund which the mortgage represents as is necessary to pay the tax before it reaches the mortgagee. In other words, it is proposed to permit the state to take the money of one man to pay the debt of another, or to appropriate a fund not yet due and compel its payment before due; that is, compel the mortgagor to make payment upon his mortgage long before anything is due thereon, so that the state may get its revenues,—the very thing which the Constitution prohibits. The assumption that this may be done is based upon the idea, as before stated, that the Legislature might in the first instance have compelled the assessment upon the land of the whole tax. The idea upon which the Act was brought into existence was that this was unjust, and a burden upon the land-owner, from which he ought to be relieved, and therefore the part which the mortgagee bears should be assessed against the holder of the mortgage. This undoubtedly could have been done, if the

Legislature had confined the provisions of the Act to mortgages thereafter made; but it is beyond the power of the Legislature to change existing contracts between the parties to the extent pointed out. Many mortgages contain a provision that the mortgagor shall pay all the taxes assessed on the land. By the Act the Legislature attempts, in violation of such contracts, to divide the tax, and compel the payment of a part of it by the mortgagee, which by section 85 of the Act may be compelled by seizure of his personal property. That section provides:

"If any person shall neglect or refuse to pay any tax assessed to him, or upon any mortgage or other obligation taxed as an interest in lands owned by such person, as provided by this Act, the township treasurer shall collect the same by seizing the personal property of such person, to an amount sufficient to pay such tax, fees, and charges for subsequent sale, whenever the same may be found in the county, from which seizure no property shall be exempt." The law under which the mortgage was given did not prohibit the entering into contracts by which the mortgagor was compelled to pay the tax assessed upon the whole land. The contract in the mortgage is that the mortgagor shall pay the tax. The Legislature now provides that the amount of the mortgage shall be deducted from the value of the land, and that the mortgagees shall pay the tax on that part, and compels the payment by distress of his personal property. A bare statement of this proposition shows a violation of the Constitution, as it clearly violates the obligation of the contract.

The whole scheme of taxation of mortgages, and the collection of the taxes thereon, by the methods pointed out by this Act, are so defective that for this reason the whole Act should fail. Let us take a few examples of the practical workings of the scheme. The mortgage interest is to be assessed in the taxing district where the land is situated. In case the mortgage covers lands in more than one taxing district, which is frequently the case, the law provides as to future mortgages, when this is shown to be the case, that they shall not be entitled to record unless there be appended a statement showing the proportionate amount to be assessed as an interest on each parcel in the different assessing districts. There is no sufficient provision in regard to existing mortgages for ascertaining these facts. The only provision relating to them is that "it shall be the duty of the holder of any such mortgage . . . to file with the supervisor or assessing officer of the township or assessing district in which the land or real property affected thereby is situate, before the 10th day of April of each year a written statement, under oath, of all his estate situate in such township or assessing district, liable to assessment and taxation under the provisions of this Act; otherwise, a written statement of the mortgagee's interest of any such real estate may be filed with the supervisor by the mortgagor or owner of the fee." In other words, as to existing mortgages the only means the assess-

ing officer has in ascertaining the value of the mortgage interest in each parcel, when situate in separate assessing districts, are these statements of the mortgagor or mortgagee. If they are both nonresidents, as the case often happens to be, and the mortgage is upon real property in different assessing districts, there is no way pointed out, except as above stated, to ascertain the facts; and, if the parties are not accessible then no means is given to ascertain the facts. Let us suppose the case of a mortgage given by a resident of Detroit, or by an owner residing out of the state, upon lands in Oscoda and Roscommon counties, in the lower peninsula, and Chippewa county, in the upper peninsula. The supervisors in Oscoda and Roscommon counties enter the land for assessment upon their respective rolls, and then find it incumbered by a mortgage covering lands in the other two counties, and they attempt to apportion the mortgage upon the several parcels of land in all the counties according to their respective values. How can it be done? The land is assessed, "Owner unknown." The mortgagee is a nonresident. Neither can be reached. Must a supervisor ascertain the facts and apportion? And, if the facts cannot be found, how shall he apportion? This is one of the many problems which the law, in its crude state, presents.

Again, in the matter of review under this statute. If the mortgagee does not appear before the board of review, he will be barred from contesting the amount of his tax in any court, as he will have an opportunity to appear before that body, and such an appearance or opportunity for an appearance would be regarded as his day in court upon the question of the amount of his assessment. Mortgagees must therefore be on the watch in every assessing district where their mortgages

may be assessed,—and a mortgage may be assessed in every assessing district where any of the land lies covered by it,—or suffer the consequences of an over assessment or overvaluation by each assessing officer on the one mortgage. Take the case of the savings banks and insurance companies situate in Detroit, all of which are organized under the laws of this state. They own nearly \$14,000,000 of real-estate mortgages held by them as security to depositors in banks and policyholders in insurance companies. Many of these mortgages cover more than one piece of land, and presumably lands which are situated in two or more taxing districts are covered by the same mortgage. These mortgages are upon lands in different parts of the state. The assessing officers not having the values at hand by which they can apportion the mortgage according to the value of each parcel of land, each assessing officer may assess the mortgage in each district according to his own view as to the proportion which it bears to the whole land. Must the bank or insurance company, in order to prevent an overvaluation in each district, appear before the board of review, or in default thereof be held to the amount assessed against the mortgage in each district? The law does not define how these matters may be arranged. Many other defects could be pointed out, and the imperfections of the law shown. These defects may not prove insurmountable barriers to a valid assessment, but I have cited them to show the difficulties of carrying the law into effect.

Upon the questions which have not been discussed by my Brother Grant or myself, I concur fully in the views of my Brother Montgomery. I am of the opinion, however, that the writ of mandamus should be denied.

IDAHO SUPREME COURT.

LATAH COUNTY, *Respt.*,

v.

E. G. PETERSON, *Appt.*

(.....Idaho.....)

Condemnation of land for a private road
to be laid out upon the application of a particular

individual and paid for and kept in repair by him is for a public purpose where the road is in fact for public use by all who desire to use it.

(June 6, 1892.)

A PPEAL by defendant from a judgment of the District Court for Latah County in favor of plaintiff in a proceeding instituted to

NOTE.—*Constitutionality of condemnation proceedings to establish a private road.*

The decisions on this subject are in much apparent conflict which is to some extent real. Many cases have decided that the establishment of a private way by condemnation proceedings is unconstitutional although just compensation is provided where the road is for individual or private use alone, as such a taking of land is not for a public use. *Nesbitt v. Trumbo*, 39 Ill. 110, 59 Am. Dec. 290; *Osborn v. Hart*, 24 Wis. 32, 1 Am. Rep. 161; *Taylor v. Porter*, 4 Hill, 140; *Witham v. Osburn*, 4 Or. 318, 15 Am. Rep. 237; *Logan v. Stogdale*, 8 L. R. A. 58, 123 Ind. 372; *Sadler v. Langham*, 34 Ala. 311; *Crear v. Crossly*, 40 Ill. 175; *Johnson v. Clayton County*, 61 Iowa, 86; *Stewart v. Hartman*, 46 Ind. 331; *Clack v. White*, 2 Swan, 540; *Varner v. Martin*, 21 W. Va. 538, 16 L. R. A.

This doctrine can hardly be said to be in any dispute, but the courts do in fact divide on the question as to what use is for individual or private use alone.

Other decisions hold that a road although denominated a private road which when established becomes a way over which all who had occasion may lawfully pass is public and that the Legislature may provide for the condemnation of land therefor. *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577; *Denham v. Bristol County Comrs.* 108 Mass. 205; *Pocopson Road*, 16 Pa. 15; *Re Private Road in Redstone Twp.* 112 Pa. 183; *Hickman's Case*, 4 Harr. (Del.) 580; *Brewer v. Bowman*, 9 Ga. 37; *Robinson v. Swope*, 12 Bush, 21.

In Delaware a private road is held to be a part of the system of public roads and open to the public

condemn land for a right of way in which defendant was awarded \$100 damages for land taken from him. *Affirmed.*

The facts are stated in the opinion.

Messrs. Freund & Loughary, for appellant:

Section 983 of the Revised Statutes of Idaho is unconstitutional for the reason that it attempts to authorize the taking of private property for a private use or benefit.

Cooley, Const. Lim. 8d ed. *530; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Gillan v. Hutchinson*, 16 Cal. 154.

The taking of private property for a private road is not conferred by the right of eminent domain, hence when the Legislature undertakes to authorize such appropriation of private property, it is an attempted delegation of power not possessed by the Legislature nor the people in legislative capacity, and is unconstitutional.

See *Cooley*, Const. Lim. 8d ed. p. 530;

Smith, Const. Stat. 2d ed. p. 477; 7 *Lawson*, Rights, Rem. & Pr. p. 6114; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Dickey v. Tennonson*, 27 Mo. 873; *Logan v. Stogdale*, 8 L. R. A. 58, 128 Ind. 872; *Com. v. Cambridge*, 7 Mass. 158; *Newbitt v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Orear v. Crossley*, 40 Ill. 175; *Stewart v. Hartman*, 46 Ind. 331; *Blackman v. Halves*, 72 Ind. 515; *Wild v. Deig*, 43 Ind. 455, 18 Am. Rep. 399; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 48; *Osburn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Bankhead v. Brown*, 25 Iowa, 540; *Embury v. Conner*, 8 N. Y. 511; *Baker v. Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Sadler v. Langham*, 34 Ala. 311.

When the public is only incidentally benefited, the right of eminent domain does not obtain.

Cooley, Const. Lim. 8d ed. *530, 531; 7 *Lawson*, Rights, Rem. & Pr. p. 6113; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42;

although made on a private petition. *Hickman's Case*, *supra*.

In New Hampshire all ways laid out by the selectmen are held to be public although they are made for the particular accommodation and at the expense of individuals and it is also held that the town is under obligation to repair them so far as the public accommodation requires. *Metcalf v. Bingham*, 3 N. H. 459; *Proctor v. Andover*, 42 N. H. 343.

In Massachusetts a "private way for the use of one or more of the inhabitants" of a town, which the statute authorizes to be laid out by selectmen, is a public road. *Denham v. Bristol County Comrs.* 108 Mass. 306.

In Vermont a pent road is also a public highway. *Whittingham v. Bowen*, 23 Vt. 317.

In Ohio a township road is for the public use and consequently land may be condemned therefor. *Ferris v. Bramble*, 5 Ohio St. 109; *Shaver v. Starrett*, 5 Ohio St. 495.

In New Jersey it is said that a private road is public in its character and use, and that every citizen has a right to travel over it. *Allen v. Stevens*, 29 N. J. L. 504; *Perrine v. Farr*, 22 N. J. L. 366.

In Alabama, although a statute authorizing the condemnation in such a case had been enforced in *Long v. Commissioners' Ct.*, 18 Ala. 423, without raising the constitutional question, it was held in a later case that as there was nothing in the statute that authorized public travel on such a road, the taking by condemnation was unconstitutional. *Sadler v. Langham*, 34 Ala. 311.

But in *Steele v. County Comrs.*, 33 Ala. 304, it was held that, under the new Alabama Constitution of 1861, providing that "the right of way may be secured by law to persons and corporations" over the land of other persons and corporations, a statute authorizing condemnation for a private road was constitutional.

In *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287, as in many of the other cases, in which the road is held to be private, it is said that the statute contains no provision that the road shall be public or that they may be kept open if the individual at whose instance they are established seeks to close them.

In *Dickey v. Tennonson*, 27 Mo. 873, a private act to establish a "neighborhood road" was held unconstitutional on the ground that it was not for a public use where the petitioner was required to pay all expenses including the fees of the commissioners. The court, however, distinguished this from cases under the general statute to enable persons 16 L. R. A.

to secure a right of way which contemplated only a recognition to the right independent of statute to a way of necessity.

A private road to a tract of enclosed land on which the owner does not reside is merely for a private use and condemnation therefor is not constitutional. *Varner v. Martin*, 21 Va. 534.

In *Pells v. Boswell*, 8 Ont. Rep. 680, 9 Am. & Eng. Corp. Cas. 353, the court decides that the opening of a street merely in the interest of two individuals who objected to pay what the owner demands for the coveted strip of land may be enjoined.

In *Com. v. Sawin*, 2 Pick. 547, it is decided that a highway cannot be laid out in consideration of the bond of an individual to pay part of the expense, if the common convenience is not sufficient to warrant it, wholly at the expense of the town, as this would not be taking the land solely for public use.

Outlet for communication with public.

In Iowa the right to condemn land for a private road, although laid out to reach the residence of a citizen, is denied even where condemnation for a public road would be proper. The decision is based in part on the fact that the public is not bound to work the road and that there is nothing to prevent the petitioner from closing it up, thus showing that the road is private. *Bankhead v. Brown*, 25 Iowa, 540.

On the other hand, it is held that a citizen cannot defeat a proceeding to lay out a public road to reach his residence on the ground that it is only a private road, as a road to reach the residence of a citizen and prevent his isolation is for a public use. *Johnson v. Clayton County*, 61 Iowa, 89.

In *Wild v. Deig*, 43 Ind. 455, 18 Am. Rep. 399, it is held that a private road is not public so as to justify a condemnation of land therefor on the ground that it is a branch of the highway and part of the system and that the power has long been exercised and undisputed and that the public is interested in securing to every citizen a way to and from his land where the private road cannot be used by the public, but that a public road should be laid out instead if any road is necessary.

The fact that a freeholder is shut off from a highway and his land and residence entirely surrounded by that of other persons, does not prevent a statute authorizing the condemnation of a private road across the land of another person from being unconstitutional. *Logan v. Stogdale*, 8 L. R. A. 58, 128 Ind. 872.

But the doctrine of the above cases is in conflict with that announced in other cases following.

Lewis, Em. Dom. § 206; *Com. v. Cambridge*, 7 Mass. 166.

It is not the policy of the governmental power of this state to extend the right of eminent domain to answer the whim or personal and pecuniary motive and interest of every individual or of individuals for personal gain or even personal convenience.

Coster v. Tide Water Co. 18 N. J. Eq. 54; 2 Bouvier, Law Dict. p. 488; Tiedeman, Pol. Powers, p. 382.

Messrs. Forney & Tillinghast and Mitchell & West, for respondent:

Although the Legislature has misclassified these roads "private roads" so as to classify them, still they are not private roads but are for the public use.

Sherman v. Buick, 83 Cal. 243, 91 Am. Dec. 577; *Monterey County v. Cushing*, 88 Cal. 507.

Section 983 was adopted directly from the California Code, and under its provisions a very large number of this class of roads have been opened and are now used. In accord-

ance with the familiar rule that in adopting the laws of any state we also adopt the decisions upon these laws, these decisions in California must be binding upon us.

See also *Bell v. Prouty*, 48 Vt. 279; *Whittingham v. Bowen*, 23 Vt. 317; *Brock v. Barnett*, 57 Vt. 172; *Harvey v. Thomas*, 10 Watts, 63, 86 Am. Dec. 141.

Morgan, J., delivered the opinion of the court:

On or before the 15th day of July, 1890, a petition in due form was presented to the board of county commissioners of Latah county, praying for the establishment of a private or by road over the lands belonging to the defendant, E. G. Peterson, described in plaintiff's complaint. On said 15th day of July the board of county commissioners appointed three viewers, and directed that said viewers should meet on the 5th day of September, 1890, and view and survey and mark out said road, and estimate the damages accruing to nonconsent-

Thus, in Kentucky a passway to enable a citizen to attend courts, elections, churches or mills, or to reach an established highway, is regarded as for a public purpose. *Robinson v. Swope*, 12 Bush, 21.

So in *Brewer v. Bowman*, 9 Ga. 87, it is said that the public have an interest in permitting the owner of land to have an outlet to a public road so that he can get out to elections, and to perform jury duty, road duty, militia or patrol duty, give evidence in court and carry produce of his land to market. In this case, however, the statute authorizing condemnation of land for a private road was held unconstitutional because no provision was made for compensation.

The same doctrine seems to be implied in the decisions below cited from North Carolina, Michigan, and Pennsylvania.

Necessity of road.

In Pennsylvania the constitutionality of statutes authorizing the condemnation of land for a private road does not seem to have been directly contested and passed upon but the decisions limit the right to a road which is strictly necessary. *Pocopson Road*, 16 Pa. 15; *Re Private Road in Redstone Twp.* 112 Pa. 183.

In *People v. Richards*, 88 Mich. 214, it is held that mere convenience will not justify condemnation for a private road, but that it can be had only where there is no other way of access to the lands of the applicant, and that the accommodation of lot-owners to get access to a village plat is insufficient.

So in *Bundel v. Blakeslee*, 47 Mich. 575, it is held that there must be an express finding that the road is necessary.

So in *Colville v. Judy*, 73 Mo. 651, it is held that the fact that the way sought is a "way of necessity," is a jurisdictional fact which must be set out in the petition.

In North Carolina condemnation of land for a private road which is "necessary, reasonable, and just" is also permitted, but it seems that the question of the constitutionality has not been explicitly considered. *Warlick v. Lowman*, 108 N. C. 122.

Thus in *Burgwyn v. Lockhart*, 60 N. C. 269, and *Mayo v. Thigpen*, 107 N. C. 63, it is held that a way is not necessary, reasonable, and just if there is another convenient outlet to a public road; and in *Lea v. Johnston*, 81 N. C. 15, it is held that a public road to which access may be had defeats the right although it is not so convenient as a proposed private road.

But it is decided in *Caroon v. Doxey*, 48 N. C. 23, 16 L. R. A.

that a private road cannot be obtained by condemnation to reach unimproved land which is used only as a range for cattle as the statute requires the owner to be "settled" upon the land for which an outlet is claimed.

So in Kentucky one who resides upon a tract of land which is situated upon a public highway cannot condemn a passageway over the lands of another merely for the benefit of a tract of land which is entirely surrounded by the land of other persons. *Robinson v. Swope*, 12 Bush, 21; *Shake v. Frasier*, 18 Ky. L. Rep. 825. See also *Varner v. Martin*, 21 W. Va. 683.

In Missouri a private road if it is a way of necessity may be condemned over another's land. *Barr v. Flynn*, 8 West. Rep. 777, 20 Mo. App. 893.

So in *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94, it is said that a right of way by necessity being merely an easement, a statute authorizing the establishment of such a right over the land of another is not unconstitutional. The decision proceeds on the theory that such right of way exists independently of the statute and that the act only provides a convenient mode of locating the way.

But in *Stewart v. Hartman*, 46 Ind. 331, and *Clack v. White*, 2 Swan, 540, the doctrine that a right of way by necessity exists whenever land is entirely enclosed by that of others, and therefore that a statute authorizing the condemnation for a private road in such a case is constitutional as a mere recognition of a prior right, is denied and it is expressly held that no such way of necessity exists over a stranger's land, but that it depends upon an implied grant.

The fact that only an easement is taken for a private road does not prevent the taking from being unconstitutional as it amounts practically to taking the land. *Crear v. Crossly*, 40 Ill. 173.

A general review of all the authorities leads to the conclusion that condemnation of land for a so-called private road the expense of which the petitioner is required to pay in whole or in part, ought not to be held unconstitutional if the road is in fact open for the use of the public. This doctrine has evidently gained ground during the time in which the question has been in dispute, and in several states express constitutional provisions have been made in favor of the right to condemn lands for private roads, as in Alabama, art. 1, § 24; Colorado, art. 2, § 14; Illinois, art. 4, § 30; Michigan, art. 18, § 14; Missouri, art. 2, § 20; New York, art. 1, § 7, and perhaps in some other states. B. & B.

ing land-owners. The said viewers met as directed; surveyed and marked out the road; platted and mapped the same; made their report to said board, which thereupon ordered the road overseer to tender to defendant, who was a nonconsenting land-owner, the sum of money awarded to him, which sum the defendant refused to accept. Thereupon this suit was commenced. The cause was tried before the Hon. W. G. Piper, *Judge*, and a jury. The jury assessed the damages accruing to defendant at \$100. Judgment of condemnation was thereupon entered. Defendant appealed from said judgment to this court. The principal contention of the appellant is that the act of the territorial Legislature, to wit, section 933, Rev. Stat. Idaho, is unconstitutional, for the reason that it attempts to take private property for private use. It is a general rule that the right of eminent domain does not imply a right in the sovereign power to take the property of one citizen, and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. This doctrine, in the absence of any constitutional provision, is established by a long line of decisions not necessary here to enumerate. Among other decisions, the appellant cites *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161. The statute of Wisconsin authorized the laying out of private roads upon the application of any freeholder, such applicant to pay all damages and costs. To this was added by the same statute the further provision that "such private road, when so laid out, shall be for the use of the applicant, his heirs or assigns, . . . nor shall the owner of the land through which such roads shall be laid out be permitted to use the same as a road, unless he shall have signified his intention of so doing, . . . before the damages were ascertained." The court held in above case that, inasmuch as the public could not use such road, and had no interest in it, and the owner of the land could not use it, the law could not be sustained. It will be noticed that our Statute (sec. 933 *et seq.*) contains no such exclusive provisions, but a private road, when opened, can be used for any purpose to which it is adapted by the general public and by any individual thereof. In the same case the court says: "In some of the states it has been held that these roads, although termed 'private,' yet were in fact public, roads, so far as the right to use them was concerned, and upon this ground the power of the Legislature to authorize them to be laid out has been sustained." *Osborn v. Hart*, 24 Wis. 91, 1 Am. Rep. 161; *Perrine v. Farr*, 23 N. J. L. 356; *Re Hickman*, 4 Harr. (Del.) 580. In case of *Witham v. Osburn*, 4 Or. 818, 18 Am. Rep. 287, also cited by appellant, the court holds that private property cannot be taken for exclusively private use, whether compensation be made or not; but the court also holds that the Legislature may provide for the establishment of private roads, or "byways," as they are termed in our statute, by providing that they shall be public instead of private roads, and that they may be used by the public. It will be noticed that the decree of the court, in the case at bar, directs that the said highway shall be opened for the use and benefit of the said P. N. Lunstrum, the appli-

cant, and the general public, so that the decree itself provides that it shall be a public as well as a private road.

In *Nesbitt v. Trumbo*, 39 Ill. 110, 39 Am. Dec. 290, and *Crear v. Crossly*, 40 Ill. 175, the court holds that section 98 of the Act of 1861 (Ill. Stat. p. 283) is unconstitutional, for the reason that it transfers the use of the land condemned to the person for whose use the road was established, his heirs and assigns, forever. The owner is deprived of its use, and the other acquires its use perpetually. For all practical purposes, this amounts to a transfer of the land. It will be seen that this statute is very different from section 933, Idaho Rev. Stat. The owner of the soil and the general public has as much interest in and the right to the use of such private road, as fully and completely, as the person upon whose application it is opened; and the effect would be that, if the use of the land for such purpose should cease, it would revert to the owner of the soil. In the two last named cases *Mr. Justice Lawrence*, one of the most eminent jurists of his time, dissents from the opinion of the court, and giving his reasons, in *Crear v. Crossly*, he says: "If the government, after making a grant, owns all the surrounding lands, the grantee takes a right of way over the surrounding land to the public highway as an incident to his grant; and if the government retains the title to a tract of land, having sold the land surrounding it on every side, a right of way to a public road is reserved by implication. This right of way continues in both cases, both in favor of and against subsequent grantees, for it is a right created by operation of law, and from necessity, to enable owners to enjoy their lands. I consider our statute in regard to private roads as simply based on this common-law right, and regulating its exercise. The right existed before the Act was passed, by the established rules of the common law in regard to the construction of grants." These reasons apply with equal force to our own statute, and in our opinion would be sufficient reason for upholding it, were there no other authority. There is abundant authority, however, for sustaining the statute in the decisions of the courts. Where the road, though laid out upon the application and paid for and kept in repair by a particular individual, who is especially accommodated thereby, is, in fact, a public road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned. *Lewis, Em. Dom. § 167; Shaver v. Starrett*, 4 Ohio St. 494; *Ferris v. Bramble*, 5 Ohio St. 109; *Denham v. Bristol County Comrs.* 108 Mass. 202; *Sherman v. Buick*, 83 Cal. 241, 91 Am. Dec. 577, and cases there cited; *Monterey County v. Cushing*, 83 Cal. 507; *Brock v. Barnet*, 57 Vt. 172.

The Constitution (art. 1, § 14) substantially recognizes the right of the Legislature to provide for laying out private roads or byways, as follows: "The necessary use of lands for reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, . . . or any other use necessary to the complete development of the material resources of the state, . . . is hereby declared to be a

public use." This provision is certainly sufficient to authorize the Legislature to provide for the establishment of byways, or pentways, as they are sometimes called, or private roads, which are for the use of anyone who may desire to use them. The necessity for such private roads is apparent when it is stated that it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways, unless this power existed. Such roads are therefore necessary to the complete development of the material resources of the state. We are therefore of the opinion that section 933, Idaho Rev. Stat., is constitutional.

The appellant complains that the decree of the court authorizes the condemnation of a strip of land only 30 feet wide instead of 50 feet, which is required for the width of highways. It would seem that the person whose land is condemned cannot be heard to complain that the court did not take 50 feet of land instead of 30 feet. It is hardly consistent with his position, since he appears here complaining that any was taken

The appellant also makes the point that the complaint does not state facts sufficient to constitute a cause of action. We think this point cannot be sustained. The ultimate facts only are necessary to be alleged, and these are sufficiently set forth. The respondent in this case complains that the court below rendered a judgment in form against P. N. Lunstrum for the amount of the damages and one half the costs, while it is undoubtedly true that no judgment can be rendered against one not a party to the suit. As neither the respondent, the county of Latah, nor Lunstrum, nor Peterson has taken any appeal from this part of the judgment, it is not before this court. The condemnation is made substantially upon condition that said Lunstrum shall pay the defendant, Peterson, the damages and one half the costs, (into court,) and, upon such payment or tender, the decree can be enforced.

Judgment affirmed.

Sullivan, Ch. J., and Huston, J., concur.

KANSAS SUPREME COURT.

UNION STOVE & MACHINE WORKS,
Pff. in Err.,

v.

J. D. CASWELL, *et al.*

(.....Kan.....)

*Where property is sold and the pur-

*Head note by VALENTINE, J.

chaser agrees to pay the consideration therefor, or a portion thereof, to a creditor of the vendor, the purchaser, as between himself and the vendor, becomes the principal debtor, and the vendor only a surety; and if the creditor afterwards, and because of this arrangement, accepts the purchaser as a debtor, he must accept him in the same manner, and as his principal debtor, with the vendor only as a surety; and if the creditor then, by a valid

NOTE.—Release of mortgagor as surety by mortgagee's dealing with vendee who has assumed the mortgage.

The above case in denying that a mortgagee can hold both the mortgagor and a grantee of the latter as principal debtor is in plain conflict with the courts of Iowa and Connecticut and also with *dicta* at least of the courts of Michigan and Missouri.

In Iowa the decisions are explicit to the effect that until a mortgagee in some way recognizes the mortgagor as surety only, he may treat both mortgagor and his vendee, who has assumed the debts, as principals. *Corbett v. Waterman*, 11 Iowa, 87; *Messie v. Mann*, 17 Iowa, 134; *James v. Day*, 37 Iowa, 164.

In *Crawford v. Edwards*, 33 Mich. 354, the court says that a mortgagee may treat both the mortgagor and vendee of the latter, who assumes the debt as principal debtors for the purpose of a personal decree against them; but in this case a personal decree was sought only against the vendee.

In *Connecticut Mut. L. Ins. Co. v. Mayer*, 8 Mo. App. 18, the court says that as to the mortgagee both the mortgagor and his vendee who assumes the debt may be principal debtors or otherwise. The actual point decided is that the consent of the mortgagee that grantees of the mortgagor, who are insolvent, may remove machinery from the premises, reducing its value so as to leave the security insufficient, does not release the grantor.

In Connecticut the assumption of a mortgage debt by a vendee of the mortgagor makes him a principal and the vendee a mere surety only as between themselves and not as to the mortgagee, or his assignee, although such assignee deals with the vendee as a principal debtor by taking an as-

signment of the mortgage for the latter's accommodation in order to give him further time for payment but without making any binding contract for extension. *Boardman v. Larrabee*, 51 Conn. 30.

The relation between mortgagor and mortgagee is not changed by assumption of the mortgage debt by a vendee of the mortgagor and a new mortgage of the lots purchased by him to secure it. *Waters v. Hubbard*, 44 Conn. 240.

On the other hand, the courts in New York and Maryland, and a circuit court of the United States, hold that a mortgagor is entitled to be treated as a surety and released as such when the mortgagee has treated the mortgagor's vendee, who has assumed the mortgage, as the principal debtor by making a new contract with him. Thus they hold that the extension of time to the vendee of a mortgagor who has assumed the mortgage debt without the mortgagor's consent releases the latter. *Union Mut. L. Ins. Co. v. Hanford*, 27 Fed. Rep. 588; *Fish v. Hayward*, 23 Hun, 456; *Calvo v. Davies*, 73 N. Y. 211; *Paine v. Jones*, 76 N. Y. 274; *Murray v. Marshall*, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 353; *George v. Andrews*, 60 Md. 23, 45 Am. Rep. 703.

But on the contrary in Iowa, in accordance with the doctrine there adopted, such an extension of time to the vendee of a mortgagor without the latter's consent will not release him. *Corbett v. Waterman*, 11 Iowa, 87.

So in Iowa the release of a part of the mortgaged property which has been bought by one who assumes the debt will not discharge the mortgagor although he does not consent to the release. *James v. Day*, 37 Iowa, 164.

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agreement with the purchaser, and without the consent of the vendor, extends the time for the payment of the debt, he will release and discharge the vendor.

(May 7, 1882.)

ERROR to the District Court for Reno County to review a judgment refusing to subject the lands of defendant Caswell to the lien of a judgment in favor of the defendant, Union Stove & Machine Works, in an action by Smedley Darlington, to foreclose a mortgage upon Caswell's land in which the corporation was made defendant, and set up a claim for independent relief under its alleged judgment. *Affirmed.*

The facts are stated in the opinion.

Mr. R. F. McGrew, for plaintiff in error: The evidence does not state that the Fisher chattel mortgage was for the Caswell debt. The demurrer should have been sustained.

See 1 Parsons, Cont. 7th ed. pp. 217-222, and notes; Story, Prom. Notes, 6th ed. §§ 105, 404, 408, 438; *Plano Mfg. Co. v. Burrows*, 40 Kan. 861.

There must not only be an agreement of a second party to pay a debt of the first party to a third party, but there must be an agreement of all parties upon a sufficient consideration to accept the first party as paymaster exclusively, and also to release the second party.

See Parsons, Cont. 7th ed. pp. 217-222; *Plano Mfg. Co. v. Burrows*, *supra*.

There might be knowledge of and acceptance of the several promises of Eastland and Fisher, and without an agreement to release Caswell, there would be no satisfaction of the judgment as to Caswell until fully paid by either of the obligors.

Plano Mfg. Co. v. Burrows, *supra*.

Messrs. Charles H. Apt and Bowman & Bucher, for defendants in error:

Payment cannot be proved under a general denial.

St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 781.

Where payment is alleged, proof thereof is admissible and the burden of proving the same is on the party pleading it.

Gutermann v. Schroeder, 40 Kan. 507.

When the creditor accepts the new debtor, such new debtor becomes the principal and the former debtor the surety.

Center v. McQuesten, 24 Kan. 480; *Plano Mfg. Co. v. Burrows*, 40 Kan. 861.

This extension given the principal for value without the consent of the security released the surety.

Rose v. Williams, 5 Kan. 488; *Hubbard v. Ogden*, 23 Kan. 368.

The pursuing of Fisher on his chattel mortgage and procuring full indemnity for the claim of the Union Stove & Machine Works is conclusive evidence of the release of Caswell.

Walker v. Crosby, 88 Minn. 84.

Valentine J., delivered the opinion of the court:

This was originally an ordinary action upon a promissory note and a real-estate mortgage, brought in the district court of Harvey county by Smedley Darlington, the payee and mortgagee, against John D. Caswell and Sarah

J. Caswell, husband and wife, the payors and mortgagors, to recover the sum of \$866.50 and interest. The plaintiff also made the Union Stove & Machine Works, a corporation of Leavenworth, Kan., a party defendant. As the plaintiff's claim seems to have been admitted by all the parties, and no claim of error is assigned as against him, it will not be necessary to again mention his name. The Union Stove & Machine Works answered, setting forth, among other things, a cause of action against John D. Caswell for \$807.82, and to enforce an alleged lien upon the real estate in question, subject, however, to the plaintiff's lien, which cause of action so set forth by the Union Stove & Machine Works was founded upon an alleged judgment rendered in its favor and against Caswell on December 8, 1886, in the district court of Pratt county, for the sum of \$863.99, and a transcript thereof filed in the office of the clerk of the district court of Harvey county on December 20, 1886, upon which judgment a payment was admitted to have been made of \$214. Among other allegations contained in this answer are the following: "That there was paid on said judgment the sum of \$214 on the 8th day of June, 1887, that there is still due and unpaid on said judgment the sum of \$807.82 after allowing all credits on the same." The defendants, the Caswells, replied to this answer, admitting the judgment, but alleging that it had been paid and satisfied in the following manner, to wit: "Said John D. Caswell and Sarah J. Caswell further allege that since the rendition of said judgment, and on December 12, 1886, one William Fisher, being then and there indebted to said Caswell in a sum greater than the amount of said judgment, assumed the payment of the same, and the said Union Stove & Machine Works took and accepted the said William Fisher therefor in full payment and satisfaction of said judgment, taking from the said William Fisher a note for the same, secured by both real and chattel mortgage, and that said Union Stove & Machine Works has since foreclosed said mortgage by an action of replevin in the district court of Pratt county, Kansas. That by reason of the premises aforesaid said judgment has been fully satisfied, and said Caswells released and relieved from the payment of the same." The defendants, the Caswells, with leave of court, filed the following amendment to their reply, to wit: "That said indebtedness of said William Fisher to said J. D. Caswell arose in this manner: That on or about November 27, 1886, said J. D. Caswell sold and conveyed his stock of merchandise and business house and lot in Saratoga, Pratt county, Kansas, to one William Eastland, who, as a part consideration therefor, assumed and promised to pay a note of the said J. D. Caswell to the Union Stove & Machine Works, which note was secured by a mortgage upon the business house and lot aforesaid, and also by a chattel mortgage upon the heating stoves of the stock of merchandise aforesaid; that afterwards, and on or about December 12, 1886, said William Eastland sold and conveyed said stock of merchandise to said William Fisher, and said business house and lot to Bertha Fisher, the wife of said William Fisher, subject, however, to the in-

cumbrances placed on the same by the said J. D. Caswell to the Union Stove and Machine Works as aforesaid; and as a part of the consideration for the sale and transfer of said business house and lot and the stock of merchandise the said William Fisher assumed the obligation of the said William Eastland as aforesaid, and promised and agreed to pay the indebtedness of the said J. D. Caswell to said Union Stove & Machine Works as aforesaid." The Union Stove & Machine Works replied to the Caswells' reply by filing a general denial. Afterwards the case was taken on a change of venue to the district court of Reno county, where it was tried upon the foregoing pleadings, and, as between the Union Stove & Machine Works and the Caswells, before the court and a jury, and the jury rendered a general verdict in favor of the Caswells and against the Union Stove & Machine Works, and also made certain special findings of fact, which verdict and findings, omitting formal parts, read as follows: Verdict: "We, the jury duly empaneled and sworn in the above-entitled case, do upon our oaths find for the defendant J. D. Caswell." Special findings: "(1) Did the Union Stove & Machine Works ever agree to release the defendant Caswell from the payment of said judgment, and take one Fisher for the payment of the same? Answer. Yes, they did, through their agent, McGrew. (2) If you find that the Union Stove & Machine Works accepted Fisher as paymaster of the judgment in question, and released defendant Caswell from the payment of the same, state what witness or witnesses testified to that fact. A. Note and mortgage. (3) Was it not expressly agreed between the Union Stove & Machine Works Company and Fisher, at the time Fisher gave the chattel mortgage to the Union Stove & Machine Works Company, that it was given as additional security for the Caswell judgment, and that Caswell was not to be released from the payment of said judgment? A. It was not. (4) If you answer the above question in the negative, then state fully what the agreement between Fisher and the Union Stove & Machine Works was at the time said mortgage was given. A. Note, mortgage, and extension of time." The court rendered judgment in accordance with the general verdict, and the Union Stove & Machine Works, as plaintiff in error, brings the case to this court, making the Caswells the defendants in error.

The first alleged error is the ruling of the court permitting the Caswells to introduce evidence tending to prove payment and satisfaction of the aforesaid judgment. There was certainly no error in this, for although the Caswells admitted the judgment and did not specifically deny that anything was due thereon, yet they substantially alleged that the whole of it had been paid and was satisfied; and this, under the facts of the case, was better than a denial.

The next alleged error is that the court permitted certain papers supposed to constitute copies of certain deeds, mortgages, etc., to be introduced in evidence. There does not appear to be any error in this. The originals of the papers were not within the custody or the control of the Caswells, and the copies intro-

duced in evidence seem to have been properly certified copies, and they were introduced in evidence under section 872 of the Civil Code. *Hammerlough v. Hackett*, 80 Kan. 58.

The next alleged error is the overruling of the demurrer of the Union Stove & Machine Works to the evidence of the defendants Caswell. The substantial question presented by the demurrer to the evidence was whether the evidence of the Caswells proved their alleged defense that the aforesaid judgment had been paid and satisfied. It is not necessary for us to consider this question, for, after the overruling of the demurrer, much additional evidence was introduced, and the Union Stove & Machine Works again by a motion for a new trial raised the broader question whether, upon the whole of the evidence introduced on the trial, the Caswells' defense was proved or not. We shall consider only this broader question raised by the motion for the new trial. Taking all the evidence together, and it proves substantially, among others, the following facts: John D. Caswell was a retail dealer in hardware, stoves, tinware, etc., at Saratoga, in Pratt county; but he owed the Union Stove & Machine Works a large amount of debt, for which his real estate and some of his personal property were mortgaged, and for which debt the aforesaid judgment was rendered in that county. The judgment was also for the sale of the mortgaged real estate. Caswell sold this property and business to William Eastland, and Eastland assumed and agreed to pay Caswell's debt to the Union Stove & Machine Works. Afterwards Eastland sold the property and business to William Fisher, and Fisher assumed and agreed to pay the aforesaid debt. After the Union Stove & Machine Works procured an execution to be issued upon said judgment, and R.F. McGrew, an attorney and agent of the Union Stove & Machine Works, with Mr. A. Magruder, the undersheriff of the county, who was holding the execution, went to the place of business of Fisher to levy upon the property, but finally Fisher gave his negotiable promissory note, dated December 17, 1886, to the Union Stove & Machine Works for \$975, due in ten days, and also executed a chattel mortgage to the Union Stove & Machine Works upon his entire stock of hardware, stoves, etc., to secure the payment of the note, and no levy was made, and the execution, by order of McGrew, was returned to the court. This mortgage included the property which had already been mortgaged by Caswell to the Union Stove & Machine Works, and much other property. In all these transactions the Union Stove & Machine Works was represented by McGrew. Three days after the execution of this note and mortgage, to wit, on December 20, 1886, the Union Stove & Machine Works, by their agent, McGrew, filed a transcript of the judgment in the office of the clerk of the district court of Harvey county in accordance with the provisions of section 419 of the Civil Code, for the purpose that the judgment should become a lien upon all Caswell's real estate in Harvey county, and so that the Union Stove & Machine Works could enforce the judgment against Caswell's real estate in that county. This note and mortgage were given, according to the

testimony of McGrew and Fisher, as additional security for the debt owing by Caswell to the Union Stove & Machine Works, and evidenced by the judgment. Afterwards the Union Stove & Machine Works replevied the mortgaged property from Fisher. Fisher gave a redelivery bond, and retained the property, and carried on his business for some time, but afterwards judgment was rendered against him in the replevin action for a return of the property or its value, to wit, \$975, and costs, and he delivered the property to the Union Stove & Machine Works. Fisher testified that the replevied property was worth about \$1,500, and his evidence upon this subject was not contradicted by the testimony of any other witness. There is nothing in the case further than the above showing that the judgment of the Union Stove & Machine Works against Caswell has ever been fully paid or satisfied, and nothing further than the above showing that the Union Stove & Machine Works ever released or agreed to release Caswell, or ever took or agreed to take Fisher as their debtor in the place of Caswell; but the evidence, so far as it goes, shows affirmatively that the note and mortgage taken by the Union Stove & Machine Works from Fisher were taken as additional security for the debt owing by Caswell to the Union Stove & Machine Works, and that the Union Stove & Machine Works did not intend to release either the judgment or Caswell.

Under the evidence introduced in this case it is claimed by the Union Stove & Machine Works that the foregoing judgment in its favor and against the Caswells has never been paid or satisfied or released, but is still in full force and effect; while, on the other side, it is claimed—*first*, that under the facts of this case such judgment has been fully satisfied by payment, but that, if it has not been satisfied in that manner, then, *second*, that it has been satisfied by a release and discharge in the following manner, to wit, that by the transactions had between Caswell, Eastland, and Fisher, and as between themselves, Fisher became the principal debtor and Caswell became only a surety, and that by the recognition on the part of the Union Stove & Machine Works of Fisher's liability to it for Caswell's debt, the Union Stove & Machine Works made Fisher its principal debtor, and converted Caswell into only a surety, and that by accepting the foregoing note and chattel mortgage from Fisher to itself it extended the time for the payment of the debt from Caswell to itself; and thereby, under the rules of law with respect to principal debtors and sureties, Caswell, who was then only a surety, was released from the payment of the debt, and thereby the judgment was also released, discharged, and satisfied, so far as it affected Caswell or his property. Within these antagonistic claims on the part of these contending parties are involved many questions of law with respect to which the authorities are diverse and conflicting, while with respect to others of the questions involved in the case the authorities are harmonious. Some of the questions involved in this case have already been settled and determined by this court, while others have not. In all cases where two persons have made a contract

for the benefit of a third, or where an owner of property has sold it upon an agreement that the purchaser should pay the consideration therefor, or a part thereof, to a creditor of the vendor, some of the questions have been settled by this court. *Plano Mfg. Co. v. Burrous*, 40 Kan. 361 *et seq.*, and cases there cited; *Mumper v. Kelley*, 48 Kan. 262. Also some of the questions with respect to the rights of sureties where the creditor and principal debtor have extended the time for the payment of the debt have also been settled by this court. *Ross v. Williams*, 5 Kan. 483; *Hubbard v. Ogden*, 23 Kan. 863. But there are still many other questions remaining to be settled. All, or very nearly all, the authorities agree that where a vendor of property and the purchaser agree that the consideration therefor, or a part thereof, shall be paid to the creditor of the vendor, the purchaser, as between these two parties, will become the principal debtor, and the vendor be transformed into a mere surety. But no transaction or agreement of this kind or of any other kind had between the vendor and the purchaser alone can affect or abridge any of the rights of the debtor. He may stand upon his absolute legal rights if he chooses to do so, looking only to the vendor as his creditor. With his consent, however, his rights may be greatly affected. With his consent the original debt may be extinguished absolutely, and the purchaser alone become liable to him, or the three parties together may modify their rights in any manner, and to any extent as they may agree. With the creditor's consent the vendor, who was the original debtor, may undoubtedly be made only a surety, and the purchaser be made the principal debtor, but of course it takes his consent either expressly or impliedly. One of the questions then arising is as follows: Can the creditor recognize the purchaser's liability to him at all without at the same time recognizing it as it really and in fact exists at the time as between the vendor and the purchaser? We would think not, and we would think the weight of authority sustains this view. *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Calvo v. Davies*, 78 N. Y. 211; *Paine v. Jones*, 76 N. Y. 274; *Murray v. Marshall*, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 858; *Fish v. Hayward*, 28 Hun. 456; *Metz v. Todd*, 36 Mich. 473; *Union Mut. L. Ins. Co. v. Hanford*, 27 Fed. Rep. 588. There are cases which hold that in such a case both the vendor and purchaser may be treated by the creditor as principals, and neither merely as a surety. *Boardman v. Larrabee*, 51 Conn. 39; *Corbett v. Waterman*, 11 Iowa, 87; *James v. Day*, 37 Iowa, 164. In that class of cases which holds that the purchaser becomes the principal debtor and the vendor merely a surety it is held that, if the creditor enters into a valid contract with the purchaser for the extension of the time for the payment of the debt without the vendor's consent, the vendor, who is merely a surety, is released and discharged; while in that class of cases which holds that both the purchaser and the vendor are principals it is held that an extension of the time for the payment of the debt by the creditor as to either the vendor or the purchaser will not release or discharge the other. We shall follow the former class of

cases, as we are inclined to think that both the weight of authority and of reason is that way. Mr. Jones, in his work on *Mortgages*, 4th ed. § 742, expresses the doctrine, as it relates to mortgage debts, as follows: "A purchaser having assumed the payment of an existing mortgage, and thereby become the principal debtor, and the mortgagor a surety of the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it. The holder cannot enlarge the time of payment, and protect himself by reserving his rights against the surety in the agreement of extension. Such a reservation has no effect unless the mortgagor agree to it." See also, upon the general subject of releasing the surety by the extension of the time for the payment of the debt by the creditor to the principal debtor, 2 Brandt, *Suretyship*, 2d ed. §§ 359, 360, 363, 364, 369, 372, 373, 375.

With the views above expressed the question then arises, Was the time for the payment of the debt in the present case extended? The note and chattel mortgage taken by the Union Stove & Machine Works from Fisher were not to be paid or to be due for ten days after their date. They were intended, however by the Union Stove & Machine Works to be taken only as additional security. Now, it is true that any kind or any amount of additional or collateral security may be taken by the creditor without discharging a surety on the original debt, provided the time for the payment of the original debt is not extended. But was that the case in the present case? If it was, and if the time for the payment of the original debt was not extended, then, of course, the vendor, Caswell, was not released; but, if the time for the payment of the original debt was extended, then the vendor, Caswell, is released. Now, Fisher was the principal debtor with regard to the original debt, and was not the time for the payment of all debt extended as to him? Could the Union Stove & Machine Works have sued Fisher for the purpose of collecting any debt prior to the expiration of the ten days given by the note and mortgage? We must answer this question in the negative. 2 Brandt, *Suretyship*, 2d ed. §§ 363, 364. And answering this question in the negative, then would not Caswell, as the surety, be discharged? This question, we think, must be answered in the affirmative. Upon questions of this kind it is possible, however, that the authorities are not entirely harmonious, but we think the weight of authority and of reason is as we have intimated. See the authorities above cited; also *Mobile L. Ins. Co. v. Randall*, 71 Ala. 220; *Kane v. Cortesey*, 100 N. Y. 132, 1 Cent. Rep. 245; *Cumming v. Montreal Bank*, 15 Grant, Ch. 686.

We think it must be held, under the facts of 16 L. R. A.

this case, that Caswell was discharged, and that by his discharge the judgment held by the Union Stove & Machine Works against him was also discharged, released and satisfied; and probably there was no injustice in this. The Union Stove & Machine Works probably had sufficient security for their debt against Caswell without recognizing or accepting Fisher as their debtor at all, as it voluntarily did. Caswell, with all his property subject to execution, was liable. Besides the Union Stove & Machine Works had a chattel mortgage upon a portion of Caswell's stock in trade, which stock in trade was transferred first to Eastland and then to Fisher; and also had a real-estate mortgage upon the real estate where the goods were kept. But the Union Stove & Machine Works voluntarily chose to recognize and accept Fisher as its debtor, and it thereby, under the law, made him its principal debtor, and from him it obtained additional security which would seem to be ample. It procured a chattel mortgage upon all Fisher's stock in trade, and afterwards replevined it from him; and Fisher, its own witness, testified that the replevined property was worth about \$1,500, while the judgment against Caswell, before any payments were made thereon, amounted to only \$963.90. This property was probably largely wasted by the transactions had between the Union Stove & Machine Works and Fisher, which perhaps would not have been the case except for the voluntary intermeddling by the Union Stove & Machine Works.

Before closing this discussion, it would perhaps be well to quote a portion of section 1312 of 2 Daniel on *Negotiable Instruments*, 4th ed. as follows: "The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in any wise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement; for, whenever the creditor relaxes his hold upon the principal debtor, he impairs the hold upon him which the surety would acquire by substitution in his place on making payment; and good faith and fair dealing require that the surety should not be exposed to the injuries which might thus be inflicted upon him. In the immense majority of cases the act done does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it."

We have now considered every substantial question in this case. There are other questions presented by counsel's briefs, but with the views that we entertain we do not think that it is necessary to discuss them.

The judgment of the court below will be affirmed.

All the Justices concur.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

CENTRAL TRUST CO. of New York
v.
MARIETTA & NORTH GEORGIA R. CO.

[INTERVENTION OF BLUE RIDGE
MARBLE CO.

(.....Fed. Rep.....)

A receiver of a railroad company is not obliged to complete the transportation of freight or repay any part of the prepaid charges although the freight had been taken by the railroad company with an advance payment of the freight for the whole distance under a contract which gave the shippers the right to take it off and have certain work done upon it at an intermediate point where it was at the time of the receiver's appointment.

(June 22, 1892.)

INTERVENTION in foreclosure proceedings to compel specific performance by the

NOTE.—Receiver's obligation on contract of the party whose property he holds.

The doctrine seems to be well established, although the cases on the subject are few, that a receiver is not bound by a contract of the party whose property is committed to his care, unless the contract creates a lien on the property. This is decided in substance not only by the case of *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 200, 25 L. ed. 821, on which the above decision is based, but also by *Brown v. Warner*, 11 L. R. A. 394, 78 Tex. 543, and the other cases referred to below.

In *Brown v. Warner*, *supra*, the court said: "A receiver as a general rule is but the agent of the court that appoints him with authority to take the possession and control of property, the subject matter of litigation; and is not the representative of the owner for the fulfillment of the latter's contracts, except in cases in which he has made the contracts his own by some act of adoption."

In that case it was held accordingly that a receiver of a railroad company was not liable for removing a switch, although he thereby broke a contract of the railroad company, which was purely personal, to maintain it at a certain place. The court said that for failure to perform the contract, the cause of action was against the company and not of that character which could be brought against the receiver without leave of court.

On the other hand, in *How v. Harding*, 76 Tex. 17, a contract of a railway company to take and pay for water from a spring on land over which a right of way was granted as part of the same contract was held to be binding upon a receiver of the company, because a lien existed upon the right of way for securing the payments for the water, that being deemed the real consideration for the grant of the right of way.

Although it has now become well established that a court appointing a receiver of railroad property may make the expenses of preserving and operating the road a lien superior to a prior mortgage, the court has no general authority to displace vested contract liens. *Kneeland v. American Loan & T. Co.* 138 U. S. 80, 34 L. ed. 379.

Somewhat analogous to the case of a receiver is that of trustees of a railroad mortgage to secure bonds, which is confirmed by the Legislature, and gave the trustees power to take and operate the road in a certain contingency subject to redemption within a certain time. It was held that such

receiver of a contract to transport certain freight the charges on which had been paid to the mortgagor. On demurrer to petition. *Sustained.*

Statement by *Newman, J.*:

On January 19, 1891, there was an existing contract between the Blue Ridge Marble Company and the Marietta & North Georgia Railway Company, by which the railway company agreed to haul marble from the quarries at Tates Station to Marietta, Ga., and allow said freight to be stopped over, cut and dressed at an intermediate station called Nelson. On said date, under this contract, there was considerable marble at Nelson, being dressed and worked, the freight on which had been prepaid from Tates Station to Marietta; and on said date said railway was put in the hands of a receiver on the petition of the trustee for the bond-holders. Said receiver refused to recognize said contract, and to haul freight stopped over at Nelson, although the freight

trustees were not bound by a contract as to transportation of express matter, made between the railroad company and an express company which had notice of the mortgage indenture. *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1.

In *Elmira, I. & S. Roll. Mill Co. v. Erie R. Co.*, 20 N. J. Eq. 294, a railroad company having a contract for the right to run over another road was held not entitled to relief against a severance of the connection by a receiver of the other road, which relief was asked for on the ground that the receiver's conduct was oppressive and unwarranted; but the court made an order requiring the receiver to perform the contract upon certain equitable terms, holding that it was for the advantage of the railroad in his hands that the contract should be performed. The question as to the legal effect of the contract upon the receiver was not discussed.

In *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 566, a contract by a railroad company to take up lumber for a mill-owner at a sand switch was held not of such a character that he was entitled to any preference over mortgage bond-holders on a claim of damages for breach of the contract, but the effect of the contract to bind the receiver was not discussed.

The same rule above laid down as to contracts generally applies to a lease. Receivers of a lessee do not become responsible for rent merely by accepting their trust and receiving the assets, unless they elect to take possession of the leased property and assume the liability to pay the rent or do some act which is in law equivalent to such an election. *Com. v. Franklin Ins. Co.* 115 Mass. 279; *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. Rep. 568.

A receiver who enters into possession of and occupies leased property unequivocally manifests his election to recognize the lease and thereby incurs a liability for the payment of the rent. *Woodruff v. Erie R. Co.* 98 N. Y. 609; *Brown v. Toledo, P. & W. R. Co.* 85 Fed. Rep. 444; *Easton v. Houston & T. C. R. Co.* 88 Fed. Rep. 784; *People v. University L. Ins. Co.* 30 Hun, 142.

The decision in the main case, like the others above referred to, is undoubtedly intended to recognize the validity of a claim against the receiver for breach of contract which can take its place without preference among other debts of the estate.

D. A. R.

charges had been prepaid to Marietta. The Blue Ridge Marble Company intervened in foreclosure proceedings, and asked that a receiver be compelled to complete the haul of all freight at Nelson, the charges on which had been prepaid; or that said receiver return to the Marble Company the freight charges unearned.

The Central Trust Company demurred to intervention, upon the ground that the claim is not a lien superior to the rights of the bondholders, and because the claim was not a traffic balance, or a claim within those usually allowed prior to the bonds.

Messrs. F. C. Tate, R. N. Holland, B. F. Abbott and C. A. Abbott for intervenor.

Mr. Henry B. Tompkins for Central Trust Co.

Mr. A. S. Clay for the receiver.

Newman, J., delivered the following opinion:

I am satisfied that the question involved in this intervention is controlled by the case of *Southern Exp. Co. v. Western N. O. R. Co.*, 99 U. S. 191, 25 L. ed. 819. In that case, the contract was made between the express company and the railroad company, whereby the express company agreed to lend the railroad company \$20,000 to be expended in preparing and equipping its road, and the railroad company should grant the express company the necessary privileges and facilities for the transaction of all express business over the road; the sum found to be due the railroad company therefor upon monthly settlements of accounts to be applied to the payment of the loan and the interest thereon.

The \$20,000 was paid in compliance with the contract, and shortly thereafter the express company entered upon the road, transporting freight according to the terms of the contract, keeping regular accounts, and exhibiting them to the company, which were always approved; and it continued to act under said contract until a receiver, appointed in a bill to foreclose the mortgage, refused to continue the contract; and the express company was compelled to abandon the road, although its debt was unpaid.

By consent of the court, the express company was allowed to file its bill in circuit court of the United States for the Western District of North Carolina, where the foreclosure proceedings were pending. The bill prayed for a decree compelling the railroad company to specifically perform its contract and to such other and further relief as the nature and circumstances of the case might require.

The prayer of petitioners in this intervention is the same in effect as the prayer of complainants in the case referred to. The supreme court, after disposing of other questions, used the following language in the opinion:

"There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can thus be diverted. The appellant can therefore have no *locus standi* in a court of equity."

I am clear that the view of the supreme court as just quoted must control the question presented by the intervention in this case. It is a peculiar condition of things, and unfortunate for the petitioners and a hardship on them undoubtedly; but to require the receiver to transport its marble to Marietta would be equivalent to require the receiver to pay them in money the amount of the freight from Nelson to Marietta; and this the court certainly could not do, inasmuch as they have no lien.

The petition of intervenors sets forth the fact as above stated, and consequently the *demurrer* to the petition *must be sustained*, and it is so ordered.

VIRGINIA SUPREME COURT OF APPEALS.

RICHMOND & DANVILLE R. CO.,

Pff. in Err.,

v.

C. C. SCOTT.

(.....Va.....)

1. A carrier is not liable for injury to a passenger's hand from striking against a

bridge where he put it out of a car window, although it projected but three inches.

2. A verdict in favor of a railway passenger to compensate him for injuries to his arm caused by contact with a bridge abutment cannot be sustained on appeal after the striking of a count alleging that he voluntarily placed his arm out of the car window if the other counts allege that it was

NOTE.—*Passenger's negligent exposure of person at car window.*

A passenger cannot recover for the breaking of his arm by a timber frame supporting a water tank while the arm is projecting out of a car window if the injury would not have been received if the arm had been inside the car. *Indianapolis & C. R. Co. v. Rutherford*, 20 Ind. 32, 23 Am. Dec. 333, 13 L. R. A.

Nothing less than gross negligence on the part of the carrier will permit recovery by a passenger for the breaking of his arm while the elbow was projecting outside of a car window by coming in contact with a standard on a freight car which would not have struck the arm if it had been inside the car. *Louisville & N. R. Co. v. Sickings*, 5 Bush, 1.

flung out by a lurch of the car caused by one rail being lower than the other, and the evidence shows only one half inch difference in the height of the rails, that the window was fifteen inches from the abutment, which was not touched by the car, and the body of no passenger was moved from its position, the allegation being so improbable in view of the evidence that the stricken count must have influenced the verdict.

(March 31, 1892.)

ERROR to the Circuit Court for Charlotte County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Meers, Staples & Munford, for plaintiff in error:

A railroad company in carrying passengers on its trains over its roads is not an insurer of their lives or safety, but it is only incumbent upon it to provide for their safe transportation by the use of such well-equipped machinery and the maintenance of such well constructed road-bed and bridges as will secure their safety, so far as human skill and foresight and the precautions and appliances ordinarily in use in such business will contribute thereto.

2 Wood, Railway Law, p. 1049; *Christie v.*

Griggs, 2 Campb. 79; *Simmons v. New Bedford*, 7. & N. S. B. Co. 97 Mass. 861, 98 Am. Dec. 99.

The accident, which occurred to the plaintiff in the manner in which he has described was such an accident as could not have been foreseen.

2 Thomp. Neg. p. 985.

Mr. W. W. Henry, for defendant in error:

When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. Said railroad company is held by the law to the utmost care, not only in the management of its trains of cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

Baltimore & O. R. Co. v. Wightman, 29 Gratt. 445, 26 Am. Rep. 484. See *Baltimore & O. R. Co. v. Noel*, 32 Gratt. 399; *Moon v. Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Torian v. Richmond & A. R. Co.* 84 Va. 191; *Richmond City R. Co. v. Scott*, 88 Va. 907.

One whose arm while protruding outside the open window of a car in swift motion was struck on the elbow by wood piled near the track is guilty of contributory negligence which will prevent his recovery, however incautious the carrier may have been in guarding against such accidents, unless it had omitted to warn him after knowledge of his danger. *Dun v. Seaboard & R. R. Co.* 78 Va. 645, 49 Am. Rep. 388.

But it is not contributory negligence for a passenger in a railroad car to ride with his elbow on the sill of an open window where it is jarred outside of the car and broken in a collision of the train with a freight car standing on a side track. *Farlow v. Kelly*, 108 U. S. 258, 27 L. ed. 728.

To similar effect is *Hallahan v. New York, L. E. & W. R. Co.*, 2 Cent. Rep. 324, 102 N. Y. 124, in which a verdict was supported for plaintiff, whose arm while resting on the window-sill of a car was struck by the arm of a crane used to deliver mail to passing trains.

So a passenger whose arm is struck and injured by something on a passing freight train while it was resting upon a window-sill, but not protruding beyond it, is not guilty of such contributory negligence as will prevent him from recovering for the injury. *Breen v. New York Cent. & H. R. Co.* 11 Cent. Rep. 891, 109 N. Y. 297.

Simply resting an elbow on the sill of a car window with the head on the arm in a natural and not unusual position, does not make a proper case for instructions on contributory negligence. *Winters v. Hannibal & St. J. R. Co.* 39 Mo. 438.

In an early Pennsylvania case (*New Jersey R. Co. v. Kennard*, 21 Pa. 203) it was held not to be negligence for a passenger to allow his arm to project slightly over the edge of a window-sill of a car if not more than was customary for passengers, and that the carrier must so construct the cars if the road was so narrow in some places as to endanger projecting limbs that the passengers could not put their limbs through the windows.

But this case was overruled by a later decision 16 L. R. A.

that it is negligence *per se* for a passenger to let his elbow protrude from a car window where it is struck by another car. *Pittsburgh & C. R. Co. v. McClurg*, 55 Pa. 294.

Question of law or fact.

There is a conflict among the decisions as to whether it is negligence *per se* to allow an arm or any other part of the body to project beyond a car window, or whether it raises a question for the jury. Like the case last above cited, a recent Alabama case holds that it is negligence *per se* to be declared so as matter of law for a passenger on a steam railway to protrude his arm, hand, or elbow through the window of a car while in motion and beyond the outer edge of the window or outer surface of the car. *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49, 44 Am. & Eng. R. R. Cas. 367.

In an action by the passenger for such an injury the jury should be instructed to find a verdict for the defendant. *Ibid.*

So if a passenger's arm or a portion of it is outside of the window of a railroad car and there is no dispute or controversy about this fact, or that the position of the arm contributes to an injury sustained by a blow from the door of a freight car on an adjoining track which had been left unfastened, the court must decide that the passenger cannot recover against the railroad company for the injury. *Todd v. Old Colony & F. R. R. Co.* 3 Allen, 18, 80 Am. Dec. 149.

And a passenger whose arm is struck while projecting out of a car window by a freight car which did not touch the car in which he was riding will be held negligent as matter of law and cannot recover for the injury. *Pittsburgh & C. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Breen v. New York Cent. & H. R. R. Co.* 11 Cent. Rep. 891, 109 N. Y. 297.

In support of the same doctrine the court held that a charge that if the elbow of a passenger was out of the car when struck and injured by some object from outside, it was a circumstance or fact

Lacy, J., delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of Charlotte county, rendered on the 28th day of March, 1890. The action is trespass on the case by the defendant in error against the plaintiff in error for damages for injuries received by him while riding as a passenger on the train of the plaintiff in error on the 15th day of February, 1888. The declaration of the plaintiff contained three counts, and the defendant in the circuit court demurred thereto, and to each count thereof; which demurrer the court overruled, the evidence was taken and instructions asked on both sides, and refused by the court, and other instructions given by the court of its own motion, and the defendant excepted. The verdict was in favor of the plaintiff, and the defendant moved the court to set aside the verdict and grant a new trial, which motion the court overruled, and certified the evidence; and the defendant having duly excepted and filed bills of exceptions to the rulings of the court against it in refusing to admit certain evidence offered by it, in refusing its instructions and giving others, and in overruling its motion to set aside the verdict and grant to it a new trial, applied for and obtained a writ of error to this court.

The first error assigned here is as to the action of the circuit court of Charlotte county in

overruling the plaintiff's demurrer. The first count, sets forth that on the 15th day of February, 1888, the plaintiff, as a passenger on the train of the plaintiff in error, was riding near a lurch of the rails, and the bridge arm of the window, and through which the plaintiff was passing, and forth that the window threw the bridge through

The third count should have been a case of *Dunham v. Am. Rep.* 49 Am. Rep. numerous cases the protrusion of the windows of the car, and, under the contributory negligence of the passenger as well as compensation which may be

from which the jury might infer negligence or want of ordinary care on the part of a passenger, was not erroneous because substantially in conformity with a request to charge that if the elbow was outside of the window it was an act of negligence which would prevent recovery against the railway company. *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502.

But there are cases on the other hand which hold the question of negligence in such cases to be one for the jury and not for the court. It was so held in a Missouri case where a passenger's arm protruding outside a car window was struck by articles loaded on a wagon and broken. *Barton v. St. Louis & I. M. R. Co.* 52 Mo. 253, 14 Am. Rep. 418.

In Wisconsin it is held to be a question for the jury, and not of law, whether a passenger on a railroad car was guilty of contributory negligence in riding with his arm projecting from a car window where it was struck and broken by a loosened timber on the inside of a railroad bridge. *Spencer v. Milwaukee & P. D. C. R. Co.* 17 Wis. 488, 84 Am. Dec. 758.

So in South Carolina the court cannot charge that it is prima facie negligence for a passenger to ride with his elbow projecting out of the window of a car as the question of negligence is for the jury and the court cannot give them his opinion upon it. *Quinn v. South Carolina R. Co.* 29 S. C. 381.

And in Oregon a non-suit will not be granted on the ground that plaintiff was guilty of negligence as matter of law in a suit by a passenger for an injury to his arm while his elbow was resting on the window-sill of a car and slightly projecting out of the window when a stick of cordwood fell from a pile near the track through the open window striking in the palm of his hand or near it and catching in the mouth of his coat sleeve and jamming the arm backwards and injuring it. *Moakler v. Portland & W. V. R. Co.* 6 L. R. A. 556, 18 Or. 189.

In Illinois, where the doctrine of comparative negligence is established, the negligence of a passenger in letting his arm slightly project outside of a car window will not prevent his recovery for the

injury, where near the track. *v. Pondrom, 5*

The strict rule cited decisions cars.

A passenger's contributory negligence upon the sill of a car projecting out of him from reaching arm is broken account of the tracks. *St. Ann. 139, 44 A.*

The court's common observation practice for passengers when not on the window of the car."

To lay one's arm where it was such negligence the carrier. *Johnson, 96 Pa. 83.*

Resting one's arm on a street-car, but cannot be deemed the arm is through is struck and injured track. *Ge. Pa. 38.*

The negligence of a passenger sitting with his arm resting on the window-sill by a passing car. *Miller v. St. L.*

So as to rest the window-sill by planks standing. *Dahlberg v. 50 Am. Rep. 58.*

cautious the latter may have been in guarding against such accidents." In that case the declaration set forth that the arm of the plaintiff protruded two inches outside of the car, and the lower court sustained the demurrer, and the plaintiff appealed to this court, where the judgment of the lower court was affirmed. In this case, as that, the declaration containing this count was bad for the same reasons assigned in that case. It is not necessary to consider the declaration further. It cannot be said that the jury found their verdict under the first any more than the third count; and a glance at the evidence indicates that, without the third count, there could reasonably have been no such verdict for the plaintiff. Admitting the evidence for the plaintiff to be true, it appears that the depression of the right-hand rail was one half of an inch lower than the other, when tested by the level which was applied to it. The plaintiff testifies that his body was not moved from its position, and other uncontradicted witnesses testified that they were not moved in their seats. This casting of the hand of a man out of the window fifteen or eighteen inches, to strike a bridge, while his body did not move out of his seat, states a proposition which is as improbable as that half an inch of difference in the rails would cause any lurch that could be discoverable to any occupant of the car. It is shown by a passenger who sat on the next seat to the plaintiff, and by the conductor who came up as soon as outcry was made, and by the doctor, who dressed the injured limb, that the plaintiff said he got his hand hurt by putting it out of the window; and he himself saying in his declaration that he got it hurt by putting it out of the car window, and it being proved that the top of the car did not touch the bridge when the sup-

posed career occurred, and the distance of the car window from the side of the bridge being established, and the depression being only claimed to be half an inch on one rail, it is unreasonable to suppose that the jury disregarded the third count, and grounded their verdict on what must have appeared an impossibility,—that, when the body is not disturbed in the seat, the hand and the arm could have been thrown backwards out of the window while it was still attached to the body of the passenger. We cannot presume this to have been the ground of the jury's action, while the declaration stated and the proof showed that there was a reasonable way by which the hand got out of the window, contrary to no reasonable experience, but in accordance with every-day experience and observation. Passengers sometimes put their arms and other parts of their body out of the window of a car in motion, but that a hand of a passenger should be cast out of a window near which he was sitting, by reason of half an inch depression in one rail, cannot be said to be in accordance with the every-day observation of men. We do not say and we do not know upon what ground the verdict rested, but it is clear that, under the pleadings, it might have rested upon the third count, and the evidence tending to suggest it, and that is enough. No recovery can be had under such circumstances.

The demurrer should have been sustained as to the third count, and the circuit court erred in overruling the same, and for that cause *the judgment will be reversed and annulled*. It is not necessary to go further into the case. The case will be remanded to the circuit court, where the plaintiff may amend his declaration, if he be so advised, by leave of the circuit court.

MONTANA SUPREME COURT.

Kate D. EDGERTON, *Appt.*,

v.

Erastus D. EDGERTON, *Resp't.*

(.....Mont.....)

1. A statutory provision for alimony when a divorce is granted does not by implication exclude a right of action to enforce a husband's obligation to furnish his wife maintenance independent of a proceeding for divorce.
2. A suit to compel a husband, if able, to support his wife whom he has deserted and left destitute is within the jurisdiction of equity, especially where the Constitution provides that a speedy remedy shall be afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay, while the statutes provide that a married woman shall have the same protection as a man for all her rights and the same right to appeal in her own name alone to the courts of law or of equity.

3. A judgment of divorce cannot be collaterally attacked as void because the appearance of the wife by an attorney was authorized only by a letter of authority which her husband compelled her to write and sign where such facts did not appear on the record.

(May 2, 1892.)

APPEAL by complainant from a judgment of the District Court for Lewis and Clarke County, sustaining a demurrer to the complaint in an action brought to compel defendant to maintain the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alexander C. Botkin and E. P. Cadwell, for appellant:

Wherever want of jurisdiction over the person of the defendant is shown, the judgment rendered without said jurisdiction is absolutely void and is a nullity. This want of jurisdiction may as well be shown by evidence *aliunde* the record as from the face of the record. In

NOTE.—The great array of authorities presented by counsel on their respective sides of the question as to the jurisdiction of equity to compel a husband to support his wife, together with the discussion of the question by the court, seem to cover the question so completely that no annotation is called for.

either case, if this want of jurisdiction is shown, the decree is absolutely void; it has no force or effect.

Starbuck v. Murray, 5 Wend. 157, 21 Am. Dec. 172.

The remark of the court in *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897, that the judgment could not be attacked on a collateral proceeding, was unnecessary to the decision, and was in effect overruled by the subsequent cases of *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 18 L. ed. 648, and *Webster v. Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761.

See also *Harris v. Hardeman*, 55 U. S. 14 How. 334, 14 L. ed. 444; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Elliot v. Peirso*, 26 U. S. 1 Pet. 840, 7 L. ed. 170; *United States v. Arredondo*, 81 U. S. 6 Pet. 691, 8 L. ed. 547; *Striker v. Lynn*, 48 U. S. 2 How. 59, 11 L. ed. 178; *Hickey v. Stewart*, 44 U. S. 8 How. 762, 11 L. ed. 819.

The appearance was the act of the counsel, and not the act of the court.

Shelton v. Tiffin, 47 U. S. 6 How. 183, 12 L. ed. 296.

If the court acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them.

Elliot v. Peirso, 26 U. S. 1 Pet. 828, 7 L. ed. 164.

A judgment rendered by a court that has no jurisdiction over the person of the defendant is void, and it is equally so whether this want of jurisdiction appears upon the face of the record or appears from evidence outside of the record.

Bishop, Mar. & Div. §§ 418, 419; *Canwell v. Canwell*, 9 West. Rep. 154, 120 Ill. 877; *Greene v. Greene*, 2 Gray, 861; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 898; *Freeman*, Judgm. §§ 98, 99, 117, 118, 499, 509; *Kerr*, Fraud, p. 51; *Feikert v. Wilson*, 38 Minn. 841; *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Dec. 876; *Atty-Gen. v. Purmort*, 5 Paige, 631, 8 L. ed. 860; *Gest v. Packwood*, 39 Fed. Rep. 536; *Earle v. Earle*, 27 Neb. 277; *Bradshaw v. Heath*, 18 Wend. 416, 417.

The wife can maintain an action against her husband for support, call it maintenance or alimony as you please, under the facts stated in the complaint.

Galland v. Galland, 38 Cal. 269; *Wilson v. Wilson*, 45 Cal. 399; *Daniels v. Daniels*, 9 Colo. 133; *Earle v. Earle*, 27 Neb. 277; *Platner v. Platner*, 66 Iowa, 378; *Glover v. Glover*, 16 Ala. 446; *Hinds v. Hinds*, 80 Ala. 225; *Purcell v. Purcell*, 4 Hen. & M. 507-511; *Almond v. Almond*, 4 Raud. (Va.) 662, 15 Am. Dec. 781; *Wallingsford v. Wallingsford*, 6 Harr. & J. 485; *Macnamara's Case*, 2 Bland, Ch. 566, note 567; *Grans v. Meginnis*, 1 Gill & J. 953, 19 Am. Dec. 287; *Helms v. Franciscus*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Verner v. Verner*, 62 Miss. 283, and cases cited; *Butler v. Butler*, 4 Litt. 202; *Lockridge v. Lockridge*, 8 Dana, 28, 28 Am. Dec. 52; *Walker v. Stringfellow*, 30 Tex. 570; *Rhame v. Rhame*, 1 McCord, Eq. 197-205, 16 Am. Dec. 597; *Hair v. Hair*, 10 Rich. Eq. 168; *Prather v. Prather*, 4 Desaus. Eq. 33-43; *Bacon v. Bacon*, Wright (Ohio) 632; *Questel v. Questel*, Id. 491; *Spiller v. Spiller*, 2 N. C. 16 L. R. A.

482; *Knight v. Knight*, 3 N. C. 101; *Bueter v. Bueter* (S. Dak.), 8 L. R. A. 562; *Spengler v. Spengler*, 38 Mo. App. 266; *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295; *Barber v. Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226; *Cheever v. Willson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604.

Messrs. McConnell & Clayberg and T. C. Bach, for respondent.

Our Constitution provides: "The district court shall have original jurisdiction in all cases at law and in equity, etc."

Montana Const. art. 8, § 11.

Under such provision courts of equity can only exercise such jurisdiction as was exercised by the English court of chancery at the date of the Revolution.

1 Pom. Eq. Jur. pars. 282, 285, 294, *et seq.*; *Fontain v. Ravenel*, 58 U. S. 17 How. 369, 15 L. ed. 80; *Jones v. Boston Mill Corp.* 4 Pick. 507, 16 Am. Dec. 858. See also cases *infra*.

Lord Loughborough, in *Ball v. Montgomery*, 9 Ves. Jr. 195, says: "It is contrary to the established doctrine that a married woman should be the plaintiff in a suit in this court for a separate maintenance."

This case was followed in *Stone v. Cooke*, 7 Sim. 22, and *Vandergucht v. DeBlaquiere*, 8 Sim. 815.

Unless the jurisdiction is provided for by positive statutory enactment or by constitutional provision, courts of equity in this country possess no jurisdiction to hear or determine suits brought solely for the recovery of alimony or maintenance.

Lawson v. Shotwell, 27 Miss. 680; *Bankston v. Bankston*, Id. 692; *Bowman v. Worthington*, 24 Ark. 529; *McGee v. McGee*, 10 Ga. 477; *Goss v. Goss*, 29 Ga. 109; *Fischli v. Fischli*, 1 Blackf. 860, 12 Am. Dec. 251; *Muckenburger v. Holler*, 29 Ind. 189, 92 Am. Dec. 845; *Moon v. Baum*, 58 Ind. 194; *Chestnut v. Chestnut*, 77 Ill. 346; *Trotter v. Trotter*, Id. 511; *Ross v. Ross*, 69 Ill. 569; *Harshberger v. Harshberger*, 26 Iowa, 508; *Wilson v. Wilson*, 49 Iowa, 544; *McFarland v. McFarland*, 51 Iowa, 565; *Jones v. Jones*, 18 Me. 811, 36 Am. Dec. 726; *Henderson v. Henderson*, 64 Me. 419; *Littlefield v. Paul*, 69 Me. 538; *Shannon v. Shannon*, 2 Gray, 287; *Baldwin v. Baldwin*, 6 Gray, 842; *Coffin v. Dunham*, 8 Cush. 405, 54 Am. Dec. 769; *Adams v. Adams*, 100 Mass. 865, 1 Am. Rep. 111; *Peltier v. Peltier*, Harr. Ch. 19; *Perkins v. Perkins*, 16 Mich. 167; *Doyle v. Doyle*, 26 Mo. 545; *Simpson v. Simpson*, 81 Mo. 24; *Parsons v. Parsons*, 9 N. H. 817, 32 Am. Rep. 362; *Sheafe v. Sheafe*, 24 N. H. 569; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 148; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Yule v. Yule*, 10 N. J. Eq. 138; *Rockwell v. Morgan*, 18 N. J. Eq. 119; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Cory v. Cory*, 11 N. J. Eq. 400; *Atwater v. Atwater*, 58 Barb. 621; *Ramsden v. Ramsden*, 91 N. Y. 281; *Codd v. Codd*, 2 Johns. Ch. 141, 1 L. ed. 823; *Lewis v. Lewis*, 3 Johns. Ch. 519, 1 L. ed. 703; *Miz v. Miz*, 1 Johns. Ch. 108, 1 L. ed. 78; *Perry v. Perry*, 3 Paige, 501, 2 L. ed. 1006; *Harrington v. Harrington*, 10 Vt. 505; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 182; *Rees v. Waters*, 9 Watts, 281; *Barker v. Dayton*, 28 Wis. 867; *Wilson v. Wilson*, 19 N. C. 877; 1 Bishop, Mar. Div. & Sep. §§ 1889-1421; 24 Am. L. Reg. N. S. 1; *Woods v. Waddle*, 26 Am. L. Reg. N. S. 83.

The judgment pleaded is not a void but a voidable judgment, and in this action the attack upon it is collateral.

Freem. Judgm. 2d ed. § 116; 1 Black, Judgm. § 170.

A judgment of a state court of general jurisdiction can only be attacked collaterally in the courts of the same state where it bears its own infirmity upon its face.

Cook v. Darling, 18 Pick. 898; *Granger v. Clark*, 22 Me. 128; *Coit v. Haven*, 80 Conn. 190; *Wingate v. Haywood*, 40 N. H. 437; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Clark v. Bryan*, 16 Md. 171; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Horner v. Doe*, 1 Ind. 131, 48 Am. Dec. 855; *Princes v. Griffin*, 16 Iowa, 553; *Hahn v. Kelly*, 84 Cal. 891, 94 Am. Dec. 742; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263; *Galpin v. Page*, 1 Sawy. 317; *Hunter v. Ferguson*, 18 Kan. 471; *Blasdel v. Kean*, 8 Nev. 308; Black, Judgm. §§ 271-273; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Lee v. Kingsbury*, 18 Tex. 68, 62 Am. Dec. 546; *Brown v. Nichols*, 42 N. Y. 26; *Sperry v. Reynolds*, 65 N. Y. 179.

Many cases have been cited wherein the particular reasons herein relied upon were urged as reasons that the judgment was void and could be collaterally attacked, but the weight of authority is against such proposition.

Freem. Judgm. § 128; 1 Black, Judgm. § 272; *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 840; *Baker v. Stonebraker*, 84 Mo. 172; *Carpentier v. Oakland*, 30 Cal. 440; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *American Ins. Co. v. Oakley*, 9 Paige, 496, 4 L. ed. 789, 38 Am. Dec. 561; *Reed v. Pratt*, 2 Hill, 64; *Brown v. Nichols*, 42 N. Y. 26; *Rogers v. Burns*, 27 Pa. 525; *Burton v. Lyford*, 87 N. H. 512, 75 Am. Dec. 144.

Harwood, J., delivered the opinion of the court:

There are two questions brought here for determination by this appeal. The first relates to the jurisdiction, in equity, of the district courts of this state, and may be stated by the following proposition: Have the district courts of this state power, in the existence of their equity jurisdiction, to enforce maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, where it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support, and he is able to maintain her. An action of this character, if maintainable at all, would naturally lie within the equitable jurisdiction of the district court. The subjects of equity, as well as common-law jurisdiction, are so well defined there can seldom arise a dispute as to whether a particular action for the enforcement of rights or the redress of wrongs lies within the cognizance of one or the other, or whether such action is not within either of these jurisdictions. In relation to the question just propounded, however, there have been and still are differences of opinion in 16 L. R. A.

the courts and among able jurists; and the discussion of it has sounded the depths and surveyed the scope and circumference of the equity jurisdiction of courts where it has been brought in question. It is unnecessary to recite the facts involved in the case at bar in order to treat this proposition. It may be treated as a question of law, relating to the equity jurisdiction of the court, without reference to any particular action. That the marriage relation lays upon the husband an obligation to furnish his wife necessary and comfortable maintenance, commensurate with his ability to provide, is a proposition upon which there is no dispute. It is an obligation imposed by law as one of the conditions of the marriage contract, and is recognized by all courts of justice, and is enforced, in proper cases, where the jurisdiction lies. Courts of common-law jurisdiction (as distinguished from equity courts) enforce that obligation by giving judgment against the husband for necessary supplies furnished the wife by third persons, where the husband, without just cause, withholds the same, or abandons his wife, or by cruelty or otherwise makes it unsafe or improper for her to abide at the family home. In this way it will be seen that even courts of common-law jurisdiction not only recognize, but to some extent enforce, performance of that obligation. This jurisdiction exercised by the common-law courts was usually explained on the theory that the law presumed the wife to be the agent of the husband to the extent of authority to obtain upon his credit necessary personal supplies. But it is plainly observable by an investigation of these cases that the common-law courts proceed upon a different ground than the mere relation of principal and agent; for when the husband had abandoned his wife, or driven her away by cruelty or other improper conduct, and had sought to avoid responsibility of her maintenance by giving notice forbidding parties to furnish her supplies, and attempting to revoke her authority in that respect, still the common-law courts, notwithstanding such notice held him bound for her necessary supplies, by an obligation irrevocable at will, arising by virtue of the marriage relation, and gave judgment against him. Schouler, Dom. Rel. § 66; *Sykes v. Halstead*, 1 Sandf. 483; 1 Bishop, Mar. & Div. 572, and cases cited. It will be observed in these cases, too, that, where the wife was living separate and apart from her husband, it was always a proper inquiry whether she had just cause for so doing; and, if she had not, that was a good defense. It seems to be clear, then, that the common-law courts proceeded in such cases upon a different principle than the law of agency alone, and founded their judgments on the obligation of the husband to support his wife, even separate and apart from his habitation, where by his conduct he justified her separation, or where he had, without cause, forsaken her,—an obligation which he could not terminate at will, as may be done in case of principal and agent. 2 Kent, Com. 146; Schouler, Dom. Rel.

§ 66; 1 Bishop, Mar. & Div. §§ 550-572, and cases cited; *Liddow v. Wilmot*, 2 Stark. 77; *Casteel v. Casteel*, 8 Blackf. 240, 44 Am. Dec. 763; *Clement v. Mattison*, 3 Rich. L. 93; *Hall v. Weir*, 1 Allen, 261; *Cartwright v. Bate*, 1 Allen, 514, 79 Am. Dec. 759; *Cunningham v. Irwin*, 7 Serg. & R. 247, 10 Am. Dec. 458; *Rumney v. Keyes*, 7 N. H. 571; *Allen v. Aldrich*, 29 N. H. 63; *McGahay v. Williams*, 12 Johns. 293; *Mayhew v. Thayer*, 8 Gray, 172; *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216; *Schnuckle v. Bierman*, 89 Ill. 454; *Reese v. Chilton*, 26 Mo. 598; *Rutherford v. Coze*, 11 Mo. 347; *Breinig v. Meitzler*, 23 Pa. 156; *Billing v. Pilcher*, 7 B. Mon. 458, 46 Am. Dec. 523; *Snover v. Blair*, 25 N. J. L. 94; *Blowers v. Sturtevant*, 4 Denio, 46.

Although the common-law courts will give judgment against the husband in such cases, it must be admitted by all to be an uncertain and inadequate relief; for in many cases she may be unable to obtain credit under such circumstances, where she can only offer the chance of compelling payment by suit against a husband who is endeavoring to escape such liability. Her position is also embarrassed by the reluctance of parties generally to becoming directly or indirectly implicated in family troubles, or to undertake to show justification for the conduct of the wife, which operates as a powerful influence in deterring persons from given her credit. The relief offered by the common-law courts is inadequate for still other reasons. While it may succeed for a brief period in some cases, the derelict husband is left free to carry out his purpose, to abandon and neglect the support of his wife, and avoid such judgments altogether by disposing of his property or by carrying it beyond the jurisdiction. In this way he not only ignores his obligation, but sets at naught the attempt of the common-law courts to compel its performance. There are other aspects of this method of granting relief which ought not to be passed without observation. If that remedy happens to be effectual in some cases, because the husband fails to use the means within his power to escape the liability, that method of enforcing maintenance would involve a multiplicity of lawsuits; for the wife must usually go to various parties to secure supplies, whereby would arise a separate cause of action in favor of each party from whom supplies were obtained; and, as often as one collection was made, another cause of action would begin to accrue. Again, the inadequacy of relief worked out by the common-law remedy is not alone relative to the position of the wife. It has its counterpart of hardship in reference to the husband. In case the husband has just grounds for his conduct, and desires to establish the same, he would have to present his defense in as many actions at law as happened to be brought against him for supplies furnished the wife; for having established his defense in one or more actions would not preclude the annoyance, loss of time, and expense of defending other actions of the same character. So the question naturally arises whether or not, upon principle, these cases

lie within the jurisdiction of courts of equity, and the conditions just pointed out suggest two familiar principles of equity as grounds upon which courts exercising that jurisdiction take cognizance of actions, and determine the rights of parties, namely: (1) Inadequacy of the relief which can be obtained in the courts of law; (2) that to obtain relief in courts of common-law jurisdiction would involve a multiplicity of suits. Mr. Pomeroy, upon this head observes: "In fact, the multiplicity of suits, which is to be prevented, constitutes the very inadequacy of legal methods and remedies which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs. On the other hand, the prevention of multiplicity of suits is the occasion for the exercise of the exclusive jurisdiction." 1 Pom. Eq. Jur. § 243. This class of actions was not generally entertained by the English chancery court, for the obvious reason that in England the ecclesiastical tribunal existed, to which, as was conceded by all, such adjudications peculiarly belonged. There was therefore no reason in general for the chancery court in England to concern itself with actions seeking such relief. Fonbl. Eq. 4th Am. ed. 98, note 105. But it nevertheless seems plain that had not another court existed in the judicial system of England, which had jurisdiction of this class of cases, there is every analogy which would have brought those cases within the jurisdiction of the court of chancery. This court took cognizance of other cases concerning marital laws. It enforced against the husband antenuptial contracts, and settlements made on behalf of his intended wife; compelled settlements to be made on behalf of the wife, where he was seeking to obtain possession or control of her property; withheld her separate property from his grasp, and devoted it to her maintenance, where he had so conducted himself as to justify her living in separation from him; enforced agreements by the spouses as to property rights, and maintenances made in contemplation of separation; by writ *ne exeat*, "restrained the husband from quitting the kingdom to evade the payment of an agreed or decreed allowance;" used its power to enforce decrees of the spiritual court, awarding separate maintenance to the wife; and, by process known as the "writ of *supplicavit*," the chancery court protected the wife against the husband's violence, and in cases where it was found unsafe for her to abide with him, as incident to such proceedings, compelled the husband to provide maintenance for her while she was separate and apart from him, by reason of his violent conduct towards her. This proceeding, however, appears to have become obsolete, probably because statutes provided a remedy for protection of all persons from threatened violence. No doubt other instances could be pointed out wherein the English chancery court exercised jurisdiction in reference to the marital rights and obligations. Fonbl. Eq. 90-106, and notes; 2 Spence, Eq. Jur.

489, 526: 2 Story, Eq. Jur. §§ 1428, 1476; 3 Pom. Eq. Jur. §§ 1114-1120; 2 Bishop, Mar. & Div. § 352. It is also clear that within the principles, procedure, and practice applied by courts of equity there are ample and appropriate methods to adequately enforce in one action the right of the wife to support against a husband who without cause abandons her, and at the same time, in the same action, vouchsafe to the husband any defense he may have to offer in justification of his conduct.

It is proper at the outset of this investigation to inquire whether, by statute, any provision has been made in relation to the right in question, and the remedy to be applied in case of its nonfulfillment. Our statute provides that the district court, "sitting as a court of chancery," may, for certain causes specified, decree a "dissolution of the bonds of matrimony," and that, "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care and custody of the children, or any of them, as from the circumstances of the parties and nature of the case shall be fit, reasonable, and just, and, in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may refuse the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court, and may also grant alimony 'a pendente lite', and the court may, on application, from time to time, make such alterations in the allowances of alimony and maintenance as shall appear reasonable and just." Sections 1000, 1004, 1006, div. 5, Comp. Stat.

It is contended that these provisions of the statute as to the decree for alimony and maintenance "when divorce is granted," by implication, exclude from the courts the jurisdiction to enforce the maintenance, except in an action where divorce is decreed. Some have so held, but upon this phase of the question, as upon nearly all aspects of it, eminent authorities are opposed to one another in the views entertained. Our own conclusion upon this particular feature of the question is that the great weight of reason is against the idea that the Legislature, in adopting the statute referred to, intended any regulation of the 'right of the wife to maintenance, or the obligation of the husband to furnish the same, arising and existing by virtue of the marriage bond prior to the dissolution of that bond by decree of court, or that by such statute the Legislature intended to take away, or in any manner control, whatever jurisdiction the courts may have had to enforce the fulfillment of that obligation in an action independent of a proceeding for divorce. In construing or applying a statute the cardinal rule, always applicable, is to seek the intention of the Legislature. The simple question then is, Did the Legislature, in providing for the granting of divorces on certain prescribed grounds, and providing that, when divorce was decreed, alimony and maintenance

might also be decreed, intend to have it inferred or implied therefrom that the obligation of the husband to maintain his wife should not be enforced, unless the bonds of matrimony were first dissolved? Or was it only the intention of the Legislature, as manifest in such statute, to make sure, by the provisions authorizing the decree of alimony and maintenance of the wife after dissolution of the bond of matrimony, to fasten upon the husband the continued obligation to support his wife, even though the bond of matrimony had been dissolved because of his wrongful conduct? After divorce the obligation to maintain the wife, which arose by virtue of the marriage contract, could not be referred to that relation, because of its non-existence; and there might be grave reason to doubt whether a court was authorized to continue to enforce that obligation after dissolution of the bond by which it arose, without a statutory provision to that effect. It is manifest by said statute that the Legislature intended that the offending husband should not escape the obligation he had entered into, to support his wife while she kept faith with her marriage vows and duties, even though he succeeded by his wrongful conduct in driving her to obtain a divorce. If this provision implied that the obligation could only be enforced by first dissolving the bonds of matrimony, the law would be open to the charge that it was so framed as to encourage divorces; for the wife who kept faith with the marriage vows might be driven by privation, in some cases at least, to release the husband from the bonds of matrimony by applying for a divorce, in order to obtain relief from penury and want. Such a construction of the legislative intent would make the statute provide, in effect, that in case a wife was driven away or deserted, and left without means of support, if the husband remained in the state, (and committed no more flagrant violations of the marriage bond,) she must wait a year, and in the mean time suffer in destitution, or suffer the humiliation of becoming a public charge, or seek relief through friends or strangers, before she could call upon a court to grant her a divorce, and then compel the offending husband, out of his substance, to fulfill his obligation to support her; at which time the derelict husband may have placed himself and property beyond the reach of the court; at least, he would in such case be given ample opportunity to do so. It can hardly be presumed that the Legislature, while carefully providing for the continuance of the obligation of the husband to maintain his wife after divorce, intended by the statute to cut off any jurisdiction which might be in the courts to simply enforce the obligation while the bonds of matrimony still existed. A more reasonable conclusion, we think, is that the statute under consideration manifests no such intention, but leaves the marital rights and obligations before divorce to be dealt with by the courts in whatever respect their jurisdiction might allow.

We therefore return to the main question, as to whether there is in the equity courts

of this state any jurisdiction to interfere on behalf of a wife deserted and left destitute, without cause, and compel the husband, if able, to support her. This subject has led to a very close investigation by the American courts (see cases cited in briefs of counsel) of the manner in which the chancery court of England dealt with such cases. The jurisdiction exercised by that court upon kindred subjects has already been adverted to. But upon this particular branch of adjudication, as is affirmed by some, the holding of the English chancery court has not been harmonious; and, while this criticism is probably correct, it must still be admitted that the doctrine finally became settled, to the effect that cases where such relief was sought would not be entertained in the chancery court, but left to the spiritual court. This was, of course, the natural result when we considered the judicial system prevailing at that time in England. Even with these conditions, however, the English chancery court did not seem to have construed its jurisdiction as so unyieldingly restricted in this matter that no relief could be granted in that court. There is a notable case, as late as 1811, where *Lord Eldon*, one of the greatest and most conservative of English chancellors, ordered certain property in probate devoted to the support of a deserted wife. It is not clearly stated in the opinion or statement of the master that this property belonged to the husband by descent, but that seems to be the case from the context; for if the property had descended to the wife in her own right, according to the course of equity, there would have been no hesitation whatever in applying it to her separate maintenance, where she was abandoned by her husband. In ordering the property applied the lord chancellor said: "I have a strong impression on my mind that this has been done; and, independent of precedent, I think the court may do it; as the husband deserting his wife leaves her credit for necessities, and would be liable to an action, and, though execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund." *Guy v. Pearkes*, 18 Ves. Jr. 196. In the American states the ecclesiastical court was not made a part of the judicial system. There being a court of chancery or equitable jurisdiction, however, and there being the conditions involved, whereby that court had grounds, upon principle, to take jurisdiction of such cases, it is not at all strange that some of the American courts of equity entertained them; and thus was established what *Judge Story* termed the broader jurisdiction asserted by the American courts in such cases. In his work on Equity Jurisprudence, he says: "In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may in all cases decree her suitable maintenance and support out of his estate, upon the very ground that

there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished it were generally adopted." 2 Story, Eq. Jur. § 1423. It will be seen from these remarks that this eminent authority on equity jurisprudence saw clearly that these cases involved conditions which, upon fundamental principles of equity would bring them into that jurisdiction, *i. e.*, there was a legal right of the wife to maintenance, existing and deeply implanted in the law, — a right capable of judicial enforcement, and that the common-law courts, although recognizing and attempting to enforce such right, by reason of their forms of procedure, fell far short of giving adequate relief. There was therefore the ground in principle for equitable relief.

Since *Judge Story* wrote, the doctrine of the American courts of equity, which he mentions, has steadily been gaining ground, until now it is held, without the aid of statute, in a large number of the states, as will be seen by reference to citations of appellant's brief. The latest case we have examined was decided in the year 1890 by the Supreme Court of South Dakota, wherein *Kellam, J.*, in a very able opinion held that the case was within the equitable jurisdiction of the courts of that state; and he did not base the conclusion upon any specific constitutional or statutory provision or implication mentioned in his opinion. *Bueter v. Bueter*, (S. Dak.) 8 L. R. A. 562. The Supreme Court of the United States, in 1858, had occasion, in the case of *Barber v. Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226, incidentally to review a number of cases in which the equity jurisdiction was held to extend over this class of cases; and no expression is found in the opinion, showing that the court regarded the exercise of such jurisdiction extraordinary, nor in any manner an arbitrary assumption of a jurisdiction not properly belonging to courts of equity on principle. Over against the holding which *Judge Story* mentions, there are courts of eminent authority holding the contrary. (See cases cited by counsel for respondent.) But the divergence of views upon this subject held by the American courts may not be without reasonable explanation, which would apply at least to some states. While there is a general harmony in the American courts of equity with one another, and with the English court of chancery, in the practice, procedure, and principles applied, and the precedents emanating from them may be safely referred to as authority in cases lying within their jurisdiction, still, when the question is as to the extent of the equitable jurisdiction possessed by courts of one state, the determination of courts of another as to the extent of their own jurisdiction cannot, as a rule, be relied on as furnishing an exact criterion for measuring the boundaries of the jurisdiction in the former state, unless the statutory or constitutional provisions governing the subject are substantially alike. This arises from the great variation in the constitutional and statutory provisions establishing and defining such jurisdiction in the different states. Therefore,

for example, to quote from Massachusetts, as denying that the equitable jurisdiction of their courts extends to cases like the one at bar, cannot be regarded strictly as authority for denying that such jurisdiction belongs to equity courts at all, nor that such jurisdiction may not pertain to the equity courts of another state, because, although emanating from one of the ablest benches in the Union, the court is speaking of the extent of its own equity jurisdiction, which appears to be limited to certain heads, specifically defined by statute, and that jurisdiction does not appear to be as broad as that exercised by the English court of chancery or that exercised by other states of the Union. 1 Pom. Eq. Jur. § 286; Mass. Gen. Stat. 1860, p. 558; *Adams v. Adams*, 100 Mass. 865, 1 Am. Rep. 111. There, also, the statute not only provided for absolute divorce, but for a decree of separation from bed and board, with separate maintenance out of the husband's estate. Mass. Gen. Stat. chap. 107, p. 581.

These variations in the scope of the equitable jurisdiction granted to the Federal courts, and that possessed by the courts of the various states, is fully explained by Mr. Pomeroy in his great work on Equity Jurisprudence. He says: "In some of the states this statutory delegation of power is so broad and comprehensive that the jurisdiction which it creates is substantially identical with that possessed by the English court of chancery, except so far as specific subjects, like administration, have been expressly given to different tribunals; but in others the delegation of power is so special in its nature and limited in extent that a reference to the statutes themselves, on the part of the courts, as the source and measure of their jurisdiction, is a matter of constant practice and of absolute necessity. A correct knowledge of these statutory provisions in the various states is of the highest importance from another point of view. Without it the force and authority of decisions rendered in any particular state cannot be rightfully appreciated by the bench and bar of other commonwealths." 1 Pom. Eq. Jur. § 288. In the same chapter the author brings to view the statutory and constitutional provisions under discussion. It is therefore not surprising, when these conditions are considered, to find different views held by different courts, when the question turns upon the extent of the equitable jurisdiction possessed. Mr. Bishop, in his valuable work on the subject of Marriage & Divorce, (vol. 2, § 356, 6th ed.), exerts the great weight of his authority against the proposition that cases like the one at bar lie within the equitable jurisdiction, unless jurisdiction is given by statutory or constitutional provisions. It is observable that, in treating the question, he has in mind a court in this country, invested with an equitable jurisdiction measured exactly by that exercised by the English court of chancery "at the time of the settlement of this country." With his usual accuracy, he states how the English chancery court dealt with the question at that time, and arrives at the conclusion that said court did not then exer-

cise the jurisdiction in question. But he goes further, and lays down the proposition that "there is no one head of equity power to which, by analogy, this can be said to belong." If it is meant, in view of the right involved, and the relief obtainable through common-law courts, that there is no analogy, when the principles of equity are considered, by which the case would come within the equitable jurisdiction, upon the same principles as many cases come within that jurisdiction, we cannot subscribe to his views. It is fair to say, however, as to Mr. Bishop's views, that he at all times, in treating this subject, reasons from the proposition that to enforce the right of the wife to support, who by the wrongful conduct of her husband is compelled to live separate and apart from him, is equivalent to, and in fact amounts to, the granting of a divorce *a mensa et thoro*. From this position he asserts his conclusion that there is no analogy which would bring the case under any head of equitable power, and draws a very striking picture of a court, admittedly without any jurisdiction in a certain case, arbitrarily holding the alleged offender, and "dodging all difficulties," administering a drastic remedy for an alleged wrong. Bishop, Mar. & Div. 6th ed. § 356. With great deference to the learned author, and admiration for the method and discrimination generally employed by him in the treatment of subjects of the law to which he has devoted his labor, we are unable to adopt his conclusion until we find reason to adopt his premise, that merely to compel the husband, who wrongfully abandons or drives away his wife, to support her, is in fact granting her a divorce *a mensa et thoro*. This is the difficulty which must be either confronted with attention, and fairly treated, or "dodged." He states the proposition in this way: "A divorce from bed and board given to the wife concludes with the same decree for alimony which this proceeding does. But it also contains a finding and a judgment, not that the marriage is dissolved, but that she who is to be alimanted is entitled, by reason of the fault of the other party, to live in separation. In the proceeding under consideration, a court acknowledging itself without power to adjudicate the right to live in separation—for that would be simply and exactly to pronounce a divorce from bed and board—undertakes to make a permanent order for alimony. And yet, as foundation for the order, it passes upon, without reducing to record, the very question of right which it admits not to be within its jurisdiction." 2 Bishop, Mar. & Div. § 356. As long as courts of equity are induced to admit that this proceeding is equivalent to granting a divorce from bed and board, no doubt the jurisdiction will be denied. Let us, therefore, examine this proposition. In every case (where the husband and wife are living separate and apart) in which the common-law courts give judgment for necessities furnished the wife by third persons, one of the facts upon which the judgment rests is that the wife has just cause for living in separation from her husband during the time in question, when such

necessary supplies were furnished. See cases from common-law courts, and other authorities, cited *supra*. Now, may it not be said with quite as much force that in these cases the common-law courts (admittedly without any jurisdiction to authorize the spouses to live separate and apart) do by their judgments confirm the proposition that during the time in question the wife had good cause for living in separation from her husband? In the case of *Liddlow v. Wilmot*, *supra*, brought in the common-law court by a third person, against a husband, for necessary supplies furnished his wife while she was living separately from him, Lord Ellenborough said: "The first question for consideration is whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him; for then he was bound by law to afford her means of support adequate to her station." In *Hult v. Gibbs*, 66 Pa. 360, the same doctrine is stated as follows: "When a husband turns his wife out of doors, without any reasonable or just cause, or forces her to withdraw from him, without any means for her support, the law implies that he has given her credit to supply herself with such necessities as are suitable and proper for her to have, namely, clothing, boarding, lodging, and the like. Her condition would be deplorable, indeed, if this were not so, because of her inability to contract for such things, and to obtain them, if she happens to have no separate estate. When, therefore, necessities are furnished to a wife so situated, on the credit of her husband, the party claiming to be paid for them must bring himself, in order to recover for them, within the rule stated. He must make out a case which shall negative all idea of a captious, voluntary abandonment of the husband's domicile, and show that she has either been turned out or forced to leave his residence. *Walker v. Simpson*, 7 Watts & S. 85, 48 Am. Dec. 216, and the authorities therein referred to." Declarations of this doctrine could be quoted by great number from the common-law courts. See cases *supra*.

So the common-law court must try the question whether the wife was abandoned without cause, or compelled to withdraw and live separately. In other words, these conditions must be shown before judgment can be given in favor of a third party for necessities furnished her living separately from her husband. Then, is not the judgment in such case an affirmation by the common-law court that the wife had just cause for living in separation? And, if the conditions thus judicially affirmed as sufficient ground still exist, such judgment would not be far from judicially sanctioning her continuance of the separation. It would at least affirm indirectly that as long as the cause for separation, which was adjudged sufficient, existed, she would be justified in living separate and apart. Yet the jurisdiction of the common-law courts to give such judgments does not appear to be questioned on the ground that the same amounts to adjudging the wife justified in living apart from her husband, which, if decreed in terms,

would amount to a decree of divorce *a mensa et thoro*. The proposition, however, is held up before the equity court as an all-sufficient "difficulty," whenever it is called upon to do, in a more adequate, direct, simple, and just manner, the very thing which the common-law court fearlessly attempts. But does the judgment or decree, whether of common-law or equity court, simply compelling the husband to continue to support his wife when he has, without cause, abandoned her, amount to a divorce from bed and board? We have seen that she must be fully justified in her separation, and that justification must be shown, before either the common-law or equity court will give relief. But the proposition that such inquiry, and the giving of relief, is equivalent to the granting of a divorce from bed and board, it would seem, must involve the common-law court in the same embarrassment as Mr. Bishop has attempted to draw the equity court into whenever it affirms that it lies within the equitable jurisdiction to grant such relief. Is there anything in the proceeding whether in the common-law or equity court, which authorizes the spouses to live separate and apart, or authorizes the delinquent husband to continue his neglect, without cause, to provide for his wife. Is not the wrongful conduct of the husband, instead of the proceeding whereby a court compels him to support his wife, the only justification she has for her separation? And is there anything in the proceeding either authorizing the husband to continue his wrongful conduct, or fail to resume the voluntary discharge of his marital duties? Is there anything in the proceeding which merely compels him to support his wife, in the nature of casting an obstacle in the way of his seeking reconciliation with her, and resuming the voluntary discharge of his marital obligations? It is within the power of courts of equity to make their decrees in all such cases subject to such modifications as circumstances may demand; and it is worthy of consideration whether the actual effect of a just and proper exercise of such jurisdiction would not tend to induce reconciliation, by checking the husband in his willful and unjustifiable abandonment of his marital obligations. The proceeding, it would seem, simply checks the husband in his attempt to entirely abandon his obligation, without sanctioning the separation any further than inquiring whether it is enforced by the husband's conduct,—the same as done by common-law courts,—and without placing the slightest obstacle in the way of reconciliation. These considerations are in no way suggested as furnishing the reasons upon which to base an answer to the question whether the equity courts of this state possess the jurisdiction in question. They are brought to view in connection with the proposition asserted by some, as we have seen, that to grant such relief is equivalent to, and in fact includes, the decree of divorce *a mensa et thoro*. But we are inclined, after much reflection, to regard the proposition as untenable. When the whole nature and effect of the relief are considered, it

appears to be an extreme view, born of a zealous advocacy of one side of this disputed question of jurisdiction.

We will close the inquiry upon this branch of the case by bringing to view certain statutory and constitutional provisions of this state which to some extent, we think, should influence our determination. The statute provides that: "Women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity, for redress and protection, that her husband has to appeal in his own name alone." Section 1489, div. 5, Comp. Stat. Our Constitution provides that "the district courts shall have original jurisdiction in all cases at law and in equity, . . . and for such special actions and proceedings as are not otherwise provided for." Section 11, art. 8. And, further, that "there shall be but one form of civil action, and that law and equity may be administered in the same action." Section 28, art. 8. And, further, that "courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay." Section 6, art. 8. This latter provision was, we think, set before the courts, by the framers of the Constitution, as a tenet for consideration in a case like this, where, clearly, there is an established right existing, subject to judicial enforcement, and the question is raised on purely artificial grounds, as to whether such right shall be enforced in such an action and in such jurisdiction as by its practice and methods of procedure can insure an appropriate, just, and adequate relief, or whether there shall be a denial of such appropriate and adequate remedy as the courts can afford. It is admitted that the right exists, and it is contended there is a remedy at law; but we have seen that in many cases that answer would be but a mockery to the aggrieved, in her unjust abandonment. The court is then confronted with the question whether there shall be a denial of enforcement of this right, except where absolute divorce is granted. We think the intentment of our Constitution and statutes is to negative that proposition. With these provisions before us, in addition to the grounds of equity jurisdiction considered, we are drawn to the conclusion that our courts are invested with a jurisdiction broad enough to give proper and adequate remedy for the enforcement of the right in question, in proper cases, where it is shown that such jurisdiction ought to be exercised, and that such remedy lies within the equity jurisdiction of our district courts.

The second proposition of law to be determined in this case will be developed by a brief statement of facts set forth in plaintiff's complaint. Among other things, it is alleged

that plaintiff and defendant intermarried on or about the 9th day of September, 1879, at Watkins Glen, Schuyler county, state of New York, and lived together as man and wife until October 24, 1886; that from September, 1882, until October, 1886, they resided in the city of Helena, territory of Montana; that in May, 1887, defendant, without any cause or provocation on the part of plaintiff, willfully abandoned and deserted her, and compelled her to live separate and apart from him; that, from the last date up to about seven months prior to the commencement of this action, defendant contributed the sum of \$50 per month, and at times \$75 per month, for plaintiff's support; that, for about seven months last past, defendant has neglected and refused, and still refuses, to furnish plaintiff any money whatever, and that she is now wholly without means of support, and is entirely dependent upon her personal exertions and the contributions of her friends for support of herself and infant son, the issue of said marriage, now in plaintiff's care and custody; that about April 24, 1887, at the city and state of New York, defendant, by threats and menaces, (particularly alleged and described), compelled plaintiff to write and sign, as dictated by defendant, a letter of authority addressed to E. D. Weed, Esq., an attorney at law, residing, and engaged in the practice of law, at the city of Helena, territory of Montana, authorizing him to appear as her counsel in an action which defendant proposed to commence against her to obtain a divorce from the bonds of matrimony existing between plaintiff and defendant; that, when defendant had thus compelled the writing of said letter by plaintiff, he took the same into his possession; that thereafter plaintiff requested defendant to destroy said letter, and that he then told plaintiff, in order to deceive and defraud her, that he had destroyed said letter, but that, contrary to such statement, defendant retained said letter in his possession, and thereafter presented the same to said attorney, and told said attorney that plaintiff desired said letter to be delivered to him, and desired him to appear for plaintiff, and "represent her in a divorce proceeding to be commenced by the defendant;" that thereafter said attorney appeared as counsel for this plaintiff in an action commenced in the district court of the fourth judicial district of the territory of Montana within and for the county of Yellowstone, by defendant herein against this plaintiff, to obtain a divorce from her; that such proceedings were had in said action as resulted in defendant obtaining from said court a decree of divorce from this plaintiff. Plaintiff further alleges that she did not appear in said action, nor had any knowledge of the fact that said attorney had appeared for her therein. Respondent interposed a demurrer to this complaint, which was sustained by the court, and plaintiff appealed from that order.

Appellant's counsel succinctly state their position on this branch of the case as follows: "Are the parties hereto husband and wife? Is said decree void or voidable? If

void, we will then claim that plaintiff is the wife of defendant, and is entitled to maintain this action. If voidable, then we concede that we are premature in our action." It is not contended by appellant that the decree of the territorial district court, dissolving the bonds of matrimony which theretofore existed between plaintiff and defendant, is void for any reason that appears on the face of such decree. It was pronounced by a court of general jurisdiction, and of special statutory jurisdiction of actions for divorce. Comp. Stat. div. 5, § 1000. Moreover, by appellant's own showing in her complaint, it appears that said court had jurisdiction of her person, by her appearance through her attorney, duly and expressly authorized by letter. Sections 80, 491, Code Civil Proc. This decree must be regarded, of course, as if pronounced by a court of this state, as the transformation from territorial to state form of government is for many purposes to be considered as a continuity of government. Const. art. 20, § 2. The theory of appellant's counsel is that the judgment is void, not by reason of any facts appearing on the face of the proceedings, but by reason of the facts pleaded as to the conduct of defendant, which led up to the court obtaining jurisdiction to grant said decree. They contend that, by reason of those facts pleaded, (which are deemed admitted on demurrer), it is shown that the court had no jurisdiction over the person of appellant, who was defendant in said proceedings for divorce. On this premise they submit "that wherever want of jurisdiction over the person of defendant is shown the judgment rendered without such jurisdiction is absolutely void, and is a nullity, and that this want of jurisdiction may as well be shown by evidence *aliunde* the record as from the face of the record; that in either case, if this want of jurisdiction is shown, the decree is absolutely void, and of no force or effect." It seems to us that, if such a premise be followed, it would sweep away all distinction between judgments void for reasons manifest on the face of the record, and those which, as appears by the record, are valid, and must be given full faith and

force until impeached in a proper proceeding, by establishing facts *aliunde* the record sufficient for that purpose. While there is much conflict relating to certain questions of law concerning judgments, we think it may be safely said to be almost uniformly settled now that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same state, by showing facts *aliunde* the record although such facts might be sufficient to impeach the judgment in question if brought to bear upon it in a proper proceeding. The proposition in this case appears to be to open a way through said decree of divorce for the progress of this action, by going back of that judgment, and raising a question as to the good faith and lawfulness of the plaintiff's conduct in obtaining it. Such a practice cannot be sustained. It is needless to go into a discussion of the reasons and public policy which forbid such a rule. These are fully developed in the authorities. Freem. Judgm. §§ 116, 128; 1 Black, Judgm. §§ 170, 270; *Hahn v. Kelly*, 84 Cal. 891, 94 Am. Dec. 742. *Carpentier v. Oakland*, 80 Cal. 440; *Granger v. Clark*, 22 Me. 128; *Penobscot R. Co. v. Weeks*, 53 Me. 456; *Prince v. Griffin*, 16 Iowa, 552; *Callen v. Ellison*, 18 Ohio St. 446, 82 Am. Dec. 448; *Coit v. Haven*, 30 Conn. 190; *Clark v. Bryan*, 16 Md. 171; *Wingate v. Haywood*, 40 N. H. 487; *Galpin v. Page*, 1 Sawy. 309; *Horne v. Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Baker v. Stonebraker*, 84 Mo. 172; *Reed v. Pratt*, 2 Hill, 64; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520. See also a late case from Oregon, —*Morrill v. Morrill*, 20 Or. 96, 11 L. R. A. 155, published in 28 Am. St. Rep. 95, with an elaborate note by Mr. A. C. Freeman, editor, and also author of Freeman on Judgments, citing many cases upon the subject.

Upon the view that said decree was not void, but only voidable in a proper proceeding for that purpose, the court sustained respondent's demurrer and in our opinion the ruling is correct.

The judgment will therefore be affirmed.

Blake, Ch. J., and DeWitt, J., concur.

MINNESOTA SUPREME COURT.

Wiseman A. SPARROW, *App't.*

v.

C. H. POND, *Resp't.*

(.....Minn.....)

"Blackberries while growing on the bushes are not subject to levy on execution as personal property.

*Head note by MITCHELL, J.

NOTE.—Classification of growing fruit as real or personal property.

Direct decisions as to the nature or classification as property of fruit before it is severed from trees or bushes are very few indeed, although the ques-
16 L. R. A.

(May 3, 1892.)

APPEAL by plaintiff from a judgment of the District Court for Dodge County in favor of defendant in an action brought to recover possession of certain blackberries which plaintiff had purchased at an execution sale upon a judgment against defendant. *Affirmed.*

The facts are stated in the opinion.

tion is discussed in a multitude of cases which actually involve only the question of cultivated crops which are grown by annual planting.

Very similar to the main case is the decision that peaches on the trees are not subject to levy as per-

Mr. S. T. Littleton, for appellant:

A levy may be made upon grain or grass while growing and upon any other unharvested crops.

Gen. Stat. chap. 66, § 815.

Chattels real may be levied upon and sold on execution.

Id. § 800.

In this state the interest of the vendee under a contract of purchase of real estate may be levied upon under a writ of execution.

Henry v. Traynor, 42 Minn. 284; *Reynolds v. Fleming*, 48 Minn. 513.

So may any equitable interest in land.

Atwater v. Manchester Sav. Bank, 45 Minn. 841.

And generally all tangible property which the debtor could himself sell can by execution be made the subject of involuntary transfer to pay his just debts.

1 Freem. Executions, § 110.

Blackberries in this state depend on annual cultivation and do not thrive or produce berries fit for market if left to nature. The crop of berries is the result of the labor and skill of the gardner, *fructus industrialis*.

Id. § 113; Benjamin, Sales, Bennett's 4th ed. §§ 129, 180.

In *Frank v. Harrington*, 36 Barb. 415, all the cases prior to that time were reviewed and it was considered that strawberries, grapes, and hops as now cultivated grow by the manur-

ance and industry of the owner and should be put in the category of personal instead of real estate and so of any kind of produce raised annually by labor and cultivation except grass growing or fruit not gathered from the trees.

Latham v. Atwood, Cro. Car. 515.

Messrs. Samuel Lord and Robert Taylor, for respondent:

Blackberries grow wild in these parts and bear fruit with or without manurance or cultivation. They are perennial, living and growing for many years without being renewed or transplanted, and sending up, each year, shoots or canes, which live over, bear fruit the second year and then die. These facts are of such general notoriety and are so commonly known that the court will take judicial notice of them.

1 Greenl. Ev. 14th ed. § 6; *Brown v. Piper*, 91 U. S. 87, 23 L. ed. 200; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 874; *Tomlinson v. Greenfield*, 81 Ark. 557; *Dixon v. Nicolls*, 89 Ill. 378, 89 Am. Dec. 812; *Raridan v. Central Iowa R. Co.* 69 Iowa, 527; *Patterson v. McCausland*, 8 Bland, Ch. 69; *Wetsler v. Kelly*, 88 Ala. 440; *Gordon v. Tweedy*, 74 Ala. 233, 49 Am. Rep. 813; *Loeb v. Richardson*, 74 Ala. 311; *Mahoney v. Aurrocochea*, 51 Cal. 429; *Garth v. Caldwell*, 73 Mo. 622.

Growing blackberries do not fall within the term "any other unharvested crops," used in the statute.

Bouvier, Law Dict. titles, *Crops, Emblements*;

sonal property. *State v. Gemmill*, 1 Houst. (Del.) 9.

The other cases arise in respect to contracts of sale.

A contract for the sale of all the growing fruit in an orchard to be picked and delivered by the vendor at a certain price per bushel and which gives the vendee no right to enter upon the land or touch the trees or the apples until they are picked, is not a contract for the sale of an interest in land within the Statute of Frauds. *Brown v. Stancilift* (Buff. Super. Ct.) Op. by Smith not reported; aff'd by Mem. Dec. 30 N. Y. 627.

A sale of a crop of peaches while growing in the orchard to be gathered and removed as they mature is not within the Statute of Frauds as a sale of an interest in land. *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591.

A contract giving "one half in the orchard of all the apples and peaches and one half of all the blackberries on the bushes" on certain land during a period of three years, which contract was construed to require a delivery thereof by the vendor, is not a contract for the sale of a chattel real, but for the sale of personal property, and therefore is not within that provision of the Statute of Frauds as to the sale of an interest in real estate, although it is within another provision of that statute as to contracts not to be performed within one year. *Smock v. Smock*, 37 Mo. App. 56.

A sale of an entire crop of fruit for a certain year is not a sale of realty which needs to be in writing. *Vulicevich v. Skinner*, 77 Cal. 239.

In this case it seems that the vendor, as in the cases above, was required to deliver the fruit to the vendee, and in that view the case is strictly parallel with the other decisions above concerning sales of fruit. The court, however, does not mention this fact as having any bearing on the decision, but treats the fruit as *fructus industrialis*.

As against the above cases concerning sales of fruit an earlier English case decided that the sale of a crop of fruit and vegetables is the sale of an in-

terest in land, within the meaning of a statute requiring a conveyance of such an interest to be stamped. *Rodwell v. Phillips*, 9 Mees & W. 508.

But in this case it appears, as it does not in any of the American cases above, that the purchaser was by the contract to enter upon the land and gather the fruit and the action was in assumpsit for "not permitting the plaintiff to gather" it. The case therefore can be readily distinguished from the American cases on that ground.

This same distinction will harmonize the American cases as to sales of growing fruit which hold it to be personal property with the main case and the case of *State v. Gemmill*, 1 Houst. (Del.) 9, which deny that it can be levied on as personality. Otherwise we have decisions treating fruit as realty for the purpose of levy but as personality for the purpose of sale.

In full agreement with the decisions holding that growing fruit cannot be levied on as personality is the generally accepted doctrine that such fruit is not the subject of larceny. Text-books all seem to agree in stating this to be the rule unless changed by statute, but they base it apparently on the reason of the law rather than upon any actual decisions of the courts to that effect. In *Bartlett v. Brown*, 6 R. I. 37, the same doctrine is stated. That case was an action for malicious prosecution in procuring plaintiff's arrest on a charge of stealing such fruit. The court held, however, that the action would not lie as the charge of theft was only a harsh or exaggerated charge of a statutory offense of taking the fruit without license.

Taking all the cases that can be found in which there was actually decided anything about the kind of property that growing fruit belongs to, it seems that they fairly establish the doctrine that such fruit is real property, but that for the purpose of a contract of sale by which the vendor agrees to sever it from the realty and deliver it to the purchaser it may be regarded as already severed and changed into personal property.

B. A. R.

4 Am. & Eng. Encyclop. Law, p. 887, title *Crops*.

At common law the "growing crops" or "emblems," that were subjected to the levy of a writ of *fi. fa.* against the tenant were only such crops of his annual planting as were mainly the result of his manurance and labor in their cultivation and as would mature the same season in which they were planted, and did not include the grasses nor the fruits of perennial shrubs, even though planted and cultivated, or pruned, by the tenant himself.

1 Schouler, Pers. Prop. §§ 100, 104, *et seq.*, 475, *et seq.*; 4 Kent, Com. p. 73; 1 Bouvier, Law Dict. 7th ed. 465; *Rodwell v. Phillips*, 9 Mees. & W. 501; *Smith v. Leighton*, 88 Kan. 544, 5 Am. St. Rep. 778; 1 Hilliard, Real Prop. 13.

When a product of the soil is claimed not to be subject to seizure and sale under a *fi. fa.* the claim must be determined by ascertaining whether such product is real or personal estate; and this last question is in turn to be settled by inquiring whether the product is chiefly the result of roots permanently attached to the soil or of the labor and skill of defendant in sowing and cultivating the soil.

1 Freem. Executions, § 118; Schouler, Pers. Prop. §§ 100, 104, *et seq.*; 2 Bl. Com. 123, *Sharswood's note*.

An exception was made as to the single product of hops.

Latham v. Atwood, Cro. Car. 515; *Frank v. Harrington*, 86 Barb. 415.

In *Darlington on Personal Property*, p. 26, "*fructus naturales*" are defined to be those products which require to be planted but once and then bear for years.

Thompson, Law of the Farm, § 25. See also Gwynne, Sheriff & Coroner, p. 220; Crocker, Sheriffs & Constables, p. 207; *Craddock v. Riddlebarger*, 2 Dana, 206; *State v. Gemmill*, 1 Houst. (Del.) 9; Jones, Chat. Mort. § 145; *Rodwell v. Phillips*, 9 Mees. & W. 503.

Mitchell, J., delivered the opinion of the court:

At common-law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblems," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life. 4 Kent, Com. p. 73; 4 Bacon, Abr. 372, title *Emblements*; Freem. Executions, § 118; 1 Schouler, Pers. Prop. § 100 *et seq.*; *State v. Gemmill*, 1 Houst. (Del.) 9; *Craddock v. Riddlebarger*, 2 Dana, 205; 9 Am. & Eng. Encyclop. Law, title *Crops*; *Rodwell v. Phillips*, 9 Mees. & W. 501. A possible exception to this classification is the case of hops on the vines, 16 L. R. A.

which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of the hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham v. Atwood*, Cro. Car. 515. See *Frank v. Harrington*, 86 Barb. 415.

It is sometimes stated that the test whether an unsevered product of the soil is an emblemment, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees were subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner, as well as purpose, of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach. *Darlington*, Pers. Prop. 26. This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts, (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree. It seems to us quite clear that at common law such berries, while growing upon the bushes, were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of section 315, chap. 66, Gen. Stat., was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits of perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the stat-

ute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case. To prevent misapprehension hereafter, it may be well, however, to say, with reference to the question whether crops growing upon a homestead under the statutes of the state are subject to levy, or whether their seizure would be an interference with the beneficial use and control

of the homestead by the debtor, that it is not determined, as counsel for appellant assume, by the case of *Erickson v. Patterson*, (Minn.) 50 N. W. Rep. 699. In that case the grain grew upon land entered under the United States Homestead Law, by the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and use as a home. Hence that case would not necessarily control the question discussed in the present case.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

Joseph HERR and Wife
v.
City of LEBANON, Appt.

(.....Pa.)

The want of a barrier along a steep bank beside a highway is not the proximate cause of injury to a passenger in an omnibus which went over the bank while the horse drawing it was struggling to get up after repeated falls, each of which took it nearer to the bank, where the horse first fell in the middle of the street, which was in good condition.

(May 16, 1892.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Lebanon County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from a defect in a highway for the repair of which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank E. Moley and W. M. Derr, for appellant:

The accident was produced by an intervening and independent cause for which the defendant was not responsible and therefore relieved the defendant from liability for the injury to the plaintiff.

Chartiers Twp. v. Phillips, 122 Pa. 601; 16 Am. & Eng. Encyclop. Law, p. 441, *note*.

Messrs. Luther F. Houck and Grant Weidman, for appellees:

The authorities whose duty it is to maintain the highways are bound not only to care for the traveled track of the roadway, but also the surroundings.

Jackson Twp. v. Wagner, 127 Pa. 195; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 738; *Lower Macungis Twp. v. Merkhoffer*, 71 Pa. 276; *Newlin Twp. v. Davis*, 77 Pa. 817; *Pittston v. Hart*, 89 Pa. 389; *Burrell Twp. v. Uncapher*, 10 Cent. Rep. 328, 117 Pa. 363; *Plymouth Twp. v. Graver*, 125 Pa. 36.

Negligence may be the proximate cause of an injury, of which it is not the sole or immediate cause. If the defendant's negligence

concurred with some other event, other than the plaintiff's fault, to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury, in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time.

Shearn. & Redf. Neg. 10.

Where an accident and want of ordinary care concur in producing an injury, the negligent person is liable for the consequences, if without his negligence the injury would not have been caused by the accident alone.

4 Am. & Eng. Encyclop. Law, p. 41; 2 *Thomp. Neg.* 1063-1065, § 8, 1087, § 4; *Sababury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Baltimore & O. R. Co. v. Sulphur Springs Ind. School Dist.* 96 Pa. 65, 42 Am. Rep. 529; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 358, 39 Am. Rep. 787.

Williams, J., delivered the opinion of the court:

The plaintiff was injured by an accident happening on one of the streets of the city of Lebanon. She seeks by this action to hold the city responsible for the consequences of the accident, on the ground that the proximate cause of her injury was the negligence of the city. The circumstances are told by the driver of the omnibus in which she was a passenger, and whom she called as a witness for that purpose. He says that there were four adults besides himself in and upon the omnibus, five children, and some household goods, including a sewing machine. It was drawn by one horse. The route passed up and along the side of a hill. On the upper side of the street was a high bank. On the lower side a steep descent of several feet. There was no guard-rail along the edge of the declivity. The driver describes the streets as smooth, hard, twenty feet wide, and "well piked." While ascending the hill in the middle of the roadway the horse suddenly fell. It struggled to regain its feet, but failed. Whether the weight of the load, in connection with the grade of the hill, was too much for the strength of the horse,

NOTE.—For notes on the subject of proximate cause, see *Smethurst v. Independent Cong. Church (Mass.)* 2 L. R. A. 695; *Erickson v. St. Paul & D. R. Co. (Minn.)* 5 L. R. A. 786; *Read v. Nichols (N. Y.)* 7 L. 16 L. R. A.

R. A. 130; *Smith v. Kanawha County (W. Va.)* 3 L. R. A. 82; *Smithwick v. Hall & U. Co. (Conn.)* 12 L. R. A. 279; *Hunnewell v. Duxbury (Mass.)* 13 L. R. A. 733.

or the horse was choked by the harness, or taken suddenly ill, no one ventures an opinion. It continued struggling until it had moved from the middle of the street to the outer edge, and then over the declivity, dragging the omnibus and its load after it. The driver was asked the question, what caused the horse to fall? He replied, "I don't know." He was then asked if the fall was not due to the fact that the horse was choked. His answer was, "I could not say." To the further question whether he could have driven safely over the road if the horse had not fallen, he said, "Yes, sir, the road was all right, but I did not have any control over him [the horse] after he was down." The jury passed upon the same question. The learned judge requested the jury to answer with their verdict two written questions, viz., Was the city negligent in not erecting a barrier at the edge of the highway? and, Was the fall of the horse caused by the negligence of the city? They answered the first question, "Yes; the second, "No." Let us accept these answers, as we should do, as correctly disposing of both questions, and as settling the fact that the city was guilty of negligence in failing to erect a barrier. It then follows that for any injury suffered by reason of the absence of the barrier, of which such absence was a proximate or efficient cause, the city would be liable. If, therefore, in the ordinary use of the street, one had been crowded over the bank by the volume of the travel, by the sudden shying of his horse, or by reason of an accumulation of ice upon the roadway, the absence of the barrier might justify a recovery if the plaintiff was not guilty of contributory negligence, and so in part the author of his own misfortune. Such accidents may be said to be a probable result of the neglect complained of. If so, the city was bound to anticipate and provide against them; and its failure to do so was negligence. But the liability so incurred does not extend to all sorts of accidents upon that street; only to those of which the negligence may be the proximate cause. The proximate cause of this accident was the fall of the horse and its inability to recover. This fall was not due to the negligence of the city, for the jury have so found the fact in their answer to the questions submitted to them. When the horse fell it was near the middle of the roadway, smooth, hard, "well piked," and twenty feet wide. In its struggles to get upon its feet the driver says he could not control it. Each time that it got partly up it fell again. It fell on the same side, and each time nearer to the edge of the bank, until at length it plunged headlong over the edge. These facts bring the case squarely within the doctrine of *Charters v. Twp. v. Phillips*, 122 Pa. 601. Indeed, they make a stronger case for the defendant than was made in that case. The horse went over, not in the ordinary use of the street, but because of its own inability to manage its load. It fell, and it could not get up. Such an accident is not one of the ordinary incidents or accidents of travel which the city ought to foresee and provide against. The duty of road officers is to provide roads suitable for ordinary travel, conducted in the ordinary manner, and to provide such safeguards as may be needed to meet the risks of such travel. *Hey v. Phila-*

delphia, 81 Pa. 44, 22 Am. Rep. 738; *Jackson Twp. v. Wagner*, 127 Pa. 164. This is the extent of their liability in this state. The same rule is held in many other states. *Warner v. Holyoke*, 112 Mass. 362; *Chapman v. Cook*, 10 R. I. 804, 14 Am. Rep. 686; *Keyes v. Marcellus*, 50 Mich. 439, 45 Am. Rep. 52; *Davis v. Hill*, 41 N. H. 329. The learned judge stated the general rule to the jury correctly, but he seemed to be of opinion that the neglect of the city to erect a barrier, and the failure and struggles of the horse, might be regarded as concurring causes of the accident, and the city might be required to pay for its results on that theory. This was a mistake. If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are "concurrent" causes. They run together, as the word signifies, to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate, and the other the remote, cause. When they stand in this relation to each other and the result to be considered, the law regards the proximate as the efficient and responsible cause, and disregards the remote.

To determine the relation which the falling of the horse in this case bears to the negligence of the city, we must remember that the jury have found that they bear no relation to each other; for they said, in answer to the question of the court, that the falling of the horse was not chargeable to the negligence of the city. It is therefore an independent, unrelated cause, without which the accident would not have happened. It was the first or proximate cause in the series; the efficient and responsible cause. The absence of the barrier was the remote cause. It did not bring about, or help to bring about, the accident, although it made its consequences more serious. It is probable that our failure to notice the assertion of the same doctrine by the court below in *Wagner v. Jackson Twp.*, when it was last here, may be responsible for its introduction into this case. On the argument of that case upon the first appeal, the important question presented was over the duties of road officers. When it came up again the learned judge seemed to have followed in his answers to the points, the rule which had been laid down, and the error assigned to the general charge escaped attention. In the general charge the same error was committed that appears in this case. The jury was substantially told that the township was not bound to anticipate or provide against such accidents as befell Mrs. Wagner in the fright of her horse and the crushing of her wheels, yet, if they failed to anticipate and provide against them, they were guilty of concurring negligence, and liable to respond in damages for the loss sustained. The illogical application of the rule relating to concurring negligence escaped attention. In so far as that subject is concerned, the case, as reported in 183 Pa. 61, is not authority, and cannot be followed. A road that is in suitable condition for ordinary travel, conducted in the ordinary manner, does not become defective, because some extraordinary condition, not foreseen, arises, in consequence of which it is for the

moment too rough or too narrow to meet all the exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen, as a probable result of the condition of the highway, the road authorities are not bound to provide against; and their neglect to make such provision can be neither a proximate nor a concurring cause of the injury received in consequence of such extraordinary happening. If the road in Jackson township was suitable and safe for ordinary travel, a traveler could ask no more. If, notwithstanding the condition of the road, a traveler was injured as the result of a series

of accidents like those that befell Mrs. Wagner, and for which it is conceded the township was not responsible, viz., the fright of her horse, his sudden turn in the road, the crushing of the wagon wheel, the dragging of the axle and the consequent pulling of the wagon out of the track and against the stone pile, it is clear that the stone pile, which did not interfere with ordinary travel or the common beaten wagon track, was not the proximate or a concurrent cause of the injury, and that the question of concurring negligence was not properly in that case.

The judgment in this case is reversed.

INDIANA SUPREME COURT.

Henry W. LANGENBERG, Sheriff of Marion County, *Appl.*,

v.

Philip C. DECKER.

(.....Ind.....)

The power to fine and imprison for contempt is essentially a judicial one and an attempt to confer it on a state board of tax commissioners who have power to take testimony is in violation of a constitutional provision that no person charged with official duties under either the legislative, executive, or judicial department of the government shall exercise any of the functions of another department, since such board belongs to the executive or administrative department.

(May 10, 1892.)

APPEAL by respondent from a judgment of the General Term of the Superior Court for Marion County affirming a judgment of the Special Term in favor of petitioner in a habeas corpus proceeding to release petitioner from the custody of respondent, to which he had been committed by the state board of tax commissioners for alleged contempt in refusing to answer questions propounded to him. *Affirmed.*

The facts are stated in the opinion.

Mr. A. G. Smith, Atty-Gen., for appellant:

The power of assessment and taxation is legislative, with no limitation except that taxation shall be uniform and equal. Courts cannot interfere with this power or the mode prescribed for its enforcement.

U. S. Const. art. 1, § 8; Ind. Const. art. 10, § 1; Cooley, Const. Lim. pp. 593-596; Blackwell, Tax Titles, 1; Montesquieu, Spirit of the Law, bk. 13, chap. 1; *Perry v. Washburn*, 20 Cal. 318, 350; *Van Horn v. People*, 46 Mich. 188, 41 Am. Rep. 159; *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 655, 23 L. ed. 455; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 428, 4 L. ed. 579, 606; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514, 561, 7 L. ed. 939, 955; *Kirkland v. Hotchkiss*, 100 U. S.

491, 25 L. ed. 558; *Board of Education v. Marlborough*, 86 Ohio St. 227, 38 Am. Rep. 582; *Lima v. McBride*, 84 Ohio St. 338, 350; Cooley, Taxn. p. 41; 1 Desty, Taxn. 81, § 22.

For the purposes of state taxation this right and power is exercised by the Legislature. The officers that are to perform the duty must be named by the Legislature; and when they have had conferred upon them the power necessary to carry into execution this great trust, it is conclusive so far as the courts are concerned. No one dare deny that power. No one dare lay his hand upon the Constitution to limit it, for the Constitution has but one limitation, and that is the limitation of eternal equality.

Tiedeman, Pol. Powers, p. 481; 1 Desty, Taxn. p. 83; *Robertson v. State*, 7 West. Rep. 481, 109 Ind. 79; *Wright v. Defrees*, 8 Ind. 298; *Smith v. Myers*, 7 West. Rep. 90, 109 Ind. 1-9, 58 Am. Rep. 375.

The subject of taxation is a legislative question, "and over purely legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government cannot enter the domain of another."

Carr v. State, 11 L. R. A. 370, 127 Ind. 208, and authorities cited; *Smith v. Myers* and *Robertson v. State*, *supra*.

The constitutional guaranty against unreasonable searches and seizures is not and never has been construed as a limitation upon the taxing power. It has no reference to or connection with the subject of taxation.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746; *Com. v. Dana*, 2 Met. 329; *First Nat. Bank of Youngstown v. Hughes*, 106 U. S. 523, 27 L. ed. 268, 6 Fed. Rep. 787.

For a person or corporation to give proper information to an officer of the law does not give publicity to his business; and a law requiring such information to be given is not repugnant to the 4th Amendment of the Constitution, and is not in its nature unreasonable searches and seizures of one's private books, papers, etc.

Laundry v. Chicago, 111 Ill. 291, 58 Am. Rep. 625; *Van Baalen v. People*, 40 Mich. 258; *Shuman v. Fort Wayne*, 11 L. R. A. 878, 127 Ind. 109; *Re Clayton*, 18 L. R. A. 68, 59 Conn. 510; Tiedeman, Police Powers, p. 471; Cooley, Const. Lim. 200; *Com. v. McCloskey*, 2 Rawls,

NOTE.—The fullness of the discussion of the question involved in the above case which is furnished by the report of the case itself makes any attempt at annotation unnecessary.
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374; *Bees v. State*, 6 Ind. 501, 528, 68 Am. Dec. 391; *Johnston v. Com.* 1 Bibb, 608; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *State v. Kruttschnitt*, 4 Nev. 178; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Hills v. Chicago*, 60 Ill. 86.

The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.

Cooley, Const. Lim. 201; *Bennett v. Boggs*, Baldw. 74; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77.

The doctrine of "due process of law" does not apply to the power of taxation at all.

Sedgw. Stat. & Const. Constr. p. 425; *McMillen v. Anderson*, 95 U. S. 40, 24 L. ed. 835; *Pearson v. Yewdall*, 95 U. S. 296, 24 L. ed. 436; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 26 L. ed. 569; *Bell's Gap. R. Co. v. Pennsylvania*, 184 U. S. 232, 83 L. ed. 892; Cooley, Taxn. 488; *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 872; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; Cooley, Const. Lim. 436, 437; *Vanzant v. Waddell*, 2 Yerg. 260; *Lens v. Charlton*, 23 Wis. 478; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Wynehamer v. People*, 18 N. Y. 378, 432; *Kallock v. San Francisco Super. Ct.* 56 Cal. 229; *Baltimore v. Scharf*, 64 Md. 499.

If the statute confers upon the tribunal the right to act in a given matter with power to hear and determine questions lawfully submitted to it, and its acts are within the powers granted by the statute, the acts of such a tribunal are judicial and can be enforced as other judicial orders and commands are enforced.

Re Saline County Subscription, 45 Mo. 58, 100 Am. Dec. 337.

The duties of assessors, in estimating the value of property for purposes of general taxation are judicial.

Barhys v. Shepherd, 85 N. Y. 298, 250; *Hasan v. Rochester*, 67 N. Y. 528, 536; *Stuart v. Palmer*, 74 N. Y. 183, 90 Am. Rep. 289; *Williams v. Weaver*, 75 N. Y. 80, 38; Cooley, Taxn. 266; *Burroughs, Taxn.* 102; *Jordan v. Hyatt*, 3 Barb. 275, 238; *Ireland v. Rochester*, 51 Barb. 416, 480, 431; *State v. Jersey City*, 24 N. J. L. 663; *State v. Morristown*, 34 N. J. L. 445; *Griffin v. Mison*, 38 Miss. 424, 437, 438; *State v. Wood*, 8 West. Rep. 540, 110 Ind. 88; *Kuntz v. Sumption*, 2 L. R. A. 655, 117 Ind. 1; *Hyland v. Brazil Block Coal Co.* 128 Ind. 835; *Garrigus v. State*, 98 Ind. 239; 1 High, Inj. § 498; *Mechem, Pub. Off. & Officers*, § 616; *Shovitz v. McPheters*, 79 Ind. 878; *Steele v. Dunham*, 26 Wis. 398; *South Nashville St. R. Co. v. Morrow*, 2 L. R. A. 853, 87 Tenn. 406; *Van Steenberg v. Bigelow*, 8 Wend. 48; *Martin v. Mott*, 25 U. S. 12 Wheat. 81, 6 L. ed. 541; *Jenkins v. Waldron*, 11 Johns. 121, 6 Am. Dec. 359; *Kendall v. Stokes*, 44 U. S. 8 How. 98, 11 L. ed. 512; *Porter v. Haight*, 45 Cal. 637.

Quasi judicial officers are empowered to punish any one guilty of contemptuous conduct in their presence.

Swafford v. Berrong, 84 Ga. 65; *Re Clayton*, 13 L. R. A. 66, 59 Conn. 510.

Penalties in tax laws are enforced without the aid of courts.

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Cooley, Taxn. 2d ed. p. 856; *Olds v. Com.* 8 A. K. Marsh. 465; *State v. Parker*, 83 N. J. L. 192; *State v. Bishop*, 84 N. J. L. 45; *State v. Parker*, 84 N. J. L. 49; *State v. McClenney*, 84 N. J. L. 63; *Thompson v. Tynkeom*, 15 Minn. 295; *People v. Stockton & C. R. Co.* 49 Cal. 414; *Boyer v. Jones*, 14 Ind. 854; *State v. Washos County Board of Equalization*, 7 Nev. 83; *State v. Appgar*, 81 N. J. L. 359; *Genin v. Belmont County*, 18 Ohio St. 534; *Champaign County Bank v. Smith*, 7 Ohio St. 48; *State v. Woods*, 8 West. Rep. 540, 110 Ind. 83.

The power to discover omitted property and cause it to be placed upon the tax duplicate is one of the legitimate powers of taxation. This power, given by the Legislature, carries with it the authority to ascertain what property has been omitted from the tax lists, the character and value of the same, and who is the owner thereof. It does not require the aid of courts to enforce the power. The mode of accomplishing this end is provided in the statute, and the "due process of law" to be resorted to in such cases is the enactment of the Legislature upon that subject.

State v. Wood, supra; *Kuntz v. Sumption*, 2 L. R. A. 655, 117 Ind. 1; *First Nat. Bank of Youngtown v. Hughes*, 106 U. S. 523, 27 L. ed. 269, 6 Fed. Rep. 737; *Hyland v. Brazil Block Coal Co.* 128 Ind. 835; *Genin v. Belmont County*, 18 Ohio St. 534; *Champaign County Bank v. Smith*, 7 Ohio St. 48; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746; *Pom. Const. Law*, §§ 288, 284; *Wade v. Kimberly*, 5 Ohio C. C. 83; *Scott v. Raine*, 25 Week. L. Bull. 154; *Woll v. Thomas*, 1 Ind. App. 282; *San Luis Obispo v. Pettit*, 87 Cal. 499; *Rev. Stat. 1881*, § 6416; *Vanderecock v. Williams*, 5 West. Rep. 248, 106 Ind. 845.

The subject of taxation belongs to the police power of the state, is complete within its scope and subject only to legislative control, and may be exercised to any extent to which the law-making power chooses to carry it.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 26 L. ed. 569; *Bell's Gap. R. Co. v. Pennsylvania*, 134 U. S. 232, 238, 83 L. ed. 892, 895; *Kidd v. Pearson*, 128 U. S. 1, 24-26, 32 L. ed. 846, 851, 852; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Pick Wo v. Hopkins*, 118 U. S. 865, 874, 30 L. ed. 225, 227; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 528, 24 L. ed. 736; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1086; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1079; *Neal v. Delaware*, 103 U. S. 834, 26 L. ed. 568.

Messrs. Addison C. Harris, Thomas A. Stuart and William A. Ketcham, for appellee:

So much of section 139 of the Act in question as gives to the state board power to punish for contempt a witness who appears and refuses to answer questions is an attempt to confer judicial powers on an administrative branch of the government, and is unconstitutional and void.

Cooley, Const. Lim. p. 2; Ind. Const. art 8, § 1.

The state board of tax commissioners be-

longs to the administrative branch, which is but a part of the executive branch; and therefore, under our Constitution, "no person," (using that word in its broad sense), "charged with official duties under one of these departments shall exercise any of the functions of any other branch."

Kilbourn v. Thompson, 108 U. S. 168, 26 L. ed. 377.

The power to punish for direct contempt was inherent in all courts of superior jurisdiction, and cannot be created, destroyed, or abridged by the Legislature."

Holman v. State, 2 West. Rep. 761, 105 Ind. 513.

The power to punish for contempt is the highest exercise of judicial power, and is not an incident to the mere exercise of judicial functions.

Re Mason, 43 Fed. Rep. 510; *Ex parte Doll*, 7 Phila. 595; *Re McLean*, 37 Fed. Rep. 648; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242.

Judicial power can only be vested in the courts.

Const. art. 7, §1; *Shoults v. McPheeters*, 79 Ind. 878, 375; *State v. Noble*, 4 L. R. A. 101, 118 Ind. 367; *Vandercook v. Williams*, 5 West. Rep. 248, 106 Ind. 345; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Gregory v. State*, 94 Ind. 885, 48 Am. Rep. 162; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

The question of the power of this board to commit for a contempt is, by the terms of the statute referred to, a question that this court may pass upon, and this would be the rule of law without any statute.

Miller v. Snyder, 6 Ind. 1.

If the commitment be against the law, as being made by one who has no jurisdiction of the case, or for a matter for which by law no man ought to be punished, the courts are to discharge.

Bacon, Abr. *Habeas Corpus*, 10.

An unconstitutional law is void, and it is as no law at all, and the alleged offense committed under it is not punishable. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be held a legal cause of imprisonment.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

If a court having no jurisdiction over the person or subject-matter before it sentences a party or a witness for disobedience of its authority, such person, thus illegally deprived of his liberty, may be released by any court authorized to issue writs of habeas corpus.

Ex parte Fisk, 113 U. S. 718, 28 L. ed. 1117; *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216; *Ex parte Perkins*, 29 Fed. Rep. 900; *Ex parte Farley*, 40 Fed. Rep. 86; *Ex parte Lange*, 85 U. S. 18 Wall. 168, 21 L. ed. 872; *People v. Cassels*, 5 Hill, 164; *People v. Warden of County Jail*, 1 Cent. Rep. 173, 100 N. Y. 20; *Fisher v. McGirr*, 1 Gray, 1-49; *Re Morton*, 10 Mich. 208.

Coffey, J., delivered the opinion of the court:

The General Assembly of the state passed an Act, which was approved and went into force on the 6th day of March, 1891, entitled "An 16 L. R. A.

Act Concerning Taxation, Repealing All Laws in Conflict herewith, and Declaring an Emergency." The Act creates a state board of tax commissioners, composed of five persons, viz., the secretary of state, the auditor of state, and the governor of the state, who are styled *ex officio* members, and two persons of opposite political faith, appointed by the governor of the state. At the time the matters occurred out of which this suit arose the board was composed of the secretary of state, the auditor of state, the governor of the state, Josiah N. Gwin, and Ivan N. Walker. By the provisions of the Act the governor of the state is the chairman of the state board of tax commissioners. Section 129 of the Act provides that this board shall annually convene in the office of the auditor of state on the first Monday of August each year for the purpose of assessing railroad property, and equalizing the assessment of real estate; that it shall not be bound by any reports or estimates of value of railroad property, real estate, or other property, as returned to the county auditors or to the auditor of state, but shall appraise and assess all property at its true cash value, as defined by the Act, according to its best knowledge and judgment, and so equalize the assessment of property throughout the state. It also contains this provision: "They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred upon it by the provisions of the statute, the state board of tax commissioners, on its own motion, caused a *subpoena duces tecum* to be issued to all the banks in the state, requiring the president, cashier, and bookkeeper, or either of them, of the bank named in the subpoena, to appear before the board at the office of the state board of tax commissioners in the state house in the city of Indianapolis, on a day named in the subpoena, and to bring and have with them then and there such books, papers, and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes, or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto or with reference to the property owned by the bank itself. The subpoena was signed by Joseph T. Fanning, as secretary of the board. At the bottom of the subpoena, and following the signature of the secretary, was the following: "For the purposes of the state board of tax commissioners, as set forth in this

subpoena, it will answer if the president, cashier, or bookkeeper of the above-mentioned bank make out a sworn statement of the balances to the credit of its individual depositors on April 1, 1891, giving name in full of each depositor, amount of his credit balance, and forward said sworn statement to the state board of tax commissioners without delay."

One of the subpoenas was served upon the appellee at the city of Evansville, where he resides, and where he is vice-president of a state bank known as the "German Bank of Evansville." In answer to the subpoena he appeared before the state bank of tax commissioners on the 25th day of August, 1891, when there were present of the members of the board the following persons, and others, viz., Claude Matthews, secretary of state, acting as president of the board, J. O. Henderson, auditor of state, and Ivan N. Walker. Upon his appearance he was duly sworn, when the following proceedings were had, viz.: "Question. State your name and place of residence. Answer. Philip C. Decker. I reside in the city of Evansville. Q. In what business are you engaged? A. That of banking. Q. With what institution are you engaged, and in what capacity? A. I am vice-president of the German Bank of Evansville, Indiana. The president lately died, and I am acting as president. Our bank was organized under the laws of Indiana. Q. State the aggregate amount of the individual deposits held by the German Bank, of which you are vice-president, on the 1st day of April, 1891. A. About \$300,000. Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor. The Witness: Before answering the question, I respectfully ask the board whether there is any appeal, complaint, suit, or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner. By the Board: No. We are exercising the power of discovery. The Witness: I decline to answer, under the advice of counsel, either as to the name of any depositor or the amount of his deposit. Q. Give me the amount of personal property, other than money, held by your bank as custodian or agent, on the 1st day of April, 1891, such as notes, stocks, bonds, or other property of value belonging to any one depositor. A. I respectfully ask the board to state, before an answer to the question just put, whether there is any appeal, complaint, cause, or proceeding of any kind pending before this board or elsewhere to assess the property of said bank, or any partner therein. Answer by the Board: No. The Witness: I decline to do so, under advice of counsel. Q. For the purpose of ascertaining what, if any, money on deposit in your institution, belonging to persons, firms, companies, or corporations, has been omitted, purposely or otherwise, from the tax duplicate of Vanderburgh county, you will please give this board a list of the names of your depositors on the first day of April, 1891. A. I most respectfully decline to give such list, having just been informed by the board that no appeal, complaint, suit, or proceeding is here pending before this board or elsewhere to assess or revise the tax list of any depositor or partner or officer of the bank. Q.

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For the purpose above indicated, give a list of depositors on the 1st day of April, 1891, with the several amounts of money to their credit on that day. A. I decline to give either the names of my depositors or the several amounts standing to their credit, respectively, on the 1st day of April, 1891, either for taxes, or for any other purpose, because I am now informed by the board that there is no appeal, complaint, suit, or proceeding pending here or elsewhere to assess or revise the tax list of any depositor. Q. Likewise give us the names of all persons who have property other than money, stocks, bonds, jewelry, or other property of value by said German Bank held as custodian on the 1st day of April, 1891, and the several amounts, with a description and value of such property. A. I decline to answer your questions for the reasons given above. Q. By an examination of the books and papers of said bank, would you, as its vice-president, be able to furnish to this board the information asked for in the foregoing question? A. I would not. Q. You are now commanded to produce such books and papers of the German Bank for the inspection of this board as will fully afford the information herein sought to be obtained, and which will discover the names of the depositors of said German Bank on the 1st day of April, 1891, and the several amounts to their credit; also such books as will show the names and description of the property of value held by said bank as custodian and agent on said day. A. As vice-president of said bank, I now decline to produce any of its books or papers for the inspection of this board for any purpose." Thereupon the state board of tax commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of \$500, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore it is considered and ordered by the state board of tax commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be, and hereby is, fined in the sum of five hundred dollars (\$500), and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied." Upon entering the foregoing judgment, the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of \$500 for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion superior court, praying for a writ of habeas corpus. To the writ issued upon this petition the appellant made his return, stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion superior

court in sustaining the exceptions to the return made by the appellant to the writ of habeas corpus. It is contended by the appellee: *First*. That the power to punish for contempt is a judicial function, which can only be exercised by a court, and, if it be claimed that the Act in question makes the state board of tax commissioners a court, then so much of the Act as seeks to do so is void, because it is not embraced in the title of the Act, and because three of the persons constituting the board are forbidden by the Constitution of the state from exercising judicial functions. *Second*. That, if the board has power to punish for contempt, it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action, or proceeding then pending. *Third*. That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." *Fourth*. That the state board of tax commissioners has no original jurisdiction, except in the matter of the assessment of railway corporations, and equalizing the assessments of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court; but it seems to us that, if the first proposition presented by the appellee, namely, that so much of the statute in question as attempts to confer on the state board of tax commissioners the power to fine and imprison for contempt of its authority is void by reason of being in conflict with the state Constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position cannot be maintained, then some or all of the others propositions do arise, and must be decided by this court. But the first inquiry in a case like this leads naturally to an investigation of the authority under which the complaining party has been deprived of his liberty. The solution of the question presented renders it necessary that we shall inquire—*first*, as to what department of the state government the state board of tax commissioners belongs; and, *second*, into the nature of the power to fine and commit for contempt.

Article 3, § 1, of our state Constitution is as follows: "The powers of the government are divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided." The division of power made by our Constitution exists in the Federal Constitution, and in most, if not all, of the state Constitutions. The powers of these departments are not merely equal; they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these de-

partments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government. *Wright v. Deftess*, 8 Ind. 293; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *State v. Deany*, 118 Ind. 382, 4 L. R. A. 79; *State v. Noble*, 118 Ind. 850, 4 L. R. A. 101; *Hoovey v. State*, 127 Ind. 588, 11 L. R. A. 763. It is the duty of the legislative department of the state to make the laws; it is the duty of the judicial department to construe and apply them; and it is the duty of the executive department to see that such laws are faithfully executed. No provision of our Constitution was more carefully considered and fully discussed in the constitutional convention than the one now under consideration. As to the legislative department, it is believed that Mr. Biddle expressed what was the understanding of the convention when he said: "The General Assembly has no other duty nor power than to make laws. After a law has been enacted, this department has no further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books; and for any functions still remaining in the legislative power, there it would forever remain. All the power of this department here ends." 2 Const. Debates, 1824. It cannot with propriety be contended that the state board of tax commissioners belongs to the legislative department of the state, for it has no power to enact laws. The General Assembly cannot delegate its law-making power to any other person or body. It cannot be successfully maintained that the Legislature could confer on the governor of the state and the principal administrative officers of the state duties pertaining to the judicial department. Indeed, the learned attorney-general admits in argument that the state board of tax commissioners is not a court, and he does not contend that it can perform any function which is of a purely judicial character. As the state board of tax commissioners is neither a legislative body nor a court, it must belong to the executive or administrative department of the state. That it does belong to that department we think it too plain for argument. It is charged with the duty of executing certain provisions of the revenue laws of the state, and when it has performed that duty its functions are at an end. But because it is a body belonging to the executive or administrative department of the government it by no means follows that it may not perform functions which are, in their nature, judicial. Hearing and determining appeals from the county board of review, hearing witnesses, and equalizing the appraisement of real estate, and assessing the railroad property named in the Act, is the performance of a duty judicial in its nature. Mr. High, in his work on Injunctions, (sec. 493,) in speaking of the power of courts of equity to enjoin assessments, says: "So the fact that the tribunal fixed by law for determining and equalizing the value of property for the purposes of assessment has assessed it too high will not warrant an injunction, since the action of such officers is judicial in its nature, and will not ordinarily be reviewed in equity." Mr. Mechem, in his work

on Public Offices and Officers, in considering the subject of liability of judicial officers on account of their official acts, in section 686 says: "There is still a large class of officers whose duties lie wholly outside of the domain of the courts of justice, or concern the business of the court only incidentally or occasionally, and who are yet called upon by law to exercise, for the benefit of the public or of individuals, power very nearly akin to those of judges in the courts." In the case of *State v. Wood*, 110 Ind. 83, 8 West. Rep. 540, this court, in speaking of the power of the board of county equalization, said: "The board was not, nor was it necessary that it should be, a court. It was not, and could not be, sitting as a court. It was in the exercise of statutory powers and duties, which duties perhaps may be said to be quasi judicial." In the case of *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, in speaking of the same tribunal, this court said: "We agree with the appellee's counsel that the board of equalization is not a judicial tribunal in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial nature."

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Offices and Officers, section 687, says. "Quasi judicial functions . . . are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides is necessarily indistinct; but, in general terms, when the law in words or by implication commits to any officer the duty of looking into facts, but after a discretion in its nature judicial, the function is termed quasi judicial." That it was in the power of the General Assembly to confer on the state board of tax commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate, and to assess the railroad property named in the Act, is not doubted, and the question as to whether the Legislature could confer upon it the power to fine and imprison the citizens of the state for contempt of its authority depends upon whether such action is purely judicial or only quasi judicial. A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for the contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. *Marxell v. Rives*, 11 Nev. 213; *Holman v. State*, 105 Ind. 513, 2 West. Rep. 791. In the case of *Ex parte Doll*, 7 Phila. 595, in discharging the prisoner, who had been committed by a commissioner appointed by the United States circuit court as for a contempt for refusing to appear and testify and to produce certain books, the court said: "I very much doubt the power of Congress to invest a commissioner with authority in a proceeding originally brought before him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which

they were appointed and held their offices." Again, in the celebrated case of *Kilbourn v. Thompson*, 103 U. S. 182, 26 L. ed. 384, involving the question of the power of Congress to arrest and punish a witness for contempt in refusing to answer questions before a committee of the house, *Justices Miller*, in speaking for the court said: "The Constitution declares that no person shall be deprived of his life, liberty, or property without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice, appointed by law, and governed by the rules of law previously established." So again, in the case of *Re Mason*, 48 Fed. Rep. 610, in which Mason had been committed by a United States circuit court commissioner for contempt in failing to appear and testify as a witness, the court said: "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases a mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inference and implication, but must be expressly conferred by law." As bearing upon the question now under discussion, see also in *Re McLean*, 37 Fed. Rep. 648; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242; *Shoults v. McPheeters*, 79 Ind. 873; *Vandercrook v. Williams*, 106 Ind. 845, 5 West. Rep. 248, and 108 Ind. 855, 5 West. Rep. 251; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Gregory v. Skate*, 94 Ind. 885; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a state expressly confers such power upon some other body or tribunal. Our state Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a party guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer. So far as we are informed, the trial of a citizen, involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the Act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of section 1, art. 8, of our state Constitution, and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion superior court did not err in ordering his release.

It is claimed, however, by the learned attorney general, that the conclusion here reached is in conflict with the conclusion in the cases of *Ex parte Mallinkrodt*, 20 Mo. 498; *Swafford v. Berrong*, 84 Ga. 65, and *Noyes v. Byrbee*, 45 Conn. 382. We have given each of those cases a careful consideration. In *Ex parte Mallinkrodt*, *supra*, it was held that the powers of a notary in taking depositions were purely statutory, and that the statutes of the state of Missouri did not confer on such officer the power to commit a witness for refusing to produce books. In the case of *Swafford v. Berrong*, *supra*, it was held that the Act of the General Assembly, incorporating the town of Clayton, conferred upon the governing board or council judicial power, with authority to try offenders alleged to have violated the town ordinances; and, inasmuch as it was a court, when sitting for that purpose, it had the power to punish for contempt. No question of the authority of the General Assembly to confer such power, under the Constitution of Georgia, was involved in the case or decided by the court. In the case of *Noyes v. Byrbee*, *supra*, it was held that the statutes of Connecticut did not confer on the insurance commissioners appointed to investigate the financial condition of life insurance companies power to commit a witness for refusing to be sworn to answer questions. In our opinion, these authorities do not conflict with the conclusion we have reached in this case. Striking out the portion of the statute which attempts to confer on the state board of tax commissioners the power to punish by fine and imprisonment for contempt does not necessarily affect the validity of any other provision, but it disposes of the question as to whether the appellee is lawfully imprisoned; and, striking out such provision, the conclusion follows that he is entitled to his release. This is the sole purpose of a suit of this kind. The purpose of the suit being attained, the other questions sought to be presented in this cause, and so ably discussed on both sides, do not arise, and we cannot with propriety discuss or decide them. If this were a prosecution for a violation of other provisions of the statute, or if it were a suit to enjoin the collection of increased taxes made on an increase in the value of property not named in the Act, fixed by the state board of tax commissioners in the exercise of original jurisdiction, then we could perhaps make a binding adjudication as to the other questions discussed, but in a suit like this, where the sole question relates to the right of the appellee to be released from an unlawful imprisonment, inflicted by a tribunal without authority to commit him, we do not think they are involved in such a sense as to render it necessary or proper that they should be decided.

Judgment affirmed.

Elliott, Ch. J., concurring:

A citizen can only be imprisoned by due process of law. Where there is an imprisonment without due process of law, the great writ of liberty will deliver the citizen from an unlawful restraint. If, therefore, the appellee was imprisoned without due process of law, the writ of habeas corpus was properly awarded, and this appeal must fail. There is,
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It is obvious, one question only that we can with propriety decide, and that is whether the appellee was imprisoned by due process of law. Prison doors open only at the command of the law, and that law must be warranted by the Constitution. It is the law that restrains citizens of their liberty, and the command for the restraint must issue from an officer or tribunal having jurisdiction to adjudge imprisonment. If the state board had jurisdiction to adjudge that the appellee should be imprisoned, there was due process of law; if it had no jurisdiction to imprison, there was not due process of law, and the appellee was unlawfully deprived of his liberty. A judgment of a tribunal—even of the highest in the land—is absolutely void if rendered in a case over which it had no authority. Whether the state board had authority in this instance to consign a citizen to prison depends upon the validity of the statutory provisions assuming to invest the board with the high power of casting citizens into jail. The question is one of legislative power. If the power exists, then the Legislature may authorize a board of town trustees, a board of assessors, a board of road supervisors, or any other administrative officer, to adjudge imprisonment against a citizen who disobeys an order made by it. If it be granted that the power exists, then it inevitably follows that it is one which cannot be limited or controlled by the courts, but is to be exercised without limit or restraint by the legislative department of the government. In my judgment, the Legislature has no power to authorize an administrative or executive officer, whatever his rank or duties, to sentence a citizen to imprisonment. It cannot confer that authority upon the governor of the state, nor upon any other executive or administrative officer, nor upon all the executive or administrative officers of the state combined. The Constitution defines the power of the Legislature to punish for contempt. It expressly provides when the Legislature may punish for contempts committed against its own immediate authority, and thus clearly denies the power to punish save as expressly provided, for the express provision excludes all implied ones. This is the provision of the Constitution: "Either House, during its session, may punish by imprisonment any person not a member, who shall have been guilty of disrespect to the House by disorderly or contemptuous behavior in its presence; but such imprisonment shall not at any time exceed twenty-four hours." Art. 4, § 15. This provision, as every one can see, closely binds and strongly fetters the power of the General Assembly itself, for it restricts the exercise of the authority to the time that body is in session, and limits the duration of the imprisonment to twenty-four hours. As the Legislature can only exercise the authority given it while in session, it is absolutely without power to lodge the authority in any officer or body of its own creation. The authority to imprison resides where the Constitution places it, and the Legislature cannot give it a residence elsewhere. The authority is essentially a judicial one, abiding in the courts of the land. As it is a judicial power, it is not created by the Legislature, nor vested by that body. The Legislature cannot create judicial power, nor

vest it in any tribunal. Judicial power, like all sovereign powers, comes from the people, and vests where the people's Constitution directs that it shall vest. The Legislature may name tribunals that shall exercise judicial powers, unless the Constitution otherwise provides; but the power itself comes from the Constitution, and not the statute. *State v. Noble*, 118 Ind. 350-354, 4 L. R. A. 101; *People v. Maynard*, 14 Ill. 419; *Perkins v. Corbin*, 45 Ala. 103. 6 Am. Rep. 698; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Missouri River Teleg. Co. v. First Nat. Bank of Sioux*, 74 Ill. 217; *Harris v. Vandervoer*, 21 N. J. Eq. 424. The Legislature may distribute the judicial power in accordance with the Constitution, but it cannot delegate that power, for the plain reason that it has none to delegate.

If the state board can be regarded as a judicial tribunal in the true sense of the term, the distribution of authority to it to punish for contempt by imprisonment would be valid and effective, but it is not a judicial tribunal. It does, indeed, possess powers of a judicial nature, but so does every officer in the land, high or low, who has the slightest discretion as to the mode of exercising his duty, and yet nothing can be clearer upon principle and authority than that such an officer is not a judicial officer within the meaning of the Constitution. *Eastman v. State*, 109 Ind. 273-281, 7 West. Rep. 418, 58 Am. Rep. 400, and cases cited; *Wilkins v. State*, 113 Ind. 514-519, 13 West. Rep. 354, and cases cited. We understand the attorney-general to concede in his able and elaborate argument that the state board is not a court. He says tersely and explicitly that "the state board is neither a court, nor can it be made a court." He endeavors however, to prove that the case is not within the rule that only courts can exercise purely judicial powers by this line of argument: "But," as he says, "the proceeding to assess and value property for the purposes of taxation is neither a case nor a controversy. It does not operate through legal forms, nor require the machinery of the courts to put it in operation. Such proceedings are not authorized to settle private controversies, and they do not involve any questions which courts are or ever were authorized to take jurisdiction of." It may be granted that this argument is in part valid, but it is so only in part. The conclusion spreads far beyond the valid premise. In free countries, courts always have assumed jurisdiction of questions involving personal liberty, and so they must, or else free government, securing personal liberty, ceases to exist. When that great right comes in issue, the courts hear and decide, and the authority of executive or administrative officers is at an end. Whatever else such officers may be empowered to do, they cannot be empowered to sit in judgment upon the right of a citizen to his personal liberty. Only the courts can give the command which takes from the citizen his liberty, and places him within prison walls, and they can only give it in accordance with the law of the land. However extensive the authority of the board may be, it is always ministerial or administrative, and hence it goes not far enough to adjudge imprisonment, for it is beyond the power of the Legislature to invest it, or any 16 L. R. A.

administrative board, with that high judicial function. It is doubtless within the power of the Legislature to authorize the state board to lodge a complaint against a person who disobeys a rightful order made by it in a court of competent jurisdiction, and thus secure by constitutional methods the punishment of a wrong-doer; but the board cannot be invested with the authority to hear and decide, for that dwells only in courts of justice. The board may be made a complainant by law, in a proceeding to punish a citizen who refuses obedience to its rightful authority, or it may be empowered to require some law officer of the state to invoke the assistance of the courts; but a court or a tribunal of judges it can never be as long as our Constitution remains unchanged, or as long as the great principle of free government forbidding the centralization of the powers of government in one department is respected and obeyed. For the reasons thus hastily stated and dimly outlined, I fully and unreservedly concur in the conclusion reached by the court.

Gustoff FRANK, *Appt.*,

Thomas J. FRAYLOR *et al.*

(.....Ind.....)

1. A judgment debtor who is in fact only a surety of a co-defendant may on payment of the judgment take an assignment thereof which will be valid al-

NOTE.—Right of surety who has paid judgment to enforce it for his own benefit.

At law.

In *Preslar v. Stallworth*, 37 Ala. 402, 406, it is said: "At law, it is well settled that the payment of a judgment by or its assignment to one of several defendants, extinguishes the judgment, although the defendant by whom it is paid, or to whom it is assigned, is a mere surety. A court of law cannot substitute such surety in the place of the plaintiff, and allow him to take out execution upon the judgment.

The judgment is regarded as extinguished against all. *Bank of Salina v. Abbot*, 8 Denio, 151; *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236; *Lyon v. Bolling*, 9 Ala. 466, 44 Am. Dec. 444.

At common law sureties who have paid a *f. fa.* have no right to return it and take out a *ca. sa.* and arrest their principal. *Elam v. Rawson*, 21 Ga. 139.

One of several sureties against whom judgment has been rendered cannot by paying the debt, without other proceeding, be substituted for the judgment creditor and proceed against his co-judgment debtors by execution. *McDaniel v. Lee*, 37 Mo. 204.

Where a surety on a note pays a judgment thereon obtained against the maker only, the judgment is extinguished as a cause of action and an assignment thereof gives the surety no right to enforce it. *Cleiman v. Murphy*, 34 Ill. App. 633.

Payment by a surety of a judgment against himself and his principal extinguishes it, although he did not so intend, so that an assignment of it to himself gives him no right against the property of his principal other than a simple contract creditor has. (*Briley v. Sugg*, 21 N. C. 368, 30 Am. Dec. 172) otherwise, however, if he had taken the assign-

though there has been no adjudication of his suretyship and that fact is not indicated on the face of the judgment.

- 2. An assignee of a judgment which has been kept alive after payment** in favor of one who appears to have been a principal but who claims to have been a surety, who takes his assignment before the question of suretyship has been adjudged, may raise such question and have it determined in a suit by a subsequent judgment creditor challenging the validity of his judgment as a prior lien.
- 3. The assignment of a judgment which does not purport to be satisfied to one of the judgment debtors** is sufficient to put a purchaser of a subsequent judgment on inquiry as to the rights of the assignee as surety.

(January 7, 1892.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Pike County in favor of defendants in a suit brought to have a judg-

ment to a stranger. *Hodges v. Armstrong*, 14 N. C. 258; *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264.

It is said *obiter* in *Ussell v. Mack*, 4 Humph. 319, 40 Am. Dec. 643: "Where a surety pays a bond or discharges a judgment, he extinguishes the only security the creditor has, and that being extinguished, there is nothing to which he can be substituted." Approved in *Miller v. Porter*, 5 Humph. 294.

It is said in *Bittick v. Wilkins*, 7 Helsk. 309, 310, that these cases "only hold that the surety is not substituted to the rights of the judgment creditor in such a sense as that an execution can be issued upon the judgment in his favor as an assignee of the judgment," but the surety can pursue in equity any fund of the principal which the judgment creditor could without obtaining another judgment.

The indorser of a promissory note after the payee, against whom and the maker judgment has been rendered thereon, is entitled upon payment by him of the judgment, and assignment to himself, to enforce the judgment in the same manner as could the judgment creditor. *Schlesman v. Kallenberg*, 72 Iowa, 383.

A surety may acquire a judgment which has been entered against himself and principal and retain it unsatisfied for his own protection, and payment for that purpose will not satisfy and discharge it. *Bleckman v. Butler*, 77 Iowa, 123.

A surety taking an assignment of a judgment against himself and principal upon payment thereof, may have execution for his use thereon against the principal alone. *Duffield v. Cooper*, 87 Pa. 443.

A surety paying an execution on a judgment against himself and principal may have the same assigned to him and hold by a levy the property of the principal attached on the original writ. *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Brewer v. Franklin Mills*, 42 N. H. 292.

In *Bones v. Aiken*, 35 Iowa, 534, it was held that while a surety paying a joint judgment might be entitled in equity to be subrogated to the rights of the judgment creditor, yet he could not take an assignment of the judgment and issue execution thereon against the principal since payment of the judgment extinguished it at law. Following this case is *Drefahl v. Tuttle*, 42 Iowa, 177.

In *Des Moines Sav. Bank v. Colfax Hotel Co.*, 79 Iowa, 497, it was held that one who was payee and indorser of a note upon which judgment has been obtained against the maker only may pay the judgment and take an assignment of it without extinguishing it, and may garnish the maker's debtor

ment held by defendants declared to be satisfied and removed as an apparent prior lien to a judgment held by plaintiff against the same property. *Affirmed*.

The facts are stated in the opinion.

Messrs. E. P. Richardson and A. H. Taylor for appellant.

Mr. E. A. Ely for appellees.

Miller, J., delivered the opinion of the court:

The appellant, who was the plaintiff, filed a complaint against the appellees, in substance, as follows: That on the 24th day of February, 1884, the appellees La Fayette Brenton and another executed a promissory note to one William W. Totten in part payment for real estate that day conveyed by Totten to Brenton. The note was assigned by Totten to one Ofill, who, on the 12th day of June, 1888, took judgment on the note against Brenton for \$740.85. This judgment was, on the 6th day of Sep-

thereon. The court distinguished this from the cases where the surety was a party to the judgment.

Where separate judgments are obtained against the principal and surety and the surety discharges that against himself, the judgment against the principal is thereby satisfied so that an action of debt thereon cannot be maintained by the surety to whom it has been assigned. *Topp v. Branch Bank of Alabama*, 2 Swan, 184.

In *Clason v. Morris*, 10 Johns. 524, it was held that where separate judgments were taken against the maker and indorser of a note, the indorser upon payment of the judgment against himself could take an assignment of the judgment against the maker and enforce the same by execution against the maker.

An indorser of a promissory note having paid a judgment thereon against the maker and himself and taken an assignment thereof may enforce an execution thereon against the property of the maker. *Corey v. White*, 3 Barb. 12, overruling *Ontario Bank v. Walker*, 1 Hill, 652, and *Bank of Helena v. Abbot*, 3 Denio, 181.

In this case the court took a distinction between subrogation by operation of law and express assignment, and also between a joint judgment against an ordinary principal and surety and a judgment against the maker and indorser of a note which is required to be joint by a statute while expressly reserving the rights of the several parties between themselves.

In *Eno v. Crooke*, 10 N. Y. 60, ignoring these distinctions it was laid down that an indorser of a note who has paid a judgment against himself is subrogated to the rights of the holder on a judgment against the maker, and may take an assignment thereof and maintain an action thereon.

A surety upon paying a judgment against himself and principal may direct an assignment of the judgment to a stranger, where the intention is not to extinguish it, and it may be revived upon *actio facias* by the assignee for the benefit of the surety. *Barringer v. Boyden*, 52 N. C. 187.

Payment to the clerk of the amount of the judgment by one of the judgment debtors, who was only a surety upon the original debt, not for the purpose of paying the judgment, but to procure an assignment thereof to his wife, does not amount to a satisfaction of the judgment, but the assignment to the wife and sheriff's deeds to her in its enforcement by her must be treated as valid. *Anglo-American Land, Mortg. & A. Co. v. Bush* (Iowa) Jan. 23, 1892.

In *Bally v. Brownfield*, 20 Pa. 41, *Black, Ch. J.*, says:

tember, 1889, sold and properly assigned to the appellant. The said La Fayette Brenton, Emily Brenton, and one Robert C. Conrad, on the 11th day of June, 1887, executed their joint and several promissory notes to one Charles E. Montgomery, on which notes Montgomery recovered a judgment against the makers, November 6, 1887, for \$748.78. On the day the judgment was rendered La Fayette Brenton paid thereon \$800, and at another time he paid \$100. That on the 30th day of July, 1888, Conrad paid \$481.60 in full of the principal, interest, and costs, and, instead of having satisfaction entered, procured Montgomery to assign the judgment to him. On the — day of August, 1889, Conrad assigned the judgment to the appellees Fraylor, who claims that the judgment is unpaid, and that it is senior to the judgment held by the appellant. The prayer is that the judgment held by Fraylor be declared satisfied. The defendant Fraylor answered this complaint, alleging in

his answer, among other things, that Conrad was the accommodation surety of La Fayette Brenton in the note to Montgomery, and that he made the payment of the balance due on the judgment as such surety, and at the time he did not intend that the judgment should be discharged. That, as a matter of precaution and notice to others, he procured Montgomery to assign the judgment to him, intending to become subrogated to all the rights of Montgomery in and to so much of the judgment as he paid as such surety. It is also alleged that the appellant, at the time he purchased the judgment, knew that Conrad was such surety, and that he paid the Montgomery judgment as such. The appellant contends that the various pleadings filed by the appellee, disclosing the facts above set out, were each bad on demurrer for failing to show that the question of suretyship between Conrad and Brenton had been determined by a judicial proceeding prior to the assignment of the judg-

"The entry of satisfaction on a judgment collected by execution from a surety, such entry not being made at the instance of the surety, is no ground for refusing subrogation. Whether the fact of payment does or does not appear on the record, it cannot be allowed to have any influence on the rights of the parties, except what equity gives it. It is also true that in this state a surety who has paid a debt secured by judgment against the principal, and who is in other respects entitled to be substituted to the rights of the creditor, may revive the judgment without first having a decree of subrogation and try his right as it was tried here on the *scire facias*. This results from our system of mingling equity and law together."

In equity.

In *Hayes v. Ward*, 4 Johns. Ch. 123, 1 L. ed. 786, 8 Am. Dec. 554, it is said to be "a settled principle of English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and to stand in the place of the creditor."

By the civil law a surety paying the debt is subrogated to the rights of the creditor, *ipso facto*. *Sandford v. McLean*, 8 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 773.

A surety upon payment of a judgment against himself and his principal may have the question of his suretyship determined by a suit in equity and be subrogated to all the rights of the judgment creditor. *Manford v. Firth*, 68 Ind. 88.

One of several co-sureties on a note, who had paid a judgment against the principal and all the sureties, may take an assignment thereof, and by invoking the equitable powers of the court be subrogated to all the rights of the judgment creditor against the maker and have his rights as to his co-sureties determined. *German-American Sav. Bank v. Fritz*, 68 Wis. 390.

In this case it is said: "Ordinarily, to secure the benefit of a judgment lien against a co-surety or co-accommodation indorser, the one paying the amount of the judgment should proceed by bill, suit, petition, or some proceeding in equity, wherein the equitable rights of the respective parties may be adjudicated and enforced. *Cuyler v. Ensworth*, 6 Paige, 28, 3 L. ed. 886; *Speigelmyer v. Crawford*, 6 Paige, 254, 3 L. ed. 978; *Goodyear v. Watson*, 14 Barb. 451; *Townsend v. Whitney*, 75 N. Y. 425; *Smith v. Rumsey*, 38 Mich. 183; *Neal v. Nash*, 23 Ohio St. 453; *Furnold v. Bank of State*, 44 Mo. 336; *Lidderdale v. Robinson*, 25 U. S. 12 Wheat. 394, 6 L. ed. 740. But such relief has been granted 16 L. R. A.

by order of the court upon hearing of the parties. *Springer v. Springer*, 43 Pa. 513."

A surety paying a judgment against himself and his principal is in equity entitled to be subrogated to all the rights of the judgment creditor as against other lien-holders (*Demsey v. Bush*, 18 Ohio St. 376), as well as against the principal judgment debtor. *Neal v. Nash*, 23 Ohio St. 453.

Equity regards the lien of a judgment paid by a surety as still subsisting, and will aid the surety in its enforcement for his reimbursement. *Searing v. Berry*, 18 Ohio, 20.

Sureties who have paid a judgment against themselves and their principal are entitled to be subrogated to the rights of the judgment creditor and to enforce in equity the same liens of the judgment which the creditor would have enforced. *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 206; *Perkins v. Kershaw*, 1 Hill, Eq. 844.

They are entitled to be substituted for the judgment creditor and may resort to lands fraudulently conveyed by his principal. *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444; *McClung v. Betrne*, 10 Leigh, 384, 34 Am. Dec. 739.

A surety who has paid a judgment against himself and principal is in equity entitled to be substituted for the creditor, and the lien of the judgment in his hands takes precedence of that of a subsequent judgment creditor. *Fleming v. Beaver*, 2 Rawle, 123, 19 Am. Dec. 623.

The court says in this case: "An actual assignment is unnecessary. The right of substitution is everything, and actual substitution nothing. By a fiction, to which we are indebted for nearly all our equitable jurisdiction, the law has made the assignment already; and, hence, the right of the party entitled by no means depends on the willingness of the creditor to transfer the security."

Where, on payment of the proceeds of sale into court for distribution, it appeared that a surety for the debtor had paid the judgment against the debtor, which was a lien on the land sold, under an agreement by which debtor was to pay a certain sum on a subsequent judgment lien on which the surety was also liable, the debtor's failure to perform relieves the surety from satisfaction of the prior judgment, and entitles him to have applied on it the money deposited in court as against a subsequent judgment lienor. *McCormick's App.* (Pa.) 12 Cent. Rep. 471.

A surety who has paid a judgment against himself and taken an assignment of the separate judgment obtained against the principal for the same debt, is entitled to have it paid out of the estate of

ment by him to the appellee Fraylor. The judgment in favor of Montgomery upon its face appears to be against all the makers as principals, and they are all primarily liable for its payment. If, in such case, the relationship of the judgment defendants is as it appears upon the face of the judgment to be, the payment by one of them would work a complete extinguishment and satisfaction of the judgment notwithstanding the agreement that it should be kept alive, and its assignment to Conrad. *Montgomery v. Vickery*, 110 Ind. 211, 8 West. Rep. 878; *Klippel v. Shields*, 90 Ind. 81. This, however, is not the question with which we have to deal; for it is alleged that Conrad was

in fact a surety who had paid the debt of his principal, although such suretyship had not been judicially declared. It has been held that where this question has not been judicially determined in the original action a complaint may be filed after the term, and after the surety has paid the judgment, to adjudicate that question. *Scherer v. Schutz*, 83 Ind. 548; *Richardson v. Horak*, 45 Ind. 451; *Montgomery v. Vickery*, 110 Ind. 211, 8 West. Rep. 878; *Knopf v. More*, 111 Ind. 570, 10 West. Rep. 812; *Duffy v. State*, 115 Ind. 851; *Kreider v. Isenbice*, 123 Ind. 10.

The case of *Manford v. Firth*, 68 Ind. 83, is in many respects similar to this one. In that

the deceased principal as a judgment debt and not as a simple-contract debt. *Thomson v. Palmer*, 3 Rich. Eq. 139; *Goodyear v. Watson*, 14 Barb. 481, *contra*, *Dinkins v. Bailey*, 28 Miss. 284.

Equity will not subrogate a surety who has paid a judgment to the rights of the judgment creditor after the surety has been defeated in an action at law against his principal for the money paid on the judgment. *Fink v. Mahaffy*, 8 Watts, 384.

A surety who pays a judgment against his principal has a right to an assignment of the judgment which equity will enforce. *Creager v. Brengle*, 5 Harr. & J. 284, 9 Am. Dec. 516.

A surety on an administrator's bond, who has paid a judgment recovered against the administrator by the administrator *de bonis non*, for failure to account, is subrogated to the right of the administrator *de bonis non*. *Cowgill v. Linville*, 3 West. Rep. 581, 20 Mo. App. 188.

A surety who executed a bond to escape execution on a judgment against himself and principal, and paid the bond, is in equity entitled to be subrogated to the rights of the creditor under the judgment against the principal debtor. *Dodd v. Wilson*, 4 Del. Ch. 399.

The decree subrogating the surety to the rights of the judgment creditor is not reviewable at the instance of the latter. *Springer v. Springer*, 43 Pa. 618.

A surety who has paid a judgment against himself and principal, by resorting to equity may secure the benefit of the lien of the judgment which the creditor had, but as his claim rests upon a promise implied by law he must commence his action in equity before the Statute of Limitations runs against such a promise. *Johnston v. Belden*, 49 Iowa, 301; *Neilson v. Fry*, 16 Ohio St. 552.

An action for subrogation is an action for equitable relief and as such must be brought within ten years in Ohio. *Neal v. Nash*, 28 Ohio St. 483.

But the right given to a surety who is certified as such in the judgment, upon payment thereof "to stand in the place of and for all the rights and remedies against the principal debtor or debtors that the plaintiff therein had at the time of such payment" by the Act of 1863, continues till the judgment outlaws. *Peters v. McWilliams*, 36 Ohio St. 155.

Under statutes.

An indorser who pays for the principal debtor a judgment against them jointly is immediately subrogated to all the rights of the judgment creditor, by virtue of Miss. Code, 1880, §§ 998, 1140. *Yates v. Mead*, 68 Miss. 787.

The entry of satisfaction on the execution docket and judgment roll, without the indorser's direction, by simply writing the word "Settled," is not ground for refusing subrogation to an indorser who paid a judgment recovered against himself and the drawer of a draft. *Ibid*.

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Failure of the record to show the fact of payment by an indorser of a judgment recovered against himself and the principal debtor does not affect the indorser's right to be subrogated to the rights of the judgment creditors. *Ibid*.

In Pennsylvania provision is made by statute (Brightly's Purdon's Dig. p. 827, § 40) for the enforcement by the surety of the lien of a judgment which he has paid against the land of his principal and co-sureties.

In Indiana provision is made by statute by which a surety who has paid a judgment, by having the fact of suretyship determined, can have execution thereon for his use against his principal. *Laval v. Rowley*, 17 Ind. 38.

So, too, in Maryland. See *Creager v. Brengle*, 5 Harr. & J. 284, 9 Am. Dec. 516.

In Georgia by statute a surety who has paid a judgment or execution is entitled to the control of the same in order to remunerate himself out of his principal's property. *Davenport v. Hardeman*, 5 Ga. 580.

A surety who pays a judgment against himself and his principal has the right, although not certified as such in the record of the judgment as provided by Ohio Rev. Stat., § 5836, to be subrogated to the judgment creditor's place. *Hill v. King*, 48 Ohio St. —.

If the surety be certified as such in the record of the judgment it seems he may, without the decree of a court subrogating him to the rights of the judgment creditor, under Ohio Rev. Stat., § 5367, issue an execution thereon. *Ibid*.

If part of the sureties on an official bond pay the judgment thereon, and in due time file the affidavits required by Wis. Rev. Stat., § 3024, to preserve their rights of subrogation to the lien of the judgment upon real estate, their affidavits inure to the benefit of another surety who afterwards pays them his share of such judgment; and he need not also file such an affidavit. *Mason v. Pierron*, 69 Wis. 565.

Under the Louisiana Code a surety paying a judgment is by operation of law subrogated to all the rights of the judgment creditor and may issue execution thereon in the name of the creditor for his own benefit against his co-judgment debtors. *Spring v. Beaman*, 6 La. 63; *Connely v. Bourg*, 18 La. Ann. 108, 79 Am. Dec. 568.

By statute in Georgia it is provided that a surety paying off a judgment by satisfying a court of common law that he was not interested in the consideration of the debt may have an order giving him control of the *f. fa.* or a court of equity will compel the creditor to assign the judgment to him. *McDougald v. Dougherty*, 14 Ga. 674.

So, too, in Kentucky. *Alexander v. Lewis*, 1 Met. (Ky.) 407; *Veach v. Wickersham*, 11 Bush. 261.

J. G. G.

case a surety paid the amount due on a judgment against all the makers, there having been no adjudication of his suretyship, and took an assignment executed by the attorney of the judgment plaintiff. The assignment was invalid to transfer the legal title of the judgment, because of want of authority on the part of the attorney to make it. It was held that it was good as an equitable assignment, and as such was notice to all subsequent purchasers that it had not been satisfied, and that when the surety had his suretyship determined he was subrogated to all the rights of the judgment creditor. We regard this as decisive of the objection that the adjudication of suretyship must precede the assignment of the judgment by Conrad to the appellee. We are also of the opinion that Conrad, having paid the amount due on the judgment, and having the right, dependent upon having his suretyship afterwards determined, to hold the judgment under such assignment, was vested with property rights and interests in the same which he might sell and assign to another. *Johnson v. Amona Lodge No. 82*, 93 Ind. 150; *Manford v. Firth*, *supra*.

The equitable right of the surety to be subrogated to the rights and position occupied by the judgment creditor before payment of the judgment is very strong, and the courts are disposed to look with favor upon any arrange-

ment, not in contravention of some rule of law, to place him in that position. *Harper v. Keys*, 43 Ind. 225; *Arbogast v. Hays*, 93 Ind. 26. The appellee having been brought into court by the appellant in an action challenging the validity of his claim to hold the judgment as a lien upon the land of Brenton, it became competent for him to have the suretyship of Conrad determined in the action. We have examined the evidence, and are satisfied that it fully sustains the finding of the court. The only objection pointed out in argument is the alleged failure to show notice to the appellant of the suretyship of Conrad, and of the payment of the judgment by him as such surety. If the appellant was a purchaser of real estate upon which the judgment would, if unsatisfied, be a lien, we would have a different question, and the cases of *Dougherty v. Richardson*, 20 Ind. 412, and *Thomas v. Stewart*, 117 Ind. 50, 1 L. R. A. 715, would be in point. The judgment did not appear to be satisfied. On the contrary, it bore upon its face an assignment to Conrad, and this, of itself, was sufficient to put the appellant upon inquiry as to the nature of his claim. *Manford v. Firth*, *supra*. It is not necessary to charge the appellant with notice that we should go to the extent that we would be authorized by the opinion in *Downey v. Washburn*, 79 Ind. 242.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Alonzo SANBORN

v.

DETROIT, BAY CITY & ALPENA R. CO., *Plff. in Err.*

(.....Mich.....)

1. A private crossing of which the railroad company has knowledge, and

NOTE.—At what railway crossings signals of trains are required.

A street must be traveled as well as public to bring it within the provisions of a statute requiring signals where a railroad "shall cross any traveled public road or street;" it is not sufficient that it has been dedicated to the public. *Byrne v. New York Cent. & H. R. Co.* 94 N. Y. 12; *Cordell v. New York Cent. & H. R. Co.* 64 N. Y. 535.

A crossing recognized by the railroad company as public for several years must be regarded as within the statute requiring signals at public crossings. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 493.

A road open and used by the public for a series of years, must be regarded as within a statute requiring signals at public highways. *Chicago & A. R. Co. v. Dillon*, 24 Ill. App. 208.

A crossing where a highway goes over a railroad by bridge is held in Alabama not to be within the meaning of a statute requiring signals at a public road crossing, as the design of the statute is to warn and protect persons who would be in danger of being struck and run over by a train. *Louisville & N. R. Co. v. Hall*, 4 L. R. A. 710, 87 Ala. 708.

But on the contrary, in New York a crossing at which a railroad is elevated above the highway over which it passes upon a bridge so as to prevent any danger of collision between travelers on the highway and the engines is within the statute 16 L. R. A.

which is used with its consent by men and teams in drawing logs, is not a railroad "crossing" within the meaning of 3 How. Stat., § 8375, at which signals by bell and whistle must be given.

2. Failure to give warning of the approach of a train to a private crossing which has been constructed with the company's consent for skidding logs along its track for

requiring signals at a railroad crossing, as the danger of frightening teams as well of actual collision is to be guarded against. *People v. New York Cent. & H. R. Co.* 25 Barb. 199.

So in Pennsylvania, apparently without any regard to statutory provisions, the failure to give signals of the approach of a train to a crossing where a highway passes over a railroad by a bridge until the train is under a bridge, makes a question for the jury as to the negligence of the company in failing to give the signals sooner. *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259.

A switch crossing provided by a railroad and across its own ground for ingress to and egress from its depot is not a "traveled public road" within the meaning of a statute requiring signals of the approach of a train at such crossing. *Hodges v. St. Louis, K. C. & N. R. Co.* 71 Mo. 50.

But to approach such a crossing without any signal may constitute negligence as a matter of fact. *Ibid.*

A railroad junction is a regular stopping place within the meaning of a statute requiring signals of the approach of trains. *Enaley R. Co. v. Chewning* (Ala.) June 11, 1891.

Private crossings.

Failure to give signals of a train at a private crossing is not generally to be regarded as negli-

transportation, is not negligence as matter of law.

3. One cannot act upon an agreement by a railroad company to give warning of the approach of a train to a private crossing, in determining his course of action at such crossing, if he knows that the warning is habitually omitted.
4. Failure to give the signals required by law at a railroad crossing renders the company liable for injuries in consequence thereof to a person lawfully crossing the track in that vicinity relying upon the performance by the railroad company of the duty to give such signals.

(May 13, 1893.)

ERROR to the Circuit Court for Alpena County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. J. C. Shields, with Mr. A. M. Henry, for appellant.

Mr. Frank Emerick, with Messrs. Turnbull & Daffoe, for appellee.

Long, J., delivered the following opinion:

This cause was tried in the Alpena circuit court. Plaintiff had verdict and judgment. Defendant brings error.

The first count of the declaration alleges that "the defendant, at or before the time of committing the grievances, was a corporation organized and existing under the general railroad laws of this state, and was operating and running its railroad and business between Alger and the city of Alpena, portions of its road and tracks passing through Alpena county. And

the said portions of its said road and tracks which passed through Alpena county were not, and never had been, fenced, and the public and plaintiff during all of this said time were invited and permitted by the defendant to bring timber and logs to its said track, and pile and skid said timber along the side of said track, so the same could be conveniently loaded upon the cars of defendant for transportation. And the plaintiff says that on the 18th of January, 1890, at the said county of Alpena, he was engaged, by the invitation of defendant, with a team of horses and log boat, in drawing logs and timber to defendant's said track at a point about one mile southwest of the city of Alpena, and was then and there piling and skidding the said timber along the side of defendant's said track, for the purpose of having the same loaded upon defendant's cars and transported to market. And plaintiff says that he had been thus engaged at work for three weeks previous to the said 18th day of January, and that in doing this said work had to use defendant's said track and road, and pass and re-pass over the same very frequently, and the defendant and its servants knew and had knowledge during all this time while plaintiff was doing his said work, as aforesaid, that plaintiff was thus using its said road and track and doing this said work as aforesaid. And the plaintiff says it was the duty of defendant, in running its trains and carrying on its said business, to have given warning to plaintiff in some manner of the approach of its trains, and not to have run its trains against and into plaintiff, while he was at work as aforesaid, yet the said defendant negligently and carelessly neglected its said duty on said 18th day of January, 1890, while plaintiff was at work as aforesaid, and while observing due care on his part, the defendant negligently and with-

gence. *Hucker v. Railroad Co.* 7 Ky. L. Rep. 761; *Johnson v. Louisville & N. R. Co.* M. S. Op. 1893.

In the absence of a statute requiring it a railroad company is under no duty to give signals of the approach of its trains to a private or farm crossing although it approaches it around a curve. *Annapolis, B. & S. L. R. Co. v. Pumphrey*, 72 Md. 82.

At a private crossing in the open country guarded by gates, where there is no station for passengers or freight, nor any side track, and where no trains ever stop, and where there is no custom to give signals, a railroad company is under no obligation to give signals of an approaching train. *Philadelphia, W. & B. R. Co. v. Fronk*, 67 Md. 389.

The public use of a foot-way as a crossing over a railroad track with the acquiescence of the company does not convert it into a public crossing within the meaning of a statute requiring signals of a train. *Gurley v. Missouri Pac. R. Co.* 104 Mo. 211; *Northern Cent. R. Co. v. State*, 54 Md. 118.

A place much used as a short cut over a railroad track between highways is not a crossing at which signals are required. *Holmes v. Central R. & Bkg. Co.* 37 Ga. 593.

But the user by the public of a path crossing a railroad track, although it cannot impose on the railroad company the statutory duty to signal the approach of its trains at a public crossing, may make a failure to give signals negligence in fact. *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 580, 16 L. R. A.

Although a railroad company is not absolutely bound to ring a bell or blow a whistle as the train approaches a place where the public are notoriously in the habit of crossing the track, but which is not a public crossing, some notice and warning is required in order to constitute reasonable care. *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645.

So reasonable care may require signals of the approach of a train at a place which is not a public crossing, but where persons who cannot be regarded merely as trespassers and who are engaged in business at that place may be called upon to pass from one side of the road to the other. *Owens v. Pennsylvania R. Co.* 41 Fed. Rep. 187.

A way kept open across a railroad track by the company's employes which the public are permitted to use as a highway requires the same care in handling trains across it as though it were a public way, except perhaps as to the statutory duty of ringing a bell or blowing a whistle on approaching it, and it is negligence to keep or shunt cars across it at great speed without any signal or warning with knowledge that a team is approaching the crossing. *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400.

A private crossing treated as a public highway by a railroad company by establishing a custom to give the usual statute signals there must be regarded for that purpose as a public crossing at which the signals are required. *Nash v. New York Cent. & H. R. Co.* 61 Hun. 594. B. A. R.

out any warning whatsoever run and caused to be run one of its freight trains along its said track into and against said plaintiff and his said team and boat load of logs, while plaintiff was crossing defendant's said track, doing the work aforesaid, thereby violently knocking the plaintiff down, and throwing the said team and log boat and its load of logs violently over and against the plaintiff, thereby greatly and permanently injuring plaintiff."

The second count alleges "that the defendant, well knowing its said duty, and on the 18th day of January, 1890, at the county of Alpena, did not and would not observe the same, but, upon the contrary, carelessly, negligently and unlawfully so conducted its said business and managed and run its trains on its said road and along this portion of its said track when plaintiff was at work, as aforesaid, as not to give plaintiff any warning or notice of the approach of said train, and then and there, without sounding or giving any signal, alarm or notice to plaintiff that any of its trains were approaching, did with great force then and there run into, over, and against plaintiff with one of its said engines (known as No. 14) and train of cars, thereby permanently and greatly injuring plaintiff, and causing all the damage set forth in the first count of this declaration, which said portion of said first count is hereby made a part of this count."

The third count alleges: "The defendant was daily running its engines and trains, transporting logs and lumber to the city of Alpena; and plaintiff says at said time he was by the permission, invitation, and consent of defendant using a portion of defendant's said road and track near the city of Alpena in banking, skidding, and piling logs upon it for the purpose of having the same transported by defendant's said trains to the city of Alpena, and the defendant and its agents knew and had notice that plaintiff was so using its said tracks and premises, and was in the habit of giving plaintiff notice of the approach of the said trains or engines over that portion of its said track being used by plaintiff as aforesaid; and plaintiff says it was the defendant's duty to give him such notice at this said time, but the plaintiff says that the defendant recklessly and unlawfully neglected its said duty, and carelessly, at the said time, January 18, 1890, ran a train of cars over this said portion of its road where plaintiff was at work, as aforesaid, without any notice or warning to plaintiff whatsoever, and caused the said train of cars to run against, over, and upon plaintiff, causing all the damage and injury to him specially set forth in the first count of this declaration."

It appeared upon the trial that at the time of the injury complained of the plaintiff was hauling and skidding pine saw-logs along defendant's track, about four miles from the city of Alpena, in the woods, and from one half of a mile to a mile from any highway and railroad crossing. The logs were being taken off from an 80-acre tract of land, through which the railroad extended north and south, the logs being taken from the east side of the railroad track. The plaintiff was a man about thirty-seven years of age at the time of the injury. He was hauling out these logs for a Mr. Chapman, who had the job. Plaintiff had been at

work two or three weeks prior to the injury. Others were there also, putting in logs alongside the railroad track, for the purpose of hauling them hauled by the defendant company to Alpena. Skidways had been made on both sides of the railroad track across this 80-acre tract, and the logs were being put on the skidways. For the purpose of crossing and re-crossing the railroad track with the boats upon which the logs were being hauled, Mr. Chapman had in three places across this tract of land placed planking upon either side of the railroad track, and had called the attention of the section foreman of the defendant company, who had examined them, to see whether they would interfere with the running of the trains. Defendant's road was used and operated as a commercial road, running freight and passenger trains thereon, as well as a logging road for the hauling of saw-logs along its line to Alpena and other points. The logs from these 80 acres were being put upon the skidways at the rate of from 100 to 200 per day. Upon either side of the railroad, and coming up to the defendant's right of way, the lands were covered with timber and brush, so that the railroad track could not be seen until one approached within two or three rods of it, when the track could be seen for a mile from where the plaintiff was employed. The plaintiff's haul of logs was only about 30 rods from the railroad, and he was perfectly familiar with the running of the trains over the road, as during the whole three weeks of his work he had been in the habit of crossing the track every day. The train by which the plaintiff was injured was a logging train. All trains had usually given the statutory signal by ringing the bell and sounding the whistle at Beck's farm crossing, which was from one half to three quarters of a mile north of the place where the plaintiff was working.

On the afternoon of January 18, 1890, at about two o'clock, the plaintiff claims that, having loaded three logs upon his boat, some 30 rods distant from the railroad track, he started to haul to the skidway across the track. Two of the logs were 20 feet in length, and the other 18 feet. He testified that he drove upon a little sharp hill, about three rods from the track, and stopped, and looked for the train; that he was then about a horse or two horses' lengths from the track; that he stepped forward of his horses, so he could see up and down the track; that he heard no sound of the approaching train, but that it was snowing and blowing so that he could only see a few rods in either direction; that he then went back to his load, stepped upon one of the logs, started his team forward, which took him from one to two minutes, and when his horses had so far crossed the track that their hind feet were between the rails and his log boat just entering upon the track, he heard a toot of the engine, looked up, and saw the train almost upon him; that he attempted to swing his horses around, and get them off from the track, and for that purpose stepped from the log upon which he was riding, picked up a switch, and struck them; that his horses were frightened by the toot of the engine, and stopped, when the engine struck between the horses and the boat, overturning the logs upon him,

and injuring him. He also testified that while all the trains had been accustomed to give the statutory signal at "Beck's farm crossing," the train by which he was struck did not ring the bell or sound the whistle at that crossing. He testified upon that subject as follows: "*Question.* During all this time, state where the trains would give you the signals as they came from Alpena. *Answer.* That was at Beck's farm. *Q.* At this general railroad crossing? *A.* Yes. *Q.* State what they did when they came there. *A.* They generally rung the bell and blew the whistle. The passenger always did there. I never knew it to fail. *Q.* Did you ever know any other train, up to this time, but what did that? *Mr. Shields:* I object to that as incompetent and immaterial. The Court: I suppose it is the theory of the plaintiff that on this occasion they did not even do that for a mile distant from where he was working. *Mr. Shields:* I don't think it has any importance. (The last question being read by the stenographer, the witness answered it as follows:) *A.* No, I don't think I did; not that I noticed. I think they all blew at that crossing, for that is the crossing that I went by. When I heard that I always looked up. *Q.* State to the jury whether this train that came there that day on which you got hurt— State to the jury whether that sounded any bell, or gave any whistle up to this crossing, before they reached you. (Which question was objected to as incompetent and immaterial, and not covered by the declaration, by defendant's counsel. Declaration was then read. The court: You may take this. To which ruling defendant did except.) *A.* No sir, they did not,—that is, until they got right on top of me. Just as they got close to me they gave a little toot. *Q.* I am asking you about the crossing. Now, then, state to the jury if they had given you this signal or warning by tooling their whistle or ringing their bell at this crossing— State to the jury whether you would have been caught upon the track, or whether the injury would have been inflicted. *Mr. Shields:* I object to that as incompetent and inadmissible. The Court: You may show, if they had given any whistle or rang the bell at the crossing, whether he would have heard it. *Q.* You may state, if they had given you any signal at this crossing, whether you would have heard it. *A.* I could have heard it sure. I always heard it when they whistled there. *Q.* State to the jury in reference to you hearing the whistle and bells of the other trains that day at this crossing,—that day when they came down there. *Mr. Shields:* I object to that as incompetent. The Court: I think it is proper. You may have an answer to it. (To which ruling defendant excepted.) *A.* I did. *Mr. Turnbull:* Now I want to ask him the question I did before, because our statute is peculiar. It, in so many words, says that the railroad is liable for any injury that they may perpetrate by reason of their not giving those signals at this crossing. Now, then, I want to ask this witness the question whether, if they had given him this signal at this crossing, whether the injury would have taken place. *Mr. Shields:* *Mr. Turnbull* cannot make a lawsuit here contrary to the facts and contrary to his declara-

tion. Injuries that happen upon a public highway are one thing; injuries that happen a mile or a half a mile away from the crossing are another thing. The Court: I think you may show that, if the signals had been given at the point that witness has designated, that if he was upon the track he could have withdrawn himself and team,—could have avoided the injury. *Q.* You may state whether, if those signals had been given at this crossing, at the place where you were on the track, or near the track where you were putting these logs, whether you could have avoided and would have avoided being on the track. *Mr. Shields:* I object to that as leading, incompetent, and inadmissible. The Court: Take an answer. *Mr. Shields:* I take an exception. *A.* Yes, sir; I would have avoided it." Plaintiff further testified that the afternoon freight usually passed that point about two o'clock, and that the log train by which he was injured usually passed there a little behind the freight train, sometimes a half hour and sometimes an hour later; but that on this day the log train came down ahead of the freight, and about an hour earlier.

Mr. Chapman was called by the plaintiff as a witness, and testified that this "Beck's crossing" was about three quarters of a mile from where plaintiff was injured; that he did not hear the ringing of the bell or the blowing of the whistle at this crossing, and the first he heard of the train was the sounding of the whistle at the place of the injury. He further testified that by spells that day the wind was blowing so desperately that you could not see three feet away, and then it would let up; that the wind did not interfere with the sound of the approaching train, and that one could hear the sound a good deal better that day.

The defendant introduced the evidence of the engineer, fireman, and brakeman on the train. They each testified that it was their custom to ring the bell and blow the whistle at "Beck's farm crossing," but that upon that particular day they were unable to state that this statutory signal was observed at that particular crossing any more than they could at any other crossing. The fireman testified that he looked out of the cab window, and saw the plaintiff about three car lengths from the engine; that at that time the plaintiff was within twelve or fourteen feet of the track, walking along the side of his boat; that he at once pulled the bell, and the engineer blew the whistle, when the plaintiff put the whip to the horses, and tried to run across the track, and when struck by the engine had got nearly across, and the boat had got on the track. This testimony was corroborated by the engineer and the brakeman. At the close of the testimony the defendant, by its counsel, requested the court to charge the jury as follows: "*Fourth.* Whether the bell was sounded or whistle blown on approaching the highway crossing, prior to reaching the place where Sanborn was, is of no importance in this case. Those signals are for persons who may be upon the highway." "*Eighth.* The plaintiff was aware, from his three weeks' work along the track, that trains were regularly running over the road, and it was his duty to care for himself, and avoid any collision. *Ninth.* It

would be negligence for the plaintiff to go upon the track relying upon the fact that he did not hear any signals at the highway crossing or near there. (a) If the jury believe the plaintiff saw or heard the train coming before going himself near the track, he cannot recover. (b) If the jury believe that the plaintiff, if he had used ordinary care, would or should have known the train was coming, he cannot recover; and in determining this the jury may consider, with other facts, that the train was on schedule time." These requests the court refused to give in charge to the jury, and charged the jury as follows: "Now, the plaintiff further contends that on this day in question the defendant corporation, in running the train which is claimed to have done the injury in this case,—if any was caused,—disregarded the required signals at the public highway crossing, which has been described here to be within half a mile or three quarters of a mile this side—towards the city—from the point of the accident. It is claimed here that the defendant corporation—its employes—in running that train entirely omitted the danger signals at this public highway crossing. I say to you, gentlemen, it was a duty which the law prescribes and imposes upon the defendant corporation at that highway crossing to give the requisite signals by the ringing of the bell and the blowing of the whistle. This is a duty which the law of this state imposes upon every railroad corporation when they seek the right and franchise of laying down and operating a railway and running its trains over their track. Now, it is one of the theories of the plaintiff's case that, if this signal had been given, he would have been warned of the approach of this train which caused the injury. And I say to you, gentlemen, here, that if you find as a fact in this case that the danger signals were not given at the highway crossing, and that, in consequence of the failure upon the part of the defendant corporation to give such signals, this injury occurred, this accident occurred, which resulted in the injury to the plaintiff,—if it has resulted in any injury to him,—the corporation would be liable. It was the omission of a duty which the law prescribes, and if from the omission to perform that duty injury has resulted to this plaintiff, the defendant would be liable. It is further contended and claimed here upon the part of the plaintiff that no warning was given by the train in question which caused the injury as it approached these other crossings, which had been put down, as the plaintiff claims, with the knowledge and acquiescence of this defendant. Now, upon this branch of the case I instruct you, gentlemen of the jury, that, if the defendant corporation knew that a crossing had been made, if the defendant, by its officers or agents, were present, and acquiesced in and recognized the making of a crossing at the point where the plaintiff was injured, if you find that as a fact from the evidence in this case, if you find such to be the fact from the evidence in this case, I charge you that it would then be the duty of this defendant corporation, if they had any notice or knowledge that people were using such crossing and working thereabouts, to give reasonable warning of the approach of trains

at that crossing. If that crossing was made there with their knowledge and acquiescence and consent, and they knew it was to be used by men and animals in drawing logs to their railway, and banking them along their railway, it was their duty, when approaching that point, to give such signals and such warning as would give persons to understand or know that a train was approaching, and that danger might be expected, so that they could avoid it." The objection to the testimony, the defendant's request to charge, and the charges as given, raise the important questions for determination here.

It is contended by plaintiff's counsel that the court was not in error in permitting him to show that the danger signals were not given at the highway crossing; that the plaintiff was injured by reason of the failure of the engineer to ring the bell or blow the whistle at this crossing; that the court was not in error in refusing the defendant's request to charge on that subject, and in charging the jury that, if they found that defendant neglected to give such signals, and the plaintiff was injured for such reason, the defendant would be liable. It is also contended that the court was not in error in charging the jury that it was the duty of the defendant, if it knew this crossing, made by Chapman, and used by the plaintiff to haul logs over,—knew that the crossing was made and used by plaintiff in putting in logs,—to give reasonable warning by the whistle or bell of the approach of the train.

Section 3875, 3 How. Stat., provides as follows: "A bell of at least thirty pounds weight, and a steam whistle, shall be placed upon each locomotive engine, and said whistle shall be twice sharply sounded at least forty rods before the crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of one hundred dollars for every neglect; provided, that at street crossings within the limits of incorporated cities and villages, the sounding of the whistle may be omitted, unless required by the common council or board of trustees of such city or village; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." Counsel for plaintiff contends that under these provisions of the statute defendant, to escape liability, should have given the signals at "Beck's Crossing," and in support of that proposition cites *Ransom v. Chicago, St. P. M. & O. R. Co.* 62 Wis. 178, 51 Am. Rep. 718; *Norton v. Eastern R. Co.* 118 Mass. 366; *Pollock v. Eastern R. Co.* 124 Mass. 158; *Palmer v. St. Paul & D. R. Co.* 88 Minn. 415; *Cosgrove v. New York Cent. & H. R. R. Co.* 87 N. Y. 88, 41 Am. Rep. 355; *Voak v. Northern Cent. R. Co.* 75 N. Y. 320; *Haas v. Grand Rapids & I. R. Co.* 47 Mich. 402; *Chicago & N. W. R. Co. v. Miller*, 46 Mich. 582; *Klanowski v. Grand Trunk R. Co.* 67 Mich. 525; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400. An examination of these cases will show that not one of them bears out the claim made by plaintiff's counsel in the present case. All of the cases above cited are either where the persons were on the highway when injured, or are cases where some other negligence aside from the ringing

of the bell or blowing of the whistle at the public highway crossing was charged. In the case of *Ransom v. Chicago, St. P. M. & O. R. Co.*, *supra*, the plaintiff's wife, accompanied by their two minor children, was driving a horse on the highway towards the railway crossing. The road upon which she was driving was an east and west road and ran parallel with the railroad, and the railroad crossed the north and south highway near that point. As the train approached this crossing of the north and south highway, the engineer failed to ring the bell or blow the whistle. The train had passed through a deep cut near this crossing, and, emerging from it, frightened the horse driven by plaintiff's wife, causing him to run, overturning the buggy, killing his wife, and severely injuring his children. The statutes of Wisconsin provide that, before crossing any highway, except in cities and villages, with any locomotive, the whistle shall be blown 80 rods from such crossing, and the engine bell rung continuously from thence until the highway shall be crossed by the locomotive. It was contended in that case that the defendant company owed the duty to the plaintiff's wife and children to give the signals required by the statute of the approach of its train to the crossing, although she was not driving upon the highway which crossed the railroad track, but upon one parallel with the railroad. The court held that persons driving on the highway in the vicinity of the crossing were within the protection of the statute, and that it made no difference that the highway upon which the deceased was driving was one crossing on a level with the railroad, or whether it passed over or under or parallel with it, yet all persons using the highway for public driving were entitled to the protection that the statute affords, which compels the ringing of the bell and the blowing of the whistle at all highway crossings.

In *Norton v. Eastern R. Co.*, *supra*, the plaintiff was driving his horse, hitched to a wagon, on the highway crossed by defendant's track at grade, and when within 86 feet of the track a train of cars passed over the crossing, frightening his horse, causing him to kick, breaking plaintiff's leg. It was claimed in that case that no bell was rung or whistle sounded to intimate the approach of the train. It was further claimed in that case that this was a flag station, and no flagman was there. It was also contended upon the part of defendant that, even if the signals by bell or whistle were omitted, and if, in consequence of this omission, the plaintiff approached nearer to the train than he would otherwise have done, the injury being caused by the fright of the horse, occasioned by this proximity, they were not to be held responsible therefor, because they contend that such signals are intended to protect travelers at highway crossings from actual collisions only, or at most from taking any position which involves imminent danger of collisions; and that this is the extent of the protection which the statute affords. It was held by the court that a fair construction of the statutes of Massachusetts (which are somewhat similar to ours) is that these signals are also intended for the benefit of those approaching crossings, for whom their warning would

be valuable, and that any one thus situated, who is injured by the omission of that which the statute requires, has just grounds of complaint. The reason of this rule, as stated by the court, is that "at such crossings the railroads are permitted to interfere with the ordinary use of the public easement, and, from the nature of the motive power employed by them; and the difficulties attending its management, the exercise of their right temporarily excludes the ordinary traveler from the use to which he is at other times entitled. But, as this use may often be made with animals liable to be alarmed by the noises of the passing train, it is important for his safety that he should be informed of the approach of the train to the highway, in order that he may take proper measures against injury from such alarm. The signals are intended to give sufficient warning to enable him to do so." The same rule was laid down in *Pollock v. Eastern R. Co.*, *supra*.

In *Palmer v. St. Paul & D. R. Co.*, *supra*, one of the acts of negligence complained of was the omission to give the signal of the approach of the train by ringing a bell or blowing a whistle before reaching the crossing, as required by statute. That statute is somewhat similar to our own. The action was for killing plaintiff's cattle, then on a highway crossing. It was contended that these signals required by the statute were only intended as a warning to human beings, and not to cattle. The court held that the omission to give these signals might properly be shown, and that it was for the jury to say, under all the circumstances of the case, whether the giving of the signal would have prevented the accident.

In *Cogrove v. New York Cent. & H. R. R. Co.*, *supra*, the negligence imputed to the defendant was the failure to ring the bell or sound the whistle. The deceased and one Barringer were killed by the collision of the horse and carriage, in which they were riding, with defendant's train, upon a public highway crossing. The question was one of contributory negligence, and there was no question in the case but that it was the duty of the defendant company to ring its bell and blow its whistle.

In *Voak v. Northern Cent. R. Co.*, *supra*, the plaintiff was riding in a buggy, she herself driving. She approached the track with great circumspection, listening and looking for the train; but, in consequence of certain obstructions, she did not see the train until she was within three rods of the crossing. She could not turn around. Her horse became frightened and restive. She backed it about three rods, and then, at a loud blast of the whistle for the first time given at the crossing, her horse turned around, and she was thrown out of the buggy and injured. The statute of New York provides that, where the railroad should cross any traveled public road or street on the same level with the railroad, the engine bell shall be rung or whistle sounded at least eighty rods from the crossing, and that the bell shall be kept ringing, or that the whistle shall be sounded at intervals, until the engine shall have crossed the road; and for neglect to comply with these requirements the railroad company is made liable for the damages sustained by any person by reason of the negligence. It

was stated by the court "that the purpose of this provision is the protection of persons actually crossing a railroad track, and also of persons approaching such a track,"—citing *People v. New York Cent. & H. R. R. Co.* 25 Barb. 199, and *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 471. "The warning is required to be given so that all persons lawfully using the public highway may keep out of danger at railroad crossings; danger not only from collisions at the crossings, but also from the fright of horses by passing trains. The law makes it negligence not to give the warning, and then imposes a liability for all the damages which can properly be attributed to such negligence.

In *Hans v. Grand Rapids & I. R. Co.*, *supra*, the action was brought by the plaintiff, as administrator of the estate of Adrian Leenders, for causing the death of his intestate by negligently running one of its trains so as to collide with his team while he was crossing defendant's track in passing along the public highway. On the trial in the court below the case was taken from the jury by instructions of the judge that they should return a verdict for the defendant. The defense insisted that the only negligence shown was imputable to Leenders himself, who carelessly drove against the train, though he was fairly warned of its approach. It was said in the case that no signboard, as required by the statute, had been erected at this crossing; but the plaintiff gave evidence that his decedent was familiar with the crossing; that he not only knew about it, but had frequent occasion to pass over it. More than this, it was a part of the plaintiff's case that the decedent had the crossing in mind when he approached it on the occasion in question, and checked his team to listen for the signals of the approach of the train. It was said by this court that, in view of that fact and the showing of the plaintiff himself, it was of no importance in the case that the railroad company had failed to erect the caution board; that the duty to erect it was a duty to the public, and no private action could be grounded upon the negligence in his individual injury, though traced to it.

In *Chicago & N. W. R. Co. v. Miller*, *supra*, the injury was one occurring upon the public highway. In that case the complaint was that the defendant company failed to ring its bell or blow its whistle in approaching the highway crossing, by reason of which the plaintiff was injured.

In *Klanowski v. Grand Trunk R. Co.*, *supra*, the injury was received upon the highway crossing.

It is upon these authorities that the plaintiff's counsel asks this court to give to the statute the broad construction contended for. We cannot agree with the learned counsel for the plaintiff that the statute was ever intended by the Legislature to be so construed. Similar statutes in other states have received a different construction by the court of those states. In *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 468, the statute of New Jersey, similar to ours, was construed by the Court of Appeals of New York. The action was brought by the administratrix against the defendant company for negligently causing

the death of her husband. The intestate was struck by one of the defendant's engines, and fatally injured, at a point about 200 feet east from a railroad crossing. The railroad runs easterly and westerly, and the highway crosses it northerly and southerly. The train was going westerly. There were three parallel tracks. Upon the south track there were two gravel trains, standing still; one just east of the crossing, and one partly across and west of it. There was a train from the west upon the middle track, which at the time of the accident had reached a point 1,500 feet west of the crossing, and the whistle upon that engine was blowing. The intestate, for three months, had lived within a quarter of a mile of the crossing, and in sight of the railroad. He worked in a slaughter house near the railroad, and about a quarter of a mile east of the crossing. He and many other persons working in the slaughter house had been in the habit of going to and from the slaughter house, passing over the railroad to and from the crossing. On the day of the accident he started from the slaughter house, to go home. He was passing along west upon the middle track, and it is supposed that he either saw the train coming east upon the same track, or heard its whistle. He stepped upon the north track, and just as he did so he was struck by a train going west upon the north track. The bell upon this train was not rung and the whistle not blown, and there was no signboard at the railroad crossing, as required by law. Earl, *Ch. J.*, speaking for the court, said: "I shall assume that the intestate was lawfully upon the railroad at the time of the accident. There was sufficient evidence to authorize the jury to find an implied license to all persons working at the slaughter house to go upon the railroad between the highway crossing and the slaughter house; but I think the plaintiff should have been defeated at the circuit, both because of failure to show negligence on the part of the defendant and because the negligence of the intestate contributed to the accident. The only negligence alleged against the defendant was that its servants upon the engine did not ring the bell nor blow the whistle, as required by New Jersey law. The sole object of this law, it seems to me, was to protect persons traveling upon the highway at or near the crossing. In the language of Allen, *J.*, in *People v. New York Cent. & H. R. R. Co.*, 25 Barb. 199, in reference to a similar law of this state: 'The hazards to be provided against are twofold: first, the danger of actual collisions at the crossing; second, that of damage by the frightening of teams traveling upon the public highway,' near the crossing. For the protection of such persons railroads were required to put up the signboard at the crossing, and to ring the bell or blow the whistle. The sign-board was to be up 'so as to be easily seen by travelers,' and none of these precautions were required except where the railroad and highway crossed each other upon the same level, thus showing clearly that the law-makers had in mind only the danger to travelers upon the highway by collisions at crossings. Railroad companies were not required by this law to ring the bell or sound the whistle when the highway passed along the railroad, nor when

it passed at an elevation over it or under it. Nor were they required to take this precaution for the protection of persons walking along the railroad. I conclude, therefore, that the intestate was not within the protection of this law; that the railroad company owed him no duty under the law to ring the bell or sound the whistle; but the duty of the railroad is not limited by the measure imposed by this law. They are bound to use at least ordinary prudence and diligence to avoid collisions with persons lawfully crossing their tracks, and hence at road crossings and in the streets of villages and cities, in the absence of any statute law they would be required to use these ordinary precautions to avoid accidents, and, if they omitted to do this, they would be liable to persons injured without their own fault by collisions."

In *Chicago, R. I. & P. R. Co. v. Binninger*, 114 Ill. 88, it appeared that the trial court instructed the jury that, if the injury happened because of there being no flagman at the railroad crossing at Twenty-Fourth street, to give warning to those about to cross the street and railroad track of the approach of the train of cars to the crossing, contrary to the city ordinance, then the plaintiff was entitled to recover. The evidence upon the part of the defendant showed that at the time the plaintiff was struck he was traveling along and upon the railroad right of way for his own convenience. It was said by the court that, "under such circumstances plaintiff was not a lawful traveler upon the highway. To such a one the railroad company does not owe the duty in respect to a flagman. Flagmen are for the protection of persons crossing railroad tracks, and are not for the benefit of persons walking along and upon the railroad track, employing it as a footpath. This instruction was calculated to mislead, and should not have been given."

In *Elwood v. New York Cent. & H. R. R. Co.*, 4 Hun, 808, it appeared that defendant's passenger train stood at its depot, in front of the platform for the use of passengers. The deceased (plaintiff's intestate) approached from the opposite side, without the knowledge of defendant or its employes, got upon a car from the side opposite the depot platform, found the car locked, got off from the platform of the car on the side from which he had approached it, and undertook to walk between the tracks to the end of the train, without looking behind him. He was struck by the working train approaching him from behind, and killed. It was held that the negligence of the intestate contributed to the injury; and that the fact that the working train did not give the signals required by the statute on crossing a street before reaching the depot was not an act of negligence towards the intestate, who was not on a street where he had any business to be.

In *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 60, it appears that the court below gave the following instructions to the jury: "It is the duty of those in charge of locomotives and trains of cars in approaching crossings of the public street to ring the bell or sound the steam whistle at the distance of eighty rods therefrom, and to keep ringing the bell continuously, or sound the steam whistle at intervals, until the train shall pass over such public

street; and if the jury believes from the evidence that in this case, as the train approached and passed over the public street in the town of Meadville, the persons in charge thereof did not ring the bell or blow the whistle as above required, and that the boy, Athan Bell, was struck by the locomotive and killed by reason of said omission, and without fault on his part, then the jury will find their verdict for plaintiff." The court in speaking of these instructions, said: "The third instruction is also objected to on the ground that it had nothing to do with the case. We concur in this view, although its impropriety alone would scarcely justify a reversal. The statute which requires the bell to be rung and the whistle sounded was for the benefit of persons at the railroad crossing or approaching it; but the boy killed in this case was not on the road or at the crossing, but forty or sixty feet west of it."

In *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea, 108, the action was brought by the husband to recover damages for injuries received by the wife by her horse being frightened by a train on defendant's track. She was riding her horse on a public highway parallel with a railroad, which was crossed by another highway. The noise of a passing train frightened her horse, which threw and injured her. It was held that the statute of Tennessee did not impose the duty on the railroad company to ring the bell or sound the whistle for the protection of any persons except those crossing or about to cross the railroad track on a public highway. Subsection 2 of the Act provides that signs should be placed by the overseer of any public road at crossings, and marked, "Look out for the cars when you hear the whistle or bell." Subsection 8 provides: "On approaching any crossing so distinguished, the whistle or the bell of the locomotive shall be sounded at the distance of one fourth of a mile from the crossing, and at short intervals till the train has passed the crossing." See also *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211.

The law is therefore well settled that a traveler upon the highway has a right to assume that a railway company will thus perform its statutory duty; and one on a highway, when he approaches a railroad crossing, and can neither see nor hear any indications of a moving train, is not chargeable with negligence for assuming that there is no train sufficiently near to make the crossing dangerous: One in such a position has a right to assume that a railroad company in handling their cars will act with appropriate care; and that the usual signals of approach will be reasonably given. The learned circuit judge, in the present case, by the admission of testimony, the refusal to charge as requested, and in the charge as given, laid down the rule as above stated, and held the defendant to the same degree of care as if the plaintiff were on a public highway; and not only that, but he gave to the plaintiff all the rights which pertain to one approaching a track on a public highway, and applied the rule that the plaintiff had the right to rely upon the defendants giving these signals at Beck's crossing, as well as the crossings put in by Chapman. The theory of the plaintiff upon which the case was tried was that defendant omitted to give these danger signals at Beck's

crossing, and that such omission was the cause of the injury. This was the theory upon which the court submitted the case to the jury. Upon the trial the court remarked to counsel: "I suppose it is the theory of the plaintiff that they did not even do that [give the signals] for a mile distant from where he was working." If this can be claimed as negligence as matter of law, and for the reason that the statute requires such signals to be given, then at every farm crossing, or at any other place where people may lawfully work upon or across a railroad track, such signals must be given at the nearest highway crossing, and a failure to do so would be negligence, which any party injured might allege as a ground of action. This question has never before been presented to this court. After a full review of the cases arising in the courts of other states under somewhat similar statutes, it appears that the whole weight of authority is against the claim made by plaintiff's counsel. In fact, but one case has been found (and I doubt if any other can be found) where the court of last resort of any state has given such a construction as claimed here to a statute similar to ours. On the contrary, the courts of New York, Rhode Island, Massachusetts, and other states, where the question has been passed upon, have uniformly held that the statute can be invoked only in aid of those actually upon the highway. The case referred to as holding a contrary doctrine is *Caill v. Cincinnati, N. O. & T. P. R. Co.* (Ky.) 18 Ky. L. Rep. 714, in which the rule is laid down that "persons lawfully using a private crossing are entitled to the benefit of signals which they know it is the duty and custom of the railroad to give at the public crossings." This case has been called to my attention since the argument of the present case, and fully sustains the claim made by plaintiff's counsel. The learned judge who wrote the opinion does not cite a single case to sustain the doctrine laid down by him, but contents himself with a statement from 4 Am. & Eng. Encyclop. Law, p. 917: "That there is a conflict of authority on the question; the doctrine of some of the courts being that only travelers on a highway or street approaching or using a crossing can complain of omission to give required signals; while by others it is held that all persons in the vicinity of a public crossing, whether intending to use it or not, are entitled to the benefit of signals, and have a right to rely upon their being given." An examination of the cases cited by this author as supporting the last proposition will show that there is no conflict of authority in the cases upon the proposition that one who is not traveling along or in the highway at the time of the injury complained of cannot invoke the aid of the statute; and the only disagreement between the courts of the several states has been whether these statutes applied to others on the highway who were crossing or about to cross the railroad track. I do not think that the author intended to be understood that there was a conflict of opinion on the question whether a person who was not on the highway at all at the time of the injury could invoke the aid of the statute, but that the disagreement had been whether these statutes applied

to persons who were on the highway and not actually crossing or attempting to cross the railroad track, and could not aid one who, though on the highway, was not crossing or attempting to cross the track, but traveling along near the crossing; as, for instance, the cases where recovery has been permitted for frightening horses, some of the courts holding that the statute was intended to prevent only actual collisions. Our statute requires the ringing of the bell or sounding of the whistle at least 40 rods before the crossing is reached. This fixes a reasonable distance for warning to be given before the train reaches the highway crossing; and it cannot be assumed that the Legislature intended that one at any other place than on the highway might claim the right to have it sounded; and as to such person, neither at common law nor under the statute is any duty fixed upon the railroad company to ring the bell or blow the whistle at least 40 rods before the crossing is reached.

Upon the second proposition it is claimed that, if the defendant company consented to the placing of those crossings there, and knew that logs were being hauled along its tracks and across them, it was defendant's duty to give some warning of the approach of its trains, either by ringing the bell or blowing the whistle. It is undoubtedly true that, where a railroad company invites parties to bring freight to it, while so doing it owes the duty of reasonable care, the same as a person who expressly or by implication invites persons upon his premises assumes the duty of warning all who may accept the invitation of any danger in coming of which he knows, but of which they are not aware. It appears, however, that the plaintiff knew of the running of trains over this road. He knew of the regular passenger trains, the freight trains, and the irregular running of this log train. He knew a train might pass there any moment. He looked for one, stopped his team, went forward of the horses, and claims he looked and listened. It is difficult to discover in what the defendant company was negligent. If it were not called upon to ring the bell or blow the whistle at Beck's crossing so far as the plaintiff was concerned, what duty did it neglect? What duty did it owe to the plaintiff? The claim is made that, if the company were not called upon to ring the bell or blow the whistle at Beck's crossing, they were called upon to give these danger signals at the crossings made by Chapman, or to do some other act for the protection of the plaintiff. Admitting that the plaintiff was rightfully upon defendant's grounds, placing these logs there, and that Chapman had been permitted to place these crossings for the purpose of enabling the plaintiff to haul the logs over, yet the defendant was under no obligation to run its trains other than in the ordinary way. If it was the duty of the defendant to have given these danger signals at this point because the plaintiff may have been about to haul logs across the track, it might as well be held the duty of the company to give these danger signals at every farm crossing, or other points on its road where people are permitted to cross the track or travel along it as a footway. Persons so using the railroad track have no right to claim that the

company shall give danger signals at such points. It would be requiring of railroad companies a duty which would be impossible of observance at all times. Highway crossings are very easy to be discovered by those in charge of the engine. Signboards are erected, and the engineer and fireman get familiar with their location. At other places along the route of the road, such as farm crossings, and places where men may be at times temporarily engaged, or where a footway is used by permission, there may be no distinguishing marks. New men may be upon the engines. The work may have just commenced, and the place not known to those in charge of the engine or train. If these signals were to be required of this log train, they would be required of the freight and passenger trains, and the company would have to respond in damages if they were not observed. I can discover nothing in the case which shows any neglect of duty on the part of the railway company or its servants. In fact, the plaintiff testifies that he relied upon the signals at Beck's crossing. He does not claim that the company had been accustomed to give any signals at the Chapman crossings, or that he in any manner relied upon its giving such signals. It is apparent that the engineer and fireman on the engine did all in their power to prevent the accident as soon as the plaintiff was discovered on the track. In *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 246, the plaintiff's intestate was on the track of defendant company, not on a public highway. He was not a trespasser there, but there by license of defendant. It was said that, in order to recover, some breach of duty on the part of the defendant must be shown. The claim of negligence was in letting some loose cars back upon the plaintiff's intestate without warning of danger. It was held that no negligence was shown. I think also that the plaintiff, by his own showing, was guilty of the grossest carelessness. He admits he stopped one or two horses' lengths from the track. He went in front of his horses, and says he looked and listened, but that the snow was blowing so that he could not see more than three or four rods up the track. He went back and started his team, which took from one to two minutes. He stepped upon one of the logs, and drove upon the track. He did not stop when the horses reached the track, though a few minutes before he was looking for a train. The situation there, considering the blowing of the snow, was such as required the greatest care on his part. Not only his own safety, but the safety of the persons who might be upon the passing train, required this. He should have stopped when his horses reached the track, and, before driving them on to the track, should have gone forward upon the track and looked and listened; and, if he could see only a rod or two up the track on account of the blinding snow, he might well have hesitated about driving across with such a load as he had upon his boat. The defendant's requests set out here should have been given. Some errors are alleged in the admission of testimony which we do not deem it important to discuss.

For the errors pointed out the judgment below

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will be reversed, with costs, and a new trial ordered.

Grant, J., concurred with Long, J.

Montgomery, J., delivered the following opinion:

The plaintiff adduced testimony tending to show that he was working hauling and skidding pine logs along the defendant's track, at a point where a crossing had been made over the defendant's track for the purpose of hauling logs across; that defendant's agents and servants knew of this track, and that it had been in use for some three or four weeks by plaintiff and others, and that the defendant's trains had daily passed over this portion of the road. The testimony also showed that there was a public highway crossing about three quarters of a mile from where the plaintiff was injured, known as "Beck's crossing." The plaintiff, being upon this temporary crossing with a boat-load of logs, drawn by a span of horses, having gone upon the track, as he claims, after stopping to look and listen, and not being able to see any train coming, was struck by the locomotive of a log train on the defendant's road and received injuries, for which he recovered damages. The evidence also showed that the day was stormy, snow flying in the air, and that it was difficult to see any great distance. Two grounds of negligence were alleged against the defendant, and, under the instructions of the circuit judge, the jury were permitted to find against the defendant upon either ground. The first ground of negligence averred was the omission to ring the bell and blow the whistle at the private crossing. The learned circuit judge instructed the jury: "If this crossing, testified to by Chapman as having been made by him for the purpose of use in the hauling of those logs, if it was made with the knowledge and consent or acquiescence of the defendant railroad company, and they knew . . . that it was to be used, and was being used, as a crossing, the law would impose upon them the duty of giving such warning by giving signal, either by ringing the bell or blowing the whistle, as would fairly warn people in the use of it of approaching trains; and if they failed to do so it would be negligence on their part." The second ground of negligence relied upon was the failure of the defendant's agents to blow the whistle for Beck's crossing, as required by statute. It was clearly error for the circuit judge to instruct the jury, as he did, that the failure to give a signal of the approaching train at the private crossing was negligence as matter of law. *Galena & O. U. R. Co. v. Dill*, 23 Ill. 264; *Rorer, R. R. § 1012*. It was claimed by the plaintiff that the use of this private crossing was such an implied invitation on the part of the railroad company, or at the least amounted to a license to use it for a crossing. But, if so, it was a limited license, the limitations being understood as well by the plaintiff as defendant's servants. The plaintiff's testimony tended to show that the defendant's train passed this point every day at about the hour of this accident, and that there was no custom of giving any signal at such private crossing. How, then, could the plaintiff be

permitted to maintain that he was there under an invitation to cross, with the assurance that warning would be given? On the contrary, if there had been no custom to give such warning, the plaintiff must have been fully assured that no such duty had been undertaken by the company, and, this being so, it should be held that the company had never invited or licensed the plaintiff to make use of this crossing in any such sense as to have assumed the burden or duty of running its trains past this point in any other than the usual way. A discovered and known omission of an alleged duty cannot constitute a proximate cause of an injury which results to one who proceeds, with knowledge that such alleged duty will not be observed, to perform an act which is only safe on the assumption that such duty would be attended to. As is very tersely stated by Mr. Bishop, in his work on Non-Contract Law: "If one discovers another to have been negligent, he must take directions accordingly." Bishop, Non-Cont. Law, § 446; *Cooper v. Central R. Co.* 44 Iowa, 184.

The question remains as to whether the failure of the defendant to give the statutory warning at Beck's crossing was such a neglect of duty as would, in the absence of contributory negligence on his part, entitle the plaintiff to recover. Section 3875, § How. Stat., provides as follows: "A bell of at least thirty pounds weight, and a steam whistle, shall be placed upon each locomotive engine, and such whistle shall be twice sharply sounded at least forty rods before the crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of \$100 for every neglect; . . . and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." It is contended on behalf of the defendant that the omission of this duty cannot support an action on behalf of one who was not injured at the crossing; and there are not wanting cases which sustain this contention, under statutes somewhat similar to the one under consideration. We do not, however, think that this is the proper construction to be placed upon this statute. The statute imposes a positive duty upon the railroad company to sound its whistle and to ring its bell at a certain point. It is a well-known fact that not only those about to cross the railroad track, but those in the immediate vicinity, lawfully there, are frequently induced to rely upon the performance of this statutory duty. If they do so, and without fault of their own suffer an injury, we see no reason why the statute should not be so construed as to protect them. We think the true construction to be that, while a failure to give a signal required by law will not avail a trespasser in an attempt to charge the road, one lawfully in a position where such negligent omission may constitute the direct and proximate cause of the injury to him is entitled to aver such negligent act as the basis of the action. In *Ransom v. Chicago, St. P. M. & O. R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, it was held that the failure to give the crossing signal is a negligent act, of which one may complain who is injured by reason of such fail-

ure while driving parallel to the track near the crossing, from the fright of his horses. In *People v. New York Cent. & H. R. R. Co.*, 25 Barb. 199, it was held that the hazards to be provided against by the enactment of such a statute are twofold: *first*, the danger of collision at crossing; *second*, that of damage by frightening of teams traveling upon a public highway near the crossing. And in the late case of *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 18 Ky. L. Rep. 714, it is distinctly held that persons lawfully using a private crossing are entitled to have the benefit of signals which they know it is the duty or custom of the railroad to give at a public crossing. In *Norton v. Eastern R. Co.* 113 Mass. 366, it was said: "When the Legislature has by statute directed that at particular points of their road they shall take especial precautions to notify those using the highways of the approach of a train, we cannot say that such precautions were intended solely for the benefit of certain travelers, even if they constituted the most numerous class, or that most likely to be endangered, if there were others also rightfully using such highways who would be liable to be injured by the neglect of them." And in *Wakefield v. Connecticut & P. R. R. Co.* 37 Vt. 390, it was said: "While such accidents are, in the main, likely to happen to persons approaching and about passing such crossing, yet they are not confined to such persons; and we think it would be an unwarrantable restriction of this provision of the statute to hold that the duty thereby imposed has reference only to persons approaching or in the act of passing the crossing. In our judgment, that duty exists in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place. The gist of each of these decisions quoted from Massachusetts and Vermont is that one lawfully in a position in which the failure to observe the statutory duty might work him an injury has the right to complain of such failure on the part of the company. An attempt has been made to distinguish those of the cases cited which hold that one upon a public highway, though not intending to cross, may rely upon the performance of the statutory duty by the company, and the case at bar; but in my judgment the cases are not to be distinguished in principle. The only possible ground upon which the company is held liable for this omission of duty to one traveling in a public highway parallel to the railroad is that he is lawfully there, and, having knowledge that the railroad company is required by law to give these statutory signals, he is justified in relying upon the performance of that duty, and that the omission to perform the duty is the proximate cause of the injury resulting to him. So, in the case at bar, the plaintiff occupied such a relation to this defendant company. He was lawfully upon this crossing. He knew that the engineer was required by law to sound his whistle, and he relied upon the performance of that duty. The proximate cause of the injury might very properly have been found by the jury to have been this neglect of duty. Every element that is present in an action by one upon the public highway, not intending to

cross, is present under the plaintiff's theory in the present case; and the important question presented is whether we will follow the line of decisions which limits the liability of the company for injuries resulting through its failure to give signals to those about to cross or actually crossing the track at the public highway

crossing. We think the better rule is that laid down by the Wisconsin and Kentucky courts, in the cases of *Ransom v. Chicago, St. P. M. & O. R. Co.* and *Cahill v. Cincinnati, N. O. & T. P. R. Co.* above cited.

Morse, Ch. J., and McGrath, J., concurred with Montgomery, J.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appel.*

v.
W. T. CUTSHALL.

(.....N. C.....)

1. Contracting a bigamous marriage in one state cannot be made a crime in another state which can be punished in the latter in the absence of any illegal cohabitation there although the persons come within the state.

2. Cohabitation within the state under a bigamous marriage contracted in another state is not punishable under Code, § 988, which attempts to make it a crime to contract a bigamous marriage in another state.

(May 2, 1892.)

APPEAL by the state from a judgment of the Criminal Court for Mecklenburg County quashing an indictment charging defendant with a violation of Code, § 988, defining and punishing bigamy. *Affirmed.*

The facts are stated in the opinion.

Mr. Theodore F. Davidson, Atty. Gen., for the State.

No appearance for appellee.

Avery, J., delivered the opinion of the court:

The Statute (Code, § 988) provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every other person counseling, aiding, or abetting such offender, shall be guilty of a felony, and imprisoned in the penitentiary or county jail for any term not less than four months, nor more than ten years, and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody as if the offense had been actually committed in that county." The general rule is that the laws of a country

"do not take effect beyond its territorial limits, because it has neither the interest nor the power to enforce its will," and no man suffers criminally for acts done outside of its confines. 1 Bishop, *Crim. Law*, 7th ed. §§ 109, 110; *People v. Tyler*, 7 Mich. 161, 8 Mich. 385, 74 Am. Dec. 708; *State v. Barnett*, 88 N. C. 616; *State v. Brown*, 2 N. C. 100, 1 Am. Dec. 548. In the case of *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678, the court said: "Our laws have no extraterritorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that state;" thus recognizing the principle, generally accepted in America, that a state will take cognizance, as a rule, only of offenses committed within its boundaries. Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act, which takes effect in our own state; as where one who is abroad obtains goods by false pretenses, or circulates libels in our own state, and contrary to our laws, or from a standpoint beyond the line of our state fires a gun or sets in motion any force that inflicts an injury within the state for which a criminal indictment will lie. 1 Bishop, *Crim. Law*, § 110; *Ham v. State*, 4 Tex. App. 659; *Cambioso v. Maffett*, 2 Wash. C. C. 98.

Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when, under the provisions of extradition laws or the terms of treaties, they are allowed to be brought into its limits to answer such charges. As a rule, the validity of marriages contracted in any foreign country must be determined by the courts of another nation with reference "to the law of the country wherein they exchange the mutual consent to be husband and wife, which consent alone is by the law of nature perfect marriage." 1 Bishop, *Mar. & Div.* §§ 855, 856; *State v. Ross, supra*. Such marriages may be declared

NOTE.—The doctrine of the above case so fully accords with the current of authorities as to the lack of jurisdiction of a state court to try a person for a crime committed in another state or country that the most noticeable thing in the case is the assertion by the dissenting judge of the broad claim of power in a state to make the mere presence in the state of a person who has committed a crime in another state sufficient to constitute an offense against the state if so declared by statute. But without regard to other questions in this connection it may be asked whether so far as this might be attempted in respect to citizens of the United 16 L. R. A.

States, it would not be a violation of their right under the federal Constitution to pass through a state. *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745.

For one phase of the kindred question of larceny by bringing stolen goods into a state, see *State v. Tiel* (Mont.) 15 L. R. A. 722.

For another kindred question, of the right to try a man for a homicide where death resulted within the state although the fatal stroke was given in another state, see *Ex parte McNeely* (W. Va.) 15 L. R. A. 223.

unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous. 1 Bishop, Mar. & Div. §§ 857-862. So a foreigner, not accredited to another government as a representative of his own nation, is subject to the law of the country in which he may travel or establish a temporary domicile, and may be tried in its tribunals for any violation of its criminal laws while within its territorial limits. Wheaton (in his treatise on International Law § 120, note 77) says: "In Great Britain, France, and the United States, the general principle is to regard crimes as of territorial jurisdiction. . . . The question whether a state shall punish a foreigner for a crime previously committed abroad against that state or its subjects also depends upon its system respecting punishing generally for crimes committed abroad; Great Britain and the United States respecting strictly the principle of the territoriality of crime." While, in our external relations with other nations, our federal head, the United States, is the only sovereign, for the purpose of internal government such portion of the sovereign power as has not been surrendered to the general government is retained by the states. 11 Am. & Eng. Encyclop. Law, p. 440, and notes.

In the exercise of their reserved powers, especially in the execution of the criminal law, questions arise which are settled and determined either according to the principles of international law or by analogy to them. It is contended that nothing but comity between nations, in the absence of express provisions of treaties, prevents one nationality from making laws to punish persons who commit criminal offenses in another country, and afterwards come within its territory and that, admitting this principle to be correct, there can be no treaty stipulation, and there is in fact no constitutional inhibition, that restricts the Legislature of one of our internal sovereignties from enacting laws to punish a person who comes into its domain, so as to be apprehended there, for a crime committed in a sister state. Article 39 of the confirmatory charter granted by Henry III. provided that "no freeman should be taken or imprisoned, or disseised of freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him, but by lawful judgment of his peers or by the law of the land." In the formal Declaration of Independence the king of Great Britain, after being charged with many violations of fundamental principles and invasion of common rights, was arraigned before the world "for depriving us in many cases of trial by jury; for transporting us beyond the seas to be tried for pretended offenses." This language evinces the purpose of our representatives to risk their lives and their fortunes, in part, at least, to secure, not simply the ancient right of trial by jury, but trial by a jury of the vicinage, within 16 L. R. A.

easy reach of all evidence material for the vindication of the accused, where the charge might prove unfounded upon a fair investigation. During the same year these principles were embodied in the Declaration of Rights by the colonial Congress, in what now constitutes sections 18 and 17 of article 1 of the Constitution, which are as follows: "Sec. 18. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men." "Sec. 17. No person ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." Not only has section 18 been construed to guarantee to every person (whether a citizen of this state or of another Commonwealth) a trial by jury in all cases, which were so triable at common law, (such as an indictment for a felony,) but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to remove the case to some neighboring county, in order to secure a fair trial. Judge Cooley says, (Const. Lim. *319, 320): "Any of the incidents of a common-law trial by a jury are essential elements of right. The jury must be indifferent between the prisoner and the Commonwealth, and to secure impartiality challenges are allowed, both for cause, and also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." *Kirk v. State*, 1 Coldw. 344; *Armstrong v. State*, Id. 338; *State v. Denton*, 6 Coldw. 539. This strong language is used in commenting upon the clause, which, in substantially the same terms, guarantees the right of trial by jury in all serious criminal prosecutions in every one of the states.

Mr. Charles A. Dana, published some years since an article in his paper, the New York Sun, which it was claimed was libelous in its strictures upon the conduct of a public official at Washington city; and Judge Blatchford, upon his being arrested in New York by virtue of a warrant of a United States commissioner and brought to Washington, heard the facts, after granting a writ of habeas corpus, and discharged the prisoner. *Re Dana*, 7 Ben. 1. Commenting upon this case, Judge Cooley said: "It would have been a singular result of a revolution, where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union, and transported by a federal officer to every territory in which its paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them." If every state of the

American Union should enact a statute identical in its terms with that under which the indictment is drawn, (Code, § 988,) the enforcement of these laws might lead to just such a series of prosecutions as the learned jurist seemed to consider so absurd, outrageous, and palpable a violation of a fundamental right asserted in our own national *Magna Charta*, the Declaration of Independence. The defendant might travel through any or all of the states, and be apprehended or in custody in any one or all of them, and thus subject himself to indictments for an offense not committed in any jurisdiction where he is tried. Every state has embodied in its organic law the guaranty that no person shall be taken or imprisoned, etc., "but by the law of the land;" and this term *Judge Cooley* treats as synonymous with "due process of law." Const. Lim. *853. "Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to him or his property." *Cooley*, Const. Lim. 4th ed. 480, note, *869; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558. In *Hoke v. Henderson*, 15 N. C. 16, 25 Am. Dec. 677, Chief Justice Ruffin said: "The clause itself [art. 1, § 17, Const.] means that such legislative Acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights as determined by the laws under which it vested, according to the course, mode, and usages of the common-law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." After the federal Constitution had been ratified the people of the states, with the recollection of the flagrant invasions of their rights by transporting freemen abroad to be tried for "pretended offenses" still fresh, amended it so that, says *Ordronaux*, "the crime and its punishment are attached to the jurisdiction within which it was committed." *Ordronaux*, Const. Leg. 259; U. S. Const. art. 3, § 2, cl. 3. These amendments apply only to federal tribunals, but the fact that they were prohibited from trying, except in the state where the crime should be committed, is evidence of a purpose to put it beyond the power of Congress to have a citizen tried for a criminal offense except by a jury of the vicinage, and at a point not so remote as to deprive him of the benefit of his witnesses. Another amendment (art. 4, § 2, cl. 2) supplements that already referred to, and shows by its terms that the purpose in enacting it was to definitely localize the forum of every crime committed by a person not in the land or naval forces, by providing for the extradition of criminals on demand of the governor "to the state having jurisdiction of the crime." It was evidently contemplated by the framers of the Constitution that ordinarily there would be but one state where a crime could be properly said to have been committed, and whose courts

would have cognizance of it. It was natural that they should cling to the old territorial rule, which limited the jurisdiction to the courts of the county.

The state of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. If the defendant married a second time in South Carolina or elsewhere outside of North Carolina, the act had no tendency at the time to affect society here, nor can that unlawful conduct be punished as a violation of our criminal laws. On the other hand, the completed act of entering into a second marriage in a neighboring state is not analogous to the cases where a mortal wound is inflicted in one state, and the wounded man lingers and dies from its effects within the limits of another state during the next ensuing twelve months. It is needless now to discuss the question whether, on account of the fact that the ultimate effect of the wound is the resulting death, the state in which the death occurs in such cases should not be held to have common-law jurisdiction to try for murder, since nearly all of the states have enacted statutes providing for such trials, and some of them declared such enactments essential. *Com. v. Macdon*, 101 Mass. 1. 100 Am. Dec. 89; 1 Bishop, Crim. Law, §§ 112-117. Our statute is a re-enactment of that passed in England in the assertion of the almost omnipotent powers of the parliament, yet, as we have seen by reference to Whartons' statement of the rule adopted in England as to jurisdiction of crime, the courts of that country would, never have held "elsewhere" to refer to bigamy committed by citizens of other nationalities, but to second marriages contracted by her own subjects, while a former wife or husband was living. Parliament is not, of course, prohibited by any constitutional provision from passing an act which makes a particular offense, contrary to the general rule, indictable and punishable, not only in a county of England other than that in which it is committed, but when committed in a different dominion of the empire or a foreign land. *Walls v. State*, 32 Ark. 568; 2 Wharton, Crim. Law, § 1685. The powers of Congress on this subject are well defined in the Constitution, and the powers of the states are limited by the clause we have cited and others, as well as by the nature of our government, containing, as we look upon it, internally as many sovereignties as there are states. Our statute was not amended so as to incorporate the English idea until the Code was enacted in 1883; but it seems that, in most of those states where attention was attracted to the subject at an earlier date, the Legislatures doubted their power to make the act done in another state punishable as a felony, merely because the offender placed himself within reach of criminal process of their own states. But, according to the express terms of their statutes, the offense was not the act of unlawfully marrying a second time, but the continuous bedding and cohabiting afterwards. *Com. v. Bradley*, 2 Cush. 533; *Brewer v. State*, 59 Ala. 103; *State v. Palmer*, 18 Vt. 570. The statute of

the state of Missouri by its very terms seems to amount to a recognition of the principle which we insist is the correct one. It provides that "every person having a husband or wife living, who shall marry another person without this state, in any case where such marriage would be punishable if contracted or solemnized within this state, and shall afterwards cohabit with such person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this state." *State v. Fitzgerald*, 75 Mo. 571. It is the subsequent cohabitation, and not the fact that the person simply invades the jurisdiction of its courts, which subjects the offender to the same punishment as would the bigamous marriage had it been celebrated within that state. Under our statute we provide for the punishment of any person who has contracted a bigamous marriage in another state, if he can be caught here, even *in transitu* to another state.

The attempt to evade the organic law by making the coming into this state (after committing an offense in another) a crime is too palpable, in view of the admitted fact that the Constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offenses against their own sovereignty, but especially because the trial for the new felony involves an investigation of the original bigamy by a jury not of the vicinage, and remote from the witnesses. No court has ever questioned the power of a state to pass quarantine laws and statutes regulating the entrance of paupers within its limits, but this does not include the authority to impose a tax *per capita*, even, on immigrants from a foreign nation, arriving at its ports, or on passengers *in transitu* from one state to another. *Norris v. Boston*, and *Smith v. Turner*, 48 U. S. 7 How. 518, 12 L. ed. 801, 2 Myers, Fed. Dec. 665, 875, 677, 678, 684. *Mr. Justice Wayne* in that case said: "Some reliance in the argument was put upon the cases of *Holmes v. Jennison*, 39 U. S. 14 Pet. 546, 10 L. ed. 582; *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *Prigg v. Com.*, 41 U. S. 16 Pet. 539, 10 L. ed. 1060—to maintain the discretion of a state to say who shall come to and live in it. Why either case should have been cited for such a purpose I was at a loss to know, and have been more so from a subsequent examination of each of them. All that is decided in the case of *Holmes v. Jennison*, is that the states of the Union have no constitutional power to give up fugitives from justice to the authorities of a nation from which they have fled; that it is not an international obligation to do so; and that all authority to make treaties for such a purpose is in the United States." The learned justice in a subsequent portion of the same opinion (page 684) said: "I have never in any instance heard the *Case of Miln* cited for the purpose of showing that persons are not

within the regulating power of Congress over commerce, without at once saying to the counsel that the point had not been decided in that case. . . . Indeed, it would be most extraordinary if the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, could be considered as having been reversed by a single sentence in the opinion of *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648. Upon a point, too, not in any way involved in the certificate of division of opinion, by which that case was brought to this court. The sentence is that 'they [persons] are not the subjects of commerce and, not being imported goods, cannot fall within a train of reasoning founded upon a construction of a power given to Congress to regulate commerce and prohibition to the states from imposing a duty on imported goods.'" It thus appears that the language relied upon to sustain the assertion on the part of a state of the power to legislate in reference to persons coming from a foreign country has been expressly declared a *dictum* and overruled. This principle approved by the court is still more explicitly stated in *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543, and in *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550. The court suggested in the latter case that, in the absence of all legislation on the subject by Congress, a state might possibly assume authority to prohibit the entrance from abroad of "paupers and convicted criminals." A treaty entered into by the United States at once operate as a repeal of all state laws repugnant to its provisions. *Baker v. Portland*, 5 Sawy. 566; *Denn v. Harnden*, 1 Paine, 59; *Re Parrott*, 1 Fed. Rep. 481; *Gordon v. Kerr*, 1 Wash. C. C. 822. "It is not competent for the Legislature of a state to deprive a citizen of any other state of his legal or equitable rights under the Constitution and laws of Congress, by declaring that they must be enforced in a local court." *Armory v. Armory*, 18 Int. Rev. Rec. 149. Our statute applies by its terms as well to a citizen of another state, who *in transitu* affords to our local authorities the opportunity to apprehend him, as to those who become domiciled within our borders. *Ordronaux*, Const. Leg. pp. 339-343. As a citizen of another state, he has the privilege of demanding a trial in a particular locality, and by a jury of the vicinage; and it would deprive him of that right, guaranteed by the federal Constitution, to arrest him while temporarily in this state, and, under the pretense of punishing him for the felony of coming into the state after a bigamous marriage, try him remote from the locality where the marriage was celebrated and his witnesses reside for an offense involving only the question whether the second marriage was in fact bigamous. *Ordronaux*, *supra*, p. 255.

Wharton, (2 Crim. Law, § 1685,) after discussing the English statute, says: "In some of the United States a similar statute has been enacted; in others a continuance in the bigamous state is made indictable, no matter where the second marriage was solemnized. But, when the act of bigamous marriage is made the subject of indictment,

then, at common-law, the place of such act has exclusive jurisdiction." The court of Alabama has expressly held in *Beggs v. State* 55 Ala. 108, that where a person is indicted for the bigamous act of marrying a second time in another state, as distinguished from continuing to cohabit within the state after such marriage, the indictment could not be sustained; but the court did not find it necessary in that case to discuss the question of legislative power, as the Legislature had modified the English statute in the same way that it has been altered by law in Vermont, Massachusetts, Tennessee, Missouri, and other states. It will not be insisted that the courts of the state of Maine would have power to enforce a statute which provided for punishing with death any person who had committed murder in another state, and then gone within its limits, by apprehending a Texan, and requiring him to send to the banks of the Rio Grande for testimony to meet and refute that of a malignant neighbor who had followed him almost across the continent to wreak his vengeance. If a state has the power to punish one caught within its borders as a felon for a bigamous marriage committed within another state, what is to prevent the trial of a citizen found in a neighboring state for a homicide, if the statute were broad enough to include murder as well as bigamy? If the statute made it a felony punishable with death to come into the state after committing murder in another? The assertion of such authority would jeopardize the security of every American citizen who ventured beyond the confines of the state in which he resided. The express provision for the extradition of criminals excludes the idea of trying them outside of the limits of the state where the offense is committed, even if there were no direct guaranty that they should not be subject to arrest and trial for offenses against their own sovereign, when beyond her limits.

The additional counts in which it is charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina, and cohabited with the person to whom he was married, cannot be sustained, because that offense is not covered by our statute. The North Carolina statute would, if enforced, subject him to indictment if he should come across the border and leave the woman behind. While we did not recognize the validity of marriage of parties when they leave the state for the purpose of evading a law which makes a marriage between them unlawful, and with the intent, after celebrating the rites in another jurisdiction, to return and live in this state, (*State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683,) we have no express statute making such acts indictable as a felony, but only as a misdemeanor, where they live in adultery here, (*State v. Outshall*, 109 N. C. 764.) This fact is fatal to another count of the indictment. But we do not wish to be understood as questioning the power of the state to punish one of its citizens who goes out of the state with intent to evade its laws by celebrating a bigamous marriage beyond

its jurisdiction, and returning to live within its borders. For the reason given we think that there was no error in the judgment of the court below quashing the indictment; and it is *affirmed*.

Shepherd, J. I concur in the conclusion that the indictment was properly quashed.

Merrimon, Ch. J., dissenting:

Indictment for bigamy, tried before Meares, J. The indictment charges the defendant with the crime of bigamy as defined and forbidden by the Statute. Code, § 988. It charges that the second marriage took place in the state of South Carolina, and that shortly thereafter the defendant came into the county of Mecklenburg, and there resided with his second wife. He appeared and moved to quash the indictment, upon the ground that it appeared from it that he had committed no offense in this state. The motion was allowed, whereupon the solicitor for the state assigned error, and appealed to this court. The statute declares that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every person counseling, aiding, and abetting such offender, shall be guilty of felony, and imprisoned in the penitentiary or county jail for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county," etc. Code, § 988. This enactment is not very aptly, precisely, or clearly expressed, and hence its validity is seriously questioned. But it must receive such reasonable interpretation as will render it intelligible, operative, and effectual, if this can be done consistently with the Constitution. It does not necessarily imply or intend that the offender shall be indictable and convicted in this state for the offense of bigamy in another state; such is not its meaning. It intends that whoever shall be in this state, being married to two living wives or two living husbands, as the case may be, (except in the cases excepted in the proviso to the statute,) shall be guilty of felony, and that without regard to whether the second marriage took place in this state or elsewhere, and without regard to whether the second marriage constituted the offense of bigamy in the state or country where it took place. It makes the bigamist here answerable, because he is here, and an offense to and an offender against this state and society here. The fact of bigamy—having two living wives or two living husbands—and the presence of the offender in this state constitute the offense. It is not simply the second marriage that constitutes the offense,—the felony; but it is the existence of that fact, and the presence of the offender in this state, that make it. The statute does not treat the second marriage as the offense, nor the of-

fense as committed elsewhere than in this state.

It is said that in such case no offense is committed in this state or against it. This is a serious misapprehension. The statute, its purpose, makes the presence of the bigamist in this state an offense; makes him here a bigamist and guilty of a felony, whether he was so where the second marriage took place or not. Suppose the statute under consideration had declared in terms that, if a bigamist shall come into this state, he shall be deemed and held to be guilty of bigamy and felony here, could its validity be seriously questioned? This is what the statute, in effect, declares. The Legislature, in the exercise of the essential police powers of government, may for the protection of the people, the safety and purity of society, exclude from its borders criminals of other states and countries. To that end it may make their coming here, their presence in this state, a felony if they were guilty of a specified offense committed by them in the state from which they came, or if they were chargeable with doing specified acts in the state from which they came, constituting no criminal offense there, but declared and deemed to be an offense here. It is their coming into this state, their presence here, and the fact that they did in the state from which they came the acts deemed and held to be a specified criminal offense here, that constitute the statutory crime and felony in this state. Such exercise of legislative power may be unusual, and perhaps not very expedient, but the power exists, and it is not the province of courts to determine when it shall or shall not be exercised. Criminals have no right to commit crime, and go from state to state or from one country to another, and inflict themselves upon society wherever they may be. It is the right and the duty of government to protect itself and its people against them by all manner of appropriate legislation.

It has been suggested that the exercise of such power, except to a very limited extent, is not consistent with that provision of the Constitution of the United States which confers upon Congress the "power to regulate commerce with foreign nations and among the several states and with the Indian tribes." To what extent and exactly in what respects this provision restricts the exercise of the police power of the states is not very definitely settled, but it is very clear that it does not inhibit the enactment of statutes like that under consideration. The right of the state to make and enforce such laws is fully recognized in *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648. In that case the court said: "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That by virtue of this it is not only the right, but the

bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all these powers which relate to merely municipal legislation, or what may perhaps more properly be called 'internal police,' are not surrendered or restrained; and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive." That case is cited with approval in *Holmes v. Jennison*, 39 U. S. 14 Pet. 540, 10 L. ed. 579, *Chief Justice Taney* saying for the court: "Again the question under this habeas corpus is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interest. The power in that respect was fully considered by this court, and decided, in the case of *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648. Undoubtedly they may remove from among them any persons guilty of or charged with crime, and may arrest and imprison them in order to effect this object. This is a part of the ordinary police power of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases the state acts with a view to its own safety, and is in no degree connected with the foreign government in which the crime was committed." The first of the cases here cited is to some extent criticised in *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 548, and *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, but not in the aspect of its material here. It is difficult to see any substantial reason why the Legislature may not by proper enactment, make it indictable—a misdemeanor or a felony—for persons who have done acts in one of the states deemed dangerous to its safety, or that of the morals or property or the prosperity of its people, if they be found within its limits. It may by such means keep out of and drive beyond its borders foreign paupers, common gamblers, bigamists, and the like. It must be the judge of the wisdom and expediency of such legislation. Offenders against such statutes are such wherever they may be found in the state, and may hence be tried wherever found, without invading any fundamental right secured to them. The acts forbidden having been done, the presence of the offender in the state anywhere constitutes the offense. This case is very different from *State v. Knight*, 1 N. C. 44, 65. In that case the statute declared void undertook to make the offense of counterfeiting in another state indictable in this state. The indictment does not charge the defendant with

bigamy committed in South Carolina; it charges him with statutory crime (a felony) committed in this state, one of the essential acts constituting it having taken place in South Carolina. The statute does not make the second marriage the offense. It simply treats this as a fact to be taken in connection

with others, all constituting the offense in this state. The offense is wholly statutory in its nature, and must be so treated. I think the order quashing the indictment should be reversed, and the case disposed of accordingly.

NEW YORK COURT OF APPEALS.

Amanda PALMERI, *Resp't.*,
v.
MANHATTAN R. CO. *Appt.*

(.....N. Y.....)

1. A ticket agent who follows a woman who has bought a ticket out upon the platform and charges her with giving him counterfeit money with a demand for other money in its stead and on her refusal angrily insults her by slandering her character and puts his hand upon her telling her not to stir until he gets a policeman to arrest and search her, but lets her go when he fails to get an officer, is acting within the scope of his employment and renders the carrier liable for false imprisonment and slander, if the detention was unlawful and his charges false.
2. An offer by defendant upon plaintiff's cross-examination to show that she is an habitual litigant, is properly excluded.

(May 8, 1892.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Circuit Court for Kings County, in favor of plaintiff in an action brought to recover damages for alleged slander and false imprisonment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies, and Brainard Tolles, for appellant:

A corporation cannot be guilty of a tort except as the tort of some officer or agent is imputed to it, by virtue of the maxim *respondet superior*.

Cooley, Torts, 2d ed. p. 186; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146.

The maxim applies only where the relation of master and servant exist, and the act or omission complained of falls within the scope of the servant's employment, and is done by the express or implied authority of the master.

Mali v. Lord, 89 N. Y. 381, 100 Am. Dec. 448; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 133, 21 Am. Rep. 597; *Higgins v. Water-viet Turnp. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Mott v. Consumers Ice Co.* 73 N. Y. 548.

A servant is not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do.

Defendant could have no right to detain the plaintiff without a warrant on the mere sus-

picion of having committed a crime. Dayton, then, in detaining the plaintiff, acted not only altogether outside the scope of his own employment, but outside the corporate powers of the defendant, and his act was no more binding on the defendant than if he had contracted to purchase the Panama canal.

Mali v. Lord, *supra*; *Poulton v. London & S. W. R. Co.* 8 Best & S. 616; *Goff v. Great Northern R. Co.* 3 El. & El. 672; *Charleston v. London Tramways Co.* 36 Week. Rep. 367, 32 Solicitor's Journal, 557.

A master is not liable for the act of his servant, even when the act is done for the master's benefit, unless it is within the general range of the servant's duties.

Fraser v. Freeman, 43 N. Y. 566, 8 Am. Rep. 740; *McKenzie v. McLeod*, 10 Bing. 865; *Meehan v. Morewood*, 23 N. Y. S. R. 487; *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311; *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 445; *Abrahams v. Deakin* (1891) 1 Q. B. 516; *Bank of New South Wales v. Ouston*, L. R. 5 App. Cas. 275.

In the absence of any contractual relation a master is not liable for the act of his servant, even within the general range of the servant's duties, where the act is done from some ulterior motive on the part of the servant and not on behalf of the master or with the purpose to serve him.

Mulligan v. New York & R. B. R. Co. 14 L. R. A. 791, 129 N. Y. 506; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 123, 7 Am. Rep. 418; *Wright v. Wilcox*, 19 Wend. 848, 32 Am. Dec. 507; *Limpus v. London Gen. Omnibus Co.* 1 Hurlst. & C. 626; *Vanderbilt v. Richmond Turnp. Co.* 3 N. Y. 479, 51 Am. Dec. 815; *Cavanagh v. Dinemore*; 19 Hun, 465; *Sheridan v. Charlick*, 4 Daly, 338; *Baldwin v. New York & H. Nav. Co.* 4 Daly, 314.

A corporation cannot be guilty of slander unless the slander is expressly authorized by it. Townshend, Slander & Libel, § 265; Odgers, Libel & Slander, p. 368.

The slander was not within the general range of the agent's duties or the scope of his authority.

Mali v. Lord, 89 N. Y. 381, 100 Am. Dec. 448; *Hamilton v. New York Cent. R. Co.* 51 N. Y. 100.

The slander was not spoken for defendant's benefit, or in pursuance of any real or supposed duty to defendant.

Limpus v. London Gen. Omnibus Co. supra. Defendant was not liable for the acts complained of, on the ground of a breach of the contract of carriage.

NOTE.—For note on liability of master for false arrest, imprisonment, or malicious prosecution by servant, see *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791.
16 L. R. A.

There can be no acceptance either of money or of goods until there is a chance to examine and reject.

Benjamin, Sales, § 703.

And where examination is followed by a rejection, nothing can turn the rejection into acceptance, even where there was a duty to accept.

Sweet v. Titus, 67 Barb. 627; *Kingston Bank v. Gay*, 19 Barb. 459; *Elderton v. Hodge*, 41 Vt. 676.

It is clear that in a cash transaction the payment of counterfeit money cannot complete the contract, because the minds of the parties never meet.

Markle v. Hatfield, 2 Johns. 455; *Ontario Bank v. Lightbody*, 13 Wend. 101, 27 Am. Dec. 179.

Mr. James D. Bell, with **Mr. Baldwin F. Strauss** for respondent:

For a willful injury to the plaintiff by defendant's agent while engaged in its employment, the defendant is liable.

Stewart v. Brooklyn C. T. R. Co. 90 N. Y. 583, 43 Am. Rep. 185.

The plaintiff was defendant's passenger, and therefore it owed a duty to her to treat her with proper respect, and prevent persons from injuring her, and it is liable for the misconduct of its own servants towards her.

Jackson v. Second Ave. R. Co. 47 N. Y. 274, 7 Am. Rep. 448; *Lynch v. Metropolitan Elec. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141; *Dwinelle v. New York Cent. & H. R. R. Co.* 8 L. R. A. 224, 120 N. Y. 117.

Gray, J., delivered the opinion of the court:

Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was thereafter sued for false imprisonment. In that case the facts were briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer," but nevertheless took it, and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were there on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine.

and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791. In the present case, however, the acts of the ticket agent were of a different character. The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words, publicly spoken, concerning her. The jury believed her story, and the judgment which she has recovered the appellant seeks to avoid principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the *Mulligan Case*. Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which *Weed v. Panama R. Co.* 17 N. Y. 382; *Hamilton v. Third Ave. R. Co.* 58 N. Y. 25; *Stewart v. Brooklyn C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185, and *Dwinelle v. New York Cent. & H. R. R. Co.* 120 N. Y. 117, 8 L. R. A. 224, are sufficient instances.

What materially distinguishes the present

from the *Mulligan Case* is that there the servant of the company was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business. Whereas here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff, and insulted her by slandering her character. It is needless to consider the case of *Mali v. Lord*, 39 N. Y. 881, 100 Am. Dec. 448, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong com-

mitted. Judge Andrews, in *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, points out the distinguishing principle of these cases, and refers to *Mali v. Lord*, in the course of his opinion.

The offer by defendant, upon plaintiff's cross-examination, to show that she was an habitual litigant, was properly excluded. It had nothing to do with the issue, and, if true, would not prove her unworthy of belief, any more than it would follow from her admission of its truth that the litigations which such a tendency had encouraged were not upon meritorious grounds.

The testimony of the witness Murphy, a bystander upon the occasion, as to the ticket-agent's conversation with him, I think, was admissible, as occurring simultaneously, and as illustrating somewhat the transaction; but, even if questionable, the defendant appears to have objected to the testimony after it was in, and obtained no ruling by motion to strike out. When, subsequently, upon it appearing to the court that the plaintiff did not hear the conversation, an objection to the testimony continuing was considered proper by the judge, and was at once sustained.

The judgment should be affirmed, with costs.
All concur.

NEW YORK COURT OF APPEALS. (2d Div.)

Frances E. COOPER, *Resp't.*

v.

UNITED STATES MUTUAL ACCIDENT
ASSOCIATION of the City of New
York, *Appt.*

(.....N. Y.)

Under a clause requiring a suit within one year from the time of the "accidental injury," in a policy of accident insurance providing a weekly indemnity for the insured in case of such injury and a death indemnity for his wife in case of his death therefrom, the limitation period for her suit begins to run at his death and not at the time of the accident to him.

(April 19, 1902.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Circuit Court for Orange County in favor of plaintiff in an action brought to recover upon a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. William B. Smith, for appellant:

This action was not brought "within one year from the time of the alleged accidental injury," as required in the contract made by the parties, and therefore, as it is not pretended or claimed

that appellant did or omitted anything upon which a waiver of this condition could be predicated, the judgment appealed from cannot be sustained.

King v. Watertown F. Ins. Co. 47 Hun. 1; *Wilkinson v. First Nat. F. Ins. Co.* 73 N. Y. 499, 28 Am. Rep. 166; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 815; *Fullam v. New York U. Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462; *Schroeder v. Keystone Ins. Co.* 3 Phila. 286; *Hocking v. Howard Ins. Co.* 130 Pa. 170; *Steel v. Phoenix Ins. Co.* 47 Fed. Rep. 868; *Moss v. London Assur. Corp.* 108 N. C. 240; *Thompson v. Phoenix Ins. Co.* 25 Fed. Rep. 296; *Grigsby v. German Ins. Co.* 40 Mo. App. 276; *Meeman v. State Ins. Co.* (Wash.) June 17, 1891.

In each of the three classes specified in the policy contract the injury itself is the basis alone upon which a claim for indemnity can be made. Keeping this "injury" in mind, there is no confusion, no uncertainty, and no ambiguity.

Claiming that accidental injury might mean actual wounding, or might fairly be construed to mean the ripening of a wound into a claim, then, that if the limitation applied to a death claim, the accidental injury mentioned is the death resulting from the accidental injury, is frittering away the language of the policy by metaphysical distinctions too fine to enter into the understanding or contemplation

NOTE.—In applying a limitation clause to an action on a death claim under an accident policy which provided not only for weekly indemnity to the insured but also for a death indemnity to his wife the above decision is apparently a novel one.

The decisions are in much conflict on the general question whether the time limited for action on a 16 L. R. A.

policy by a provision therein is to run from the date of actual loss or from the time when the right of action therefor is complete. See on this question *note to Travelers Ins. Co. v. California Ins. Co.* (N. Dak.) 8 L. R. A. 769. Later cases show the same conflict.

of parties engaged in the practical business of making a contract of insurance.

Tuttle v. Travelers Ins. Co. 134 Mass. 175, 45 Am. Rep. 816.

It is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent and the proofs respecting it are accessible.

Riddlesbarger v. Hartford Ins. Co. 74 U. S. 7 Wall. 386, 19 L. ed. 257. See *Steel v. Phaniaz Ins. Co.* 47 Fed. Rep. 863; *Spare v. Home Mut. Ins. Co.* 9 Sawy. 145, 17 Fed. Rep. 568.

Mr. Lewis E. Carr, for respondent:

Until the death, the furnishing of the proofs, and their acceptance by the association as satisfactory, there is, and can be, no claim that can be the subject of arbitration or suit. Until then the association is called on to do nothing. When the profits are finally accepted as satisfactory, the association has ninety days in which to pay. Until the expiration of that period no action can be mentioned. For nine months then from the infliction of an injury action is barred, and it may be much longer through asserted defects in the proofs.

Steen v. Niagara F. Ins. Co. 89 N. Y. 315; *Ames v. New York U. Ins. Co.* 14 N. Y. 253; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 39 Am. Rep. 607; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45.

The "time of the alleged injury" is the point where the proofs are furnished and accepted and the claimant has something that may be either submitted to arbitration or made the subject of a suit.

Ames v. New York U. F. Ins. Co., *New York v. Hamilton F. Ins. Co.*, *Hay v. Star F. Ins. Co.* and *Steen v. Niagara F. Ins. Co.* *supra*.

In the most favorable view an ambiguous phrase has been inserted in this contract, and the beneficiary is entitled to its most favorable construction.

Dennis v. Massachusetts Ben. Assn. 9 L. R. A. 189, 120 N. Y. 496; *Holley v. Metropolitan L. Ins. Co.* 7 Cent. Rep. 263, 105 N. Y. 437.

The fair and reasonable construction of this contract is that the limitation begins when a claim is in existence which may be sued upon and not before.

Matt v. Iowa Mut. Aid Assn. 81 Iowa, 185.

The language used at the beginning of the limitation clause, "any claim under this certificate," does not affect the conclusion stated above.

Mallory v. Travelers Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 472.

Haight, J., delivered the opinion of the court:

This action was brought upon a certificate of insurance, issued by the defendant, to recover \$5,000. The defendant, by its certificate, undertook to insure Theodore H. Cooper against personal bodily injury, and in case he should receive such injuries, disabling him from transacting business pertaining to his occupation, to pay him certain amounts, specifically named, dependent upon the nature of his injuries; and in case death should result from such injuries within ninety days the defendant agreed to pay to the plaintiff, as his wife, the sum of \$5,000. The certificate contained the following: "No 16 L. R. A.

suit or proceeding at law or in equity shall be brought . . . to recover any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury." Cooper received an accidental bodily injury on December 10, 1887, which resulted in his death on January 2, 1888. This action was commenced on December 29, 1888, more than one year after the accident, but within one year of his death. It is claimed that the action was not commenced within the time required by the provision of the certificate referred to.

It will be observed that provisions are made in the certificate for two different persons, who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his lifetime the amounts provided for his disability resulting from the accidental injury received. The other is to his wife, which is for the injuries which she suffers by reason of his death, resulting from such accident. The accident received by Cooper did not injure the plaintiff, or give her a right of action until death ensued. So far as she is concerned, the infliction of the wound is but the beginning, and the death is the completion, of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury;" in other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident. As to Cooper, he suffered from the date of the wound. His right to indemnity dates from that event, and it is possible that his right to maintain an action would not continue after the expiration of a year from that date. But, as to the plaintiff, it appears to us that the construction already indicated was intended and should be given to the certificate. As thus construed the various clauses of the contract are rendered harmonious, and the different beneficiaries thereunder are given the same period of limitation within which to bring actions to establish their claims; that is, within one year from the time that their right of action accrued. This construction is in a measure sustained by the authorities. In the case of *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, the policy of insurance required actions to be brought within twelve months next after the "loss or damage shall accrue." In an action upon the policy, it was held that the period of limitation prescribed did not commence to run until the loss became due and payable, and the right to bring an action had accrued. And to the same effect are the cases of *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, and *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 39 Am. Rep. 607. The case of *King v. Watertown F. Ins. Co.* 47 Hun, 1, appears to us to be clearly distinguishable. In that case the policy provided that no suit or action could be maintained unless commenced "within twelve months next after the fire shall have occurred." In that case it was held that the year within which the action must be brought commenced to run from the date on which the fire occurred; it so having been expressly stipulated in the policy.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur, except **Vann, J.**, not sitting.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.*, F. H. LYSONS, *Appt.*

G. C. RUFF, *Recept.*

(.....Wash.....)

Failure to take the oath of office within the time specified by law does not *ipso facto* create a vacancy which will prevent the officer from qualifying thereafter if it is done be-

fore any steps are taken to declare the vacancy, although the statute declares that the office shall become vacant on refusal or neglect to take the oath within the time prescribed.

(May 6, 1882.)

A PPEAL by relator from a judgment of the Superior Court of Snohomish County in favor of defendant in a proceeding instituted

NOTE.—Vacancy in office by failure to file bond within time prescribed.

A statutory requirement that a bond must be executed within a certain number of days is merely directory, and the bond may be lawfully filed on a subsequent day. *Duntley v. Davis*, 42 Hun, 229; *McRoberts v. Winant*, 15 Abb. Pr. N. S. 210; *People v. Holley*, 12 Wend. 481; *Com. v. Read*, 2 Ashm. 261; *State v. Churchill*, 41 Mo. 41; *State v. Texas County Ct.* 44 Mo. 230; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Porter*, 7 Ind. 204; *Smith v. Cronkhite*, 8 Ind. 134; *State v. Peck*, 30 La. Ann. 280.

So a statutory provision that an "office shall become vacant" on failure to furnish a bond within a specified time is merely directory, and may be sufficiently complied with by furnishing the bond after that time. *Knox County Comrs. v. Johnson*, 7 L. A. R. 684, 124 Ind. 145; *State v. Colvig*, 15 Or. 57; *Sprowl v. Lawrence*, 38 Ala. 674; *State v. Falconer*, 44 Ala. 696; *State v. Ely*, 43 Ala. 538. But see *contra* the California, Kansas, Florida and Virginia cases *infra*.

The same is true where the provision is that a person in default shall be "deemed to have refused" his office, or that the "office shall become vacant." *Cawley v. People*, 95 Ill. 242; *Chicago v. Gage*, Id. 588.

So where a statute said that an office shall be vacated if the person failed to give bond within a certain time it was held that the mere fact that the bond was not given within that time was not of itself sufficient to show that the office was vacant without showing that it was his fault in as much as it was customary to notify a person that his commission was ready for him and not to consider the office vacant until notice was given. *Ross v. Williamson*, 44 Ga. 501.

So a statute which says an "office shall be deemed absolutely vacant" on failure to file a bond within a specified time, was held not to vacate the office *ipso facto* by such failure, but merely to make it a cause of forfeiture. *State v. Toomer*, 7 Rich. L. 216.

This was held in an action against sureties on the bond who sought to escape liability thereon on the ground that the office became vacant by delay in filing the bond.

Likewise a statute providing that a person shall "forfeit the office" to which he may have been elected by acting therein without having given the required bond, does not make the office vacant without a proceeding to declare it so where such cause of forfeiture exists. *Foot v. Stiles*, 57 N. Y. 389; *Cronin v. Stoddard*, 97 N. Y. 271.

In conflict with some of the above authorities, it is held in California that a statute providing that an office becomes vacant upon the happening of certain events, one of which is the failure to file a bond within the time prescribed, is held mandatory causing a forfeiture of the office if the bond is not filed within that time. *People v. Perkins*, 36 Cal. 509; *Payne v. San Francisco*, 3 Cal. 122.

So in Kansas under a statute substantially the same it is also held that the office is vacated by fail-

ure to file the bond within the specified time. *State v. Matheny*, 7 Kan. 327.

Likewise in Florida the failure to give bond within the thirty days specified by statute was held by the judges of the supreme court, in an opinion rendered to the governor not to be cured by performance nearly a year afterward under a statute declaring that for such failure the office should "be deemed vacant." *Re Atty-Gen.* 14 Fla. 277.

And in Virginia a statute requiring an officer to qualify between the time of his election and the beginning of his term of office is held mandatory, and a qualification on the day the term begins is held too late. *Johnson v. Mann*, 77 Va. 265.

Again in Mississippi, under a statute providing that an "office shall thereby become vacant" if an officer fails to give a new bond when required by the proper officers, it was held that no steps to declare the office vacant were necessary in order to relieve the sureties on his old bond. *Bennett v. State*, 68 Miss. 556.

But this is manifestly quite a different case from one in which the offer of a bond after the time specified should be rejected, and the decision cannot fairly be regarded as in conflict with the majority of the cases above cited.

Where a statute provided that a person should "forfeit his right to the office" by failure to give bond within a specified time, and made it the duty of a clerk to notify the governor of such default and of the latter immediately to appoint a person to fill the vacancy, it was too late to file a bond after the failure to file it within a specified time had been certified to the governor and an appointment made by him. *Falconer v. Shores*, 37 Ark. 333.

This decision does not necessarily deny the right to file a bond after the time specified if no proceedings had been taken to enforce the forfeiture. But although a statute which says that an office shall be vacant if the bond is not given within ten days is merely directory, as it is held in Indiana to be, failure for more than six months to tender the bond will be deemed an abandonment of the office and prevent a qualifying if the delay is not excused. *State v. Johnson*, 100 Ind. 489.

On the other hand, although such a statute is held in Kansas to be mandatory a different statute, which provides that failure to qualify within the time specified "without sufficient cause" shall forfeit the right to an office, does not prevent qualifying after the time specified where such cause for the delay existed. *Carpenter v. Titus*, 33 Kan. 7.

The appointment by a board of county commissioners to an office on the "express condition" that a bond be given within two days, will not prevent the board from accepting the bond after three days. *State v. Ring*, 20 Minn. 73.

The time specified for giving a bond does not run pending a contest for the office. *People v. Potter*, 63 Cal. 127; *Pearson v. Wilson*, 57 Miss. 848.

Failure to file a bond within the time prescribed is excused where it is prevented by a conspiracy of the officers whose duty it was to receive it. *Culver v. Armstrong*, 77 Mich. 194. B. A. R.

to test defendant's right to the office of county auditor. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hill, Gilliam & Benson, Fish-back Hardin and L. F. Hart for appellant.

Messrs. Ault & Munns for respondent.

Hoyt, J., delivered the opinion of the court:

The relator was, at the time of and prior to the election held in 1880, the auditor of Snohomish county. At said election respondent was duly elected as his successor in office, but did not qualify by taking the proper oath of office and giving bond, within fifteen days after the service upon him of notice of his election, as required by the statute. About the 17th day of January following his election he completed his qualification by complying with the statutes in that regard, and entered upon the discharge of his duties as such auditor, whereupon relator brought this action to determine as to the right to said office as between himself and said respondent. Under this state of facts it is contended by the relator that the respondent, by his failure to comply with the statute as to qualification within the time therein provided, vacated said office, and that under the provisions of the law relating thereto he was entitled to hold over until the election and qualification of his successor. On the other hand, the respondent contends that he did not lose his right to said office by reason of such failure to qualify, and that, having qualified before any action seeking to declare said office vacant, his right to the same became vested. This question must be determined by the construction of our statutes. Section 2708, Code 1881, is as follows: "Every auditor, within fifteen days after receiving his certificate of election, and before he shall enter upon the discharge of the duties of his office, shall . . ." And from the language used it will be seen that it was the duty of the respondent to have fully qualified within fifteen days after notice of his election; and, if such language is considered mandatory, it would conclusively establish the position contended for by the relator. Is it mandatory or declaratory? Such provisions have almost universally been held to be simply declaratory. See *Chicago v. Gage*, 95 Ill. 588; *People v. Holley*, 12 Wend. 481; *State v. Churchill*, 41 Mo. 41; *State v. Porter*, 7 Ind. 204; *State v. Falconer*, 44 Ala. 696; *Mechem*, Pub. Off. §§ 265, 266. The language of this section, then, if standing alone, must, under the authorities, be construed as being simply declaratory. In fact, as we understand the position of relator, he does not question this position, and, if the section above quoted stood alone in our statutes, there would be little ground for controversy in relation to the question at bar; but it is claimed that under the language of this section, as read in the light of section 3063 of the Code, it must receive an entirely different construction from what it would if standing alone. Said last-named section is as follows: "Every office shall become vacant upon the happening of either of the following events: . . . the death of the incumbent; . . . his refusal or neglect to take his oath of office . . . within the time prescribed by law. . . ." In determining the force of

these statutes, this well-settled rule must be borne in mind, that forfeitures are abhorred by the courts, and that, when it is reasonably possible so to construe the law as to avoid a forfeiture, such construction will be adopted. If, as we have seen, the first section above quoted is clearly declaratory when standing alone, the last section above quoted might be held to have been enacted in view of such construction of said first section, and the Legislature to have intended in said last section by the words "within the time fixed by law" not within fifteen days, as named therein, but within the time which the court would hold to be covered by said section when construed as declaratory, and not mandatory. With such a construction of section 3063 all difficulty would be done away with, and there would be nothing in it to change the rule of construction which would otherwise obtain as to said section 2708. Said section 3063 is found within the chapter relating to the filling of vacancies, and provides what facts shall be sufficient to authorize the proper authority to exercise its powers in that regard. But it does not follow that the person elected has lost all right by reason of his failure to qualify. The object of such provision will be fully accomplished by holding that such failure to qualify does not in itself work a forfeiture of the right to the office, but simply authorizes the proper authority to declare such forfeiture, and fill the office by appointment. By the construction force would be given to every word in said section 3063, and the usual construction preserved as to the other section in question. Thus construed, the proper authority would at any time after the expiration of the fifteen days prescribed by the statute have the power to declare a vacancy, and at once fill the same by appointment, and, this having been done, the right of the person elected to the office would be determined and ended; but until such action was taken the person elected could, by qualifying within any reasonable time after notice of his election, make perfect his title.

If this were a new question, and if we were to take as the foundation of our decision the fact that said section 2708 would, if standing alone, be construed as declaratory, and would have been substantially complied with by qualification within a reasonable time, instead of within the letter of the statute, this construction of section 3063 would be more reasonable, and would give better force to all the words of both statutes, than would that contended for by the relator. It must be borne in mind in this connection that these two sections are not parts of the same Act, and a different rule of construction will obtain than would if the substance of section 3063 had been embodied as a part of section 2708. If the Legislature had provided in a single section that a person must qualify within fifteen days, and that, if he did not do so, his office should be vacant, there would be much greater force in the argument of relator than under the law as it stands. There have been numerous adjudications bearing more or less directly upon the question here involved, some of which seem to warrant the contention of each of the parties to this action. We shall not attempt a general review of the cases, but shall content ourselves

with a brief examination of the question in the light of the authorities. Mechem on Public Officers lays down the general doctrine as follows: "Statutes usually directory and not mandatory. Failure to give bond within time prescribed does not work a forfeiture, even though the statute expressly provide that upon a failure to give the bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment. It is generally held that the default is a ground for forfeiture only, and not a forfeiture *ipso facto*." The authorities cited by the relator and respondent respectively satisfy us that the conclusion to which Mr. Mechem has come as above stated is warranted thereby. A large list of authorities have been cited by the respective parties as sustaining or contradicting the conclusion of Mr. Mechem as above stated. The leading ones cited sustaining the text above quoted are: *State v. Toomer*, 7 Rich. L. 216; *Sproul v. Lawrence*, 83 Ala. 674; *Chicago v. Gage*, 95 Ill. 598. Of the long list cited by the relator upon the other side the most of them, though perhaps tending in some degree to sustain the proposition for which they are cited, can easily be distinguished from this case, and can have but little force in deciding this question. For instance, he cites *State v. Tucker*, 54 Ala. 905, and claims that it not only decides the question adversely to the text above quoted, but that it substantially overrules the case of *Sproul v. Lawrence*, *supra*; while, as we read this case, it only decides that a judicial determination as to the existence of a vacancy is not a necessary prerequisite to an appointment to fill the same, and to us it seems evident that there was no intention to overrule the case in 83 Ala. above cited, but a direct intention to affirm said case and distinguish it from this. *State v. Beard*, 84 La. Ann. 278, is also much relied upon, and, if the statute, the construction of which was involved in that case were like ours, the text would justify the citation; but such was not the case. The statute construed there provided that the officer should qualify within a definite time named, and that a failure to do so should *ipso facto* work a forfeiture of the office, and it needs no argument to show that the language of the court in construing a statute of this kind could throw no light upon the construction of our statute. The same court had in *State v. Peck*, 80 La. Ann. 281, under a statute which was not dissimilar from ours, held as contended for by respondent. *Re Atty-Gen.* 14 Fla. 277, was decided without argument, and upon a proceeding substantially *ex parte*. *State v. Matheny*, 7 Kan. 327, seems squarely in point, and to justify the contention of relator, but it must be said with reference to that case that the character of statutes of this kind, and the tendency of courts to hold them declaratory, rather than mandatory, received no attention by the judge deciding it. He contented himself with putting his decision solely upon the language of the statute of the state, and, so far as appears from the opinion, the controlling reason therefor may as well have been the fact that one section provided that the bond should be filed within twenty days, and that, therefore, it must be filed within that time, or not at all, as upon the other section, which was some-

thing like our section 8063. What the judge says, in deciding *People v. Taylor*, 57 Cal. 620, is entitled to but little weight, as, so far as it relates to this question, it was pure *dicta*. Of all the cases cited by relator not more than two or three can be said to be squarely in point, and, in our opinion, they would not justify us in sustaining the contention of relator when that of respondent is upheld by such a text-writer as Mr. Mechem, and by the authorities cited by him, especially as to do so would be to control and change what is conceded to be the ordinary and proper construction of the section directly relating to the qualification of an officer by another section upon a different subject, the language of which can be given force without so doing. Under some statutes the qualification is made a prerequisite to the holding of the office, and in fact that which bestows the office. Under such statutes, the failure to qualify within the time specified would no doubt prevent a later assertion of any right thereto. But under our statute it is the election which gives the right to the office, and the qualification is only an incidental requirement for the protection of the public. If the provisions for such qualification are not timely complied with, the public can protect itself by declaring a vacancy and filling the same by appointment; but until such acts have been done the force of the election has not been exhausted, and, upon a compliance with the incidental duty of qualification, is given full force. The construction which we have above contended for seems to us reasonable and proper. Besides any other construction should be avoided, if possible, on account of the hardship and injustice that would be caused thereby. If the construction contended for by relator is to obtain, then the provisions of our statute must be held to be mandatory, and if they are mandatory they cannot be relieved against. It would follow that, however overwhelming the misfortune or necessity, a failure to qualify within the fifteen days would absolutely forfeit the office, notwithstanding the fact that the person elected thereto should have qualified the day after the expiration of such time. But it is said by the relator that the provision can be waived by the public through their proper officers, and he seeks to meet the force of many of the cases cited by respondent by the assertion that they present the status of the officer after such waiver of the right to declare forfeiture by the public. If the requirements are declaratory, they can of course, be waived, and perhaps a failure to act affirmatively would in itself constitute a waiver; but, the provisions are mandatory, there can be no waiver thereof. A definite time fixed by the Legislature in a statute, which is held to be mandatory in all its provisions, cannot be extended. So soon as you once hold that the court, or any other power, has authority to extend the time fixed by the Legislature, you in fact hold that the statute is declaratory, and not mandatory. The people, by their votes, determine their choice of officers, and they should not be robbed of the fruits of such choice for slight or insufficient reasons; and to hold that the Legislature intended to rob them of such fruits by reason of the fact that their choice qualified

sixteen days instead of only fifteen after notice of his election, would only be justified when language had been used which made such construction absolutely necessary. From the expiration of the fifteen days after notice of his election until the date of the qualification of respondent it would have been competent for the proper authority to have declared the office vacant under the provisions of section 8063, but, no action having been taken thereunder until the respondent was fully qualified, his right to the office became absolute.

The judgment of the court below must be affirmed.

Anders, Ch. J. and Stiles, J., concur.

On May 12, 1892, Dunbar, J., filed the following dissenting opinion.

I am unable to agree with the majority. Nor do I think that a plain statutory enactment setting forth specifically circumstances under which an office becomes vacant should be construed out of existence by the mere statement of the theoretical rule that "forfeitures are abhorred by the courts." What the courts abhor should be of very little consequence. The vital question is, What did the Legislature intend? I think it is an excellent idea for courts to give to statutory language its plain and ordinary meaning. Let us see what the language of section 8063 is: "Sec. 8063. Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officer: *First*, the death of the incumbent; *second*, his resignation; *third*, his removal; *fourth*, his ceasing to be an inhabitant of the district, county, town, or village for which he shall have been elected or appointed, or within which the duties of his office are to be discharged; *fifth*, his conviction of an infamous crime or of any offense involving a violation of his official oath; *sixth*, his refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law; *seventh*, the decision of a competent tribunal declaring void his election or appointment; *eighth*, whenever a judgment shall be obtained

against such officer for breach of the condition of his official bond." It seems to me that, if the Legislature had desired to enact that an office should become vacant upon the refusal or neglect of the officer elect to take his oath of office or to give or renew his official bond within the time prescribed by law, it could not have expressed itself in language more clear or unambiguous. Nothing is said about a "forfeiture being declared by the proper authority;" that is an idea expressed by the majority opinion, but it is not found anywhere in the law. It may be a wise amendment to the law, but, if so, it must be incorporated by legislative enactment, and not by judicial construction. The interpretation of the majority that the language of section 8063, "within the time fixed by law," does not refer to the time fixed by law, viz., within fifteen days, but means the time within which the court would hold to be covered by said section when "construed as declaratory and not mandatory," is to my mind an interpretation unwarranted by any rule of construction, and will lead to results most confusing. "Within the time prescribed by law" is a very common legislative expression in enactments of this kind, and ordinarily I am inclined to think that in looking up the time in which to qualify under such a statute the mind of every layman, practitioner, or judge would go to the definite time prescribed by the law. It is true that hardships may arise in individual cases by construing these sections as mandatory, but that was a matter for the Legislature to guard against. It is evident that it did not intend that the refusal of the officer to qualify should alone work a forfeiture, for the law specially provides that the neglect to qualify shall also cause a vacancy. Neither do I think there is anything unwise in the requirement. Officers are elected not for the benefit of individuals, but for the benefit of the community; and, if an officer is so careless of the requirements of law under which he is elected that he neglects to qualify, it is a fair indication that he will be neglectful in the transaction of the duties of his office.

The judgment should be reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Thomas REEVE, Impleaded etc., *Plff. in Err.*,

v.
FIRST NATIONAL BANK OF GLASSBORO.

(.....N. J.)

*1. Where nothing appears in the body of a note to indicate who is the maker, and it is signed by a person who affixes to his

*Head notes by REED, J.

name an official title as officer of a corporation, the note is *prima facie* that of the person so signing; but it is so far ambiguous in respect to the question whether the officer or the corporation is the maker that parol testimony is admissible to settle it. If, however, the note is signed by the corporate name, followed by the name of a corporation officer, who affixes to his name his official title, such note is conclusively taken to be corporation paper.

2. A promissory note made in this form: "We promise to pay to the order of—the sum of—;" and signed, "Warrick Glass Works,

NOTE.—Without attempting any extended annotation of the question of individual liability of officers of a corporation on notes signed by them for the corporation, we call attention particularly to *Liebscher v. Kraus*, 5 L. R. A. 493, 74 Wis. 387 and *Miller v. Roach*, 6 L. R. A. 71, 150 Mass. 140, both of which are closely parallel to the above case; also to 16 L. R. A.

McKensy v. Edwards (Ky.) 3 L. R. A. 397, and *note*, *McCandless v. Belle Plaine Canning Co.* 4 L. R. A. 393, 78 Iowa 161, which present exceptions to or the converse of the rule above adopted.

For agents' liability on contracts, see also *note* to *Farmers' Co-operative Trust Co. v. Floyd* (Ohio) 13 L. R. A. 344.

J. Price Warrick, Pres.—is the note of the corporation, and not the note of Warrick, or the joint note of Warrick and the corporation.

(February 22, 1892.)

ERROR to the Supreme Court holding circuit in Gloucester County to review a judgment in favor of plaintiff in an action brought to recover from Reeve the amount of a promissory note signed by the Warrick Glass Works, J. Price Warrick, President, and indorsed and sold by Reeve to the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. J. J. Crandall, for plaintiff in error: If the note was made by joint makers, the indorser's liability did not attach until demand of payment had been made upon both makers. Story, Prom. Notes, §§ 289, 295.

The notes have joint makers.

In *Appar v. Hiler*, 24 N. J. L. 814, the Chief Justice says: "As to the payees they were all principals and all bound jointly and severally to pay the debt."

In Daniel on Negotiable Instruments, § 94, it is laid down that "if a note runs 'We promise', and is signed A. B. principal, C. D. surety, it is still the joint note of both," citing *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68; *Palmer v. Grant*, 4 Conn. 387; *Barnett v. Juday*, 38 Ind. 86; *Johnson v. King*, 20 Ala. 370.

The note being perfect on its face, entirely unambiguous, testimony that J. Price Warrick acted as agent for the sole purpose of avoiding and escaping liability is incompetent.

Prutz v. Stanton, 10 Wend. 271, 1 Am. L. Cas. 5th ed. 744; *Kean v. Davis*, 21 N. J. L. 692, 47 Am. Dec. 182; *Pooley v. Harradine*, 7 El. & Bl. 481; *Strong v. Foster*, 17 C. B. 201.

Assuming the proof established J. Price Warrick, to be president, no agency was thereby established to pledge the credit of the corporation.

See *Titus v. Cairo & F. R. Co.* 37 N. J. L. 102; *Nichols v. Williams*, 22 N. J. Eq. 63.

Mr. Lewis Starr, for defendant in error: "We" does not show the plurality of makers because in ordinary parlance it is most natural to designate a corporation by the word "we," because it is suggestive of an aggregation of individuals.

For a determination as to who is bound by an instrument of the kind, it is proper to refer to the signature.

Randolph, Com. Paper, § 129.

The addition of an official title to the signature of the officer is a mere description of the person and makes it doubtful who was intended to be bound. Such ambiguity may be explained by parol testimony.

Abbott, Trial Ev. 87; Randolph, Com. Paper, § 147; Dan. Neg. Inst. § 418; 1 Parsons, Bills & Notes, 168; *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182; *Chaddock v. Vanness*, 85 N. J. L. 523; *Appar v. Hiler*, 24 N. J. L. 815; *Shotwell v. McKown*, 5 N. J. L. 828.

The notes in question are unambiguous and on their face they show conclusive evidence of a corporate promise alone, and that the officer whose name was signed is not liable thereon.

Draper v. Massachusetts Steam Heat Co. 5 Allen, 388; *Atkins v. Brown*, 59 Me. 90; *Castle* 16 L. R. A.

v. Belfast Foundry Co. 72 Me. 187; *Liebscher v. Kraus*, 5 L. R. A. 496, 74 Wis. 387; *Falk v. Moebis*, 127 U. S. 597, 32 L. ed. 266; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Bean v. Pioneer Min. Co.* 66 Cal. 451, 56 Am. Rep. 106; *Miller v. Roach*, 6 L. R. A. 71, 150 Mass. 140; *Chipman v. Foster*, 119 Mass. 189.

A note in this form "We promise to pay" etc., signed "W. B. S. Sec'y," and sealed with the corporate seal, has been held in Indiana to be a note of the corporation.

Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330. See also *Latham v. Houston Flour Mills* 68 Tex. 127; Randolph, Com. Paper, § 148; *Newmarket Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39.

Reed, J., delivered the opinion of the court:

This cause was tried at the Gloucester circuit. The action was brought upon certain promissory notes, of which the following is a copy:

"Glassboro, N. J., Dec. 18, 1890. \$97 70-100. Three months after date we promise to pay to the order of Thos. Reeve, at the First National Bank of Glassboro, ninety-seven and 70-100 dollars, without defalcation, value received. Warrick Glass-Works. J. Price Warrick, Pres."

Two additional notes, one for \$90.80 and another for \$140.10, were in the same form. Each was indorsed by the payee, and held for value by the First National Bank of Glassboro. At maturity a demand of payment was made at the bank upon the Warrick Glass-Works, payment refused, and notice of protest duly given to Reeve, the payee and indorser. The defense interposed by the defendant's counsel was that the note was signed by the Warrick Glass-Works and by J. Price Warrick as joint makers; that demand of payment should have been made upon each of the joint makers; and therefore it was insisted that the failure to make a demand upon Warrick relieved the indorser from liability. The only facts proved in the case bearing upon the question mooted were that the note was given by the corporation for feed furnished, and that J. Price Warrick was the president of the company. At the conclusion of the plaintiff's case a motion to nonsuit was made and overruled. This action of the trial court was the subject of the only material exception.

We are of the opinion that the refusal to nonsuit was correct. The note was that of the Warrick Glass-Works alone. The demand of payment was properly made upon the corporation only. The cases in which the liability of parties to paper similar to this is determined are not uniform in their results. Indeed, great contrariety of views can be found in the decisions upon this question. A detailed examination of those cases would not result in much profit. The result of the best-considered decisions is this: Where nothing appears in the body of a note to indicate the maker, and the note is signed by a corporate name, under which name appears the name of an officer of the company, with his corporate official title affixed thereto, in such case the note is taken conclusively to be that of the corporation.

Where, however, a note drawn in a similar form, except as to the signatures, is subscribed by the name of an officer of a corporation, to which name is affixed his title as an officer of a particular corporation, the result is not the same. In respect to notes drawn in the last-mentioned form, the courts in most of the states hold that there is an ambiguity arising out of this manner of coupling the names of the natural person and of the corporation. It is therefore open to the parties to introduce extrinsic testimony to disclose facts from which it can be concluded which of the parties should be regarded as the maker. In this state the rule is that a note drawn in this form is prima facie the note of the person signing and not the note of the corporation; but this is only a disputable presumption, and, upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended to be the note of the corporation, which evidence can, of course, be met with counter-evidence of the same character. This rule was definitely settled in the case of *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 183. In this case a note was signed, "John Kean, Prest. F. & S. S. R. R. Co." It was held to be prima facie the note of Kean, but it was held that parol evidence might be introduced to show whether it really was the personal note of the officer or was the note of the railroad company. If, therefore, the present notes had been signed, "J. Price Warrick, President of the Warrick Glass Works," it, in the absence of parol testimony to show a contrary intention, would be regarded as the note of Warrick. As the notes are signed with the name of the corporation, followed by the words, "J. Price Warrick, Pres.," they are taken to be corporation paper. This conclusion seems to rest upon rational ground. The name of the corporation signed first stands as a principal, and that of the offi-

cer as agent. The name of a corporation, so placed, raises the implication of a corporate liability. To so place it requires the hand of an agent. The name of an officer of such corporation, to which name the official title is appended, put beneath the corporate name, implies the relation of principal and agent. It means that, inasmuch as every corporate act must be done by a natural person, this person is the agent by whose hand the corporation did the particular act. This form of signature is just as significant in respect to the notes in question as if the name the "Warrick Glass Works" had been written, "Per Warrick, Agent." The following are cases in which notes in similar form to those now in suit have been held to be solely the notes of the corporation whose name first appeared, followed by the name of an officer: *Bean v. Pioneer Min. Co.* 66 Cal. 451, 56 Am. Rep. 106; *Atkins v. Brown*, 59 Me. 90; *Castile v. Belfast Foundry Co.* 72 Me. 167; *Miller v. Roach*, 150 Mass. 140, 6 L. R. A. 71; *Draper v. Massachusetts Steam-Heat Co.* 5 Allen, 388; *Liescher v. Kraus*, 74 Wis. 387, 5 L. R. A. 496.

I do not perceive any significance in the use of the words, "We promise to pay," instead of "The company promises to pay." The contention was that the use of these words raised an implication that it was the joint note of the corporation and Warrick. But, as has been remarked in more than one of the cases cited, in which the notes contained a promise in like form, the word "we" is often used by a corporation aggregate. *Draper v. Massachusetts Steam Heat Co.*, *supra*; *Bean v. Pioneer Min. Co.*, *supra*; *Randolph*, Com. Paper, § 143.

Our conclusion is that the demand was made upon the only maker, and therefore the refusal of the trial judge to nonsuit was right.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

E. ARCHER, *Appt.*,
v.
SALINAS CITY, *Resp.*
(.....Cal.....)

1. A dedication to the public of land for a park is effected by the owner of a tract which lies within an incorporated town if he makes and records a map by which the tract is subdivided into blocks and lots which are bounded by streets connecting with streets of the town already laid out, marks a space thereon "park," and sells lots which according to the map face the park, holding out its existence as an inducement to purchasers.
2. Delay on the part of a town in using land which has been dedicated to it for a park will not impair its right thereto.
3. Although acceptance is necessary in case of an offer to dedicate, actual dedi-

cation will vest title in the public without acceptance.

4. A dedication to the public of a portion of land which is subject to a purchase-money mortgage, will be superior to the claim of the mortgagee if he accepts a reconveyance in satisfaction of the mortgage.

(January 21, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Monterey County in favor of defendant in an action brought to quiet the title to certain real estate to which defendant had set up an adverse claim. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. P. Geil and H. V. Moorehouse for appellant.

Messrs. W. M. R. Parker and B. V. Sar- gent for respondent.

Harrison, J., delivered the opinion of the court:

Action to quiet title to a block of land in Salinas City. Judgment was rendered for the

NOTE.—For notes on dedication of land for a public park, see *Clarke v. Providence* (R. I.) 1 L. R. A. 725; *West Chicago Park Comrs. v. McMullen* (Ill.) 16 L. R. A. 215; *Atty-Gen. v. Abbott* (Mass.) 18 L. R. A. 261.

defendant upon the ground that the land in question had been dedicated for use as a public park. From this judgment, and an order denying a new trial, the plaintiff has appealed.

The land in question is a portion of a larger tract of about 200 acres within the limits of Salinas City, of which the plaintiff was the owner on January 15, 1874, when he conveyed the same in fee to W. H. Stone for the sum of \$25,000, and received from him \$5,000 in money, and a mortgage on the same property to secure the remaining \$20,000. This mortgage was renewed in 1878, and on December 24, 1880, Stone reconveyed a portion of the tract, including the block in question, in satisfaction of the mortgage debt, and other obligations of his to the plaintiff. In July, 1874, Stone caused the tract to be surveyed and subdivided into blocks, with streets connecting with other streets that had been laid out in Salinas City, marking the blocks with stakes set in the ground; and on the 12th of March, 1875, filed in the recorder's of Monterey county a map of the tract, showing these streets and blocks, and the subdivisions of the blocks. Upon this map the block in question is laid down as bounded by Park street, Homestead avenue, Central avenue, and Villa street, and is itself marked "Central Park." Prior to the filing of the map, Stone had advertised in several newspapers that a sale of the tract would be held March 15, 1875, and had made and circulated copies of the map, and on the day of the sale he had an enlarged copy of the map upon the ground, and sold at public auction a very large number of the lots according to the map. In the advertisement of the sale it was stated that "in the center of this plat is located and held in reservation a block 580 feet square for a city park." At the sale it was represented that the square had been laid out for a city park, and the auctioneer made frequent references to this park as an inducement to pay advanced prices for lots in its vicinity, and the lots around it were sold at much higher prices than those remote from it. Stone was present at the sale, and made no objection to any of these representations. Nearly all of the lots upon the streets bounding the park and fronting thereon were sold at the sale, and during several years after the auction other lots were sold with reference to the map; and, after the conveyance to the plaintiff, deeds were executed by him with reference to the map as late as 1887. Previous to the auction sale, Stone had caused the land within this block to be laid out and planted with trees, and for several years thereafter he kept it fenced and had the trees cared for, and about 1884 the plaintiff cut some of the trees down, and hauled away the wood, under the claim that he was the owner of the land. It does not appear that the city ever made any improvements upon the park or took any steps with reference to it until some time in 1887, when it took possession of the block, and very soon thereafter the plaintiff commenced this action.

Upon the foregoing facts we are of the opinion that Stone dedicated the land in controversy for use as a public park, and that the finding of the court that the land was so dedicated is fully sustained by the evidence. When the owner of property which is within the limits

of an incorporated city or town makes and records a map of such property, by which he subdivides the same into blocks and lots bounded by streets which are continuations of other streets already laid out by the city or town, and sells and conveys the lots abutting upon those streets, he thereby dedicates to the public the streets so laid out by him as prolongations of other streets, as well as the other streets which are laid out upon such map intersecting and connecting the same; and if, upon such map or plan, he has designated a space or block as a public park, such space or block is as fully dedicated to public use as are the streets delineated thereon. The purchasers of such lots have not merely an easement in the streets upon which the lots abut, but all of the streets are set apart for the purpose of enabling such purchasers to have reciprocal intercourse with the public outside of the subdivided tract, and are thus themselves dedicated to the entire public for all purposes to which streets can properly be applied. The same principles which are applicable to the dedication of public streets apply to the dedication of a public park or square. All dedications for public use are to be considered with reference to the purpose of which the dedication is made, or the use to which the property dedicated may be applied and that purpose may be ascertained by the designation which the owner has affixed to the land upon the map, whether it be a street, a school lot, or a public park. The setting apart of a public park upon such maps is for the convenience and enjoyment of the inhabitants of the place, and, as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received, in the increased prices for which that property was sold, the compensation for its surrender to the public as a public park. The word "park," written upon a block of land designated upon a map, is as significant of a dedication, and of the use to which the land is dedicated, as is the word "street," written upon such map. The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England the word, when applied to an inclosed tract of land in the country, has a different signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land and style it a "park," or give that name to his place, without giving to the public any right to its use, for in such a case there would be no semblance of dedication; but the meaning of a word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term "park" signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone, or with some qualifying term, as "Hyde Park," or "Regent's Park," or, as in the present case, "Central Park." Upon this point the authorities are uniform. *Watertown v. Cowen*, 4 Paige, 513, 8 L. ed. 540; *Price v. Plainfield*, 40 N. J. L. 608; *Carter v. Portland*, 4 Or. 839; *Cincinnati v. White*, 81 U. S. 6 Pet. 431, 8 L. ed. 452; *Rowan*

v. *Portland*, 8 B. Mon. 246; *San Leandro v. Le Breton*, 72 Cal. 170; Dill. Mun. Corp. §§ 640, 644. Dedication is an ultimate fact dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. *Harding v. Jasper*, 14 Cal. 648. It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express and completed by a single act, as when the land is dedicated by deed; or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it, or right to its use. Even though the acceptance presumed from an express dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated, whenever convenience or necessity may suggest.

A distinction is to be observed between actual dedication and an offer to dedicate. In the latter case there must be an acceptance on behalf of the public before the dedication is complete, and the owner may at any time before such acceptance revoke the offer, while in the former case the acceptance will be presumed from the benefit arising from the dedication. The acceptance of an offer to dedicate may, moreover, be formal, as by resolution on the part of the city, or it may be implied, as by user or adaptation for use, as in the improvement of the streets. Merely recording a map of the subdivided tract, or simply designating the streets and blocks by stakes or monuments upon the ground, would constitute no more than an offer to dedicate. Whether the owner, by making sales according to such map or designation, has made the offer with reference to other streets than those by which the lots sold are bounded, is a fact that the court must determine from the circumstances of each case, such as the number of sales, their proximity to the street claimed to have been dedicated, the use to which the land has been put, and the means by which, or the extent to which, the streets have been brought into connection with other streets or highways. The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should himself repurchase all of the lots so

sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user. *Rowan v. Portland*, 8 B. Mon. 286. In *San Leandro v. Le Breton*, 72 Cal. 170, it was held that the sale of the blocks opposite the space designated on the map as "Court Square," with other lots and blocks upon the map, effected such a dedication of that space that it could not afterwards be revoked by the owner. The principles relative to dedication and an offer to dedicate which are laid down in that case are in accord with the law upon that subject, as well as with previous decisions in this state, and should have controlling effect in the present case. The failure to observe this distinction between a dedication and an offer to dedicate explains the apparent discrepancy in the language used in various opinions, where it is said that a dedication is not complete until the city has given its acceptance. In this state, however, it has been the uniform rule, whenever the question has been presented for decision, that, whenever an actual dedication has been made, no acceptance is required, but will be presumed, even though there may not from such dedication be imposed upon the public an obligation to make expenditures upon the streets. *Harding v. Jasper*, 14 Cal. 642; *Stone v. Brooks*, 85 Cal. 497. In *Hayward v. Manzer*, 70 Cal. 476, Castro, the owner of the land, made and recorded a map of the town of San Lorenzo in 1858, on which the street in question was delineated, and made some sales of land according to that map. The street, however, was not opened to the public, or even used as a public road. Within less than a year after making the map he conveyed a portion of the tract so laid out, including the place marked for this street, and it was thereafter held in possession under said conveyance. The town was not incorporated until 1876, and after such incorporation its authorities accepted this alleged dedication. The court held that these acts of Castro were only an offer to dedicate, which was revoked by his conveyance of the tract before the actual acceptance. In *Phillips v. Day*, 82 Cal. 24, the owner had made a map of the tract, marked streets and subdivisions upon the ground, and made sales of a few of the lots according to such map and subdivision. The land was not, however, within the limits of any city or town, and the streets were not traveled, but were kept from use by the public by fences inclosing the entire tract. The lots conveyed by the owner were afterwards repurchased by him, and a sale made of the entire tract, including the streets, before any map was recorded. The court held that these circumstances amounted to only an offer to dedicate the streets, and that the sale of the entire tract operated as a revocation of such offer. In *Eureka v. Croghan*, 81 Cal. 524, the owner of the land made a conveyance in 1870, describing the tract conveyed with reference to certain streets as they would exist if projected through the tract, and about four months afterwards sold the portion covered by these streets. It was held that the first conveyance was no more than an offer to dedicate, which was revoked by the second conveyance; distinguishing the case from those

in which the owner has himself platted the land into blocks and streets, and sold the lots with reference to such streets. In *Eureka v. Armstrong*, 88 Cal. 623, the dedication was held complete, for the reason that the offer had been formally accepted before any attempt at revocation was made. There is nothing decided in *People v. Reed*, 81 Cal. 70, inconsistent with the foregoing principles, although there are certain expressions in the opinion in that case that may seem at variance therewith but they were *obiter dicta*, or side remarks and unauthoritative views of the justice who wrote the opinion. That the court did not intend to lay down any different rule from that which is given in *Stone v. Brooks*, *supra*, or to qualify or limit the authority of that case, is evident from the fact that that case and others are cited on page 75, 81 Cal., as authority for the proposition that "where the owner surveys and plats his property, and makes sales of lots with reference to such plat, the streets designated thereon are irrevocably dedicated to the public as streets." In fact, the question itself was not presented for decision, inasmuch as the facts in *People v. Reed* showed that there never had been more than an offer to dedicate. The map of the property was never recorded; the part of the alleged street in controversy was never opened as a street, but had for many years been fenced and occupied by substantial and permanent buildings; no sales of lots thereon were ever made;

and it did not appear that any of the individuals who purchased property on other parts of the alleged street had ever seen the map of the property; and no action was taken by the city for more than 20 years after the map was made, and the property inclosed and permanently improved. 81 Cal. 76.

When the plaintiff took the conveyance from Stone, in December, 1890, in satisfaction of Stone's indebtedness to him, the title thereby acquired was subject to the dedication in his hands as much as it would have been in the hands of any other grantee of Stone, and subject to this incumbrance as much as to any other incumbrance which Stone might have placed upon the land while he was the proprietor. While Stone might not have made any dedication of the tract that would impair the security of the mortgage that he had previously made thereon, or that would have prevented a purchaser under a foreclosure sale under such mortgage from acquiring a title free of such incumbrance, yet the acceptance by the mortgagee of a deed in satisfaction of the debt gave to him only such title as Stone had at the time when the deed was executed.

The judgment and order denying a new trial are affirmed.

We concur: De Haven, J.; Paterson, J.; McFarland, J.; Sharpstein, J.; Garrouite, J.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania v.

Charles A. ALLEN *et al.*, Appts.

(.....Pa.....)

The regular use of a steam traction engine to draw heavy loads of stone

NOTE.—Nuisance—Traction engine.

The lawfulness of the use of a steam traction engine on a highway is yet an unsettled question, although in recent years the use of such engines on highways has become somewhat common.

In *Macomber v. Nichols*, 34 Mich. 212, 23 Am. Rep. 522, it was decided, in an opinion written by Judge Cooley, that a steam engine used as a means of locomotion in a highway is not necessarily a nuisance, and that whether it is so or not is a question of fact, a question of reasonable conduct and management.

In *Watkins v. Reddin*, 2 Post. & F. 623, where the declaration charged the owner of a steam traction engine with using it in a highway for the purpose of drawing trucks and carriages, the court charged that the plaintiff was entitled to a verdict if the engine was calculated by noise and appearance to frighten horses, so as to make its use in the highway dangerous to persons riding or driving horses, and the owner knew of the danger, whether his knowledge was derived from the nature of the engine or otherwise. Both these cases, it will be noticed, make the question one of fact for the jury, although the former expressly declares that such an engine in a highway is not necessarily a nuisance, while the latter seems to regard it as necessarily a nuisance if from the nature of the engine

along a public highway from a quarry to a railroad, taking a train of two wagons at a time and making two trips per day, each requiring from one hour to one hour and a half for one way, and sometimes stopping half an hour to get up steam, and frequently making much noise by blowing off steam, constitutes an indictable nuisance where travel is thereby seri-

it is calculated by noise and appearance to frighten horses.

Little, if any, help toward the determination of the question can be drawn from cases concerning the fright of horses by engines on or near railroad crossings, or even on tracks laid in streets, as these engines being operated under a franchise, the question as to them is chiefly one of the reasonable or negligent exercise of the franchise. But cases relating to steam engines operated near a highway may be of some value in this connection.

In *Wabash, St. L. & P. R. Co. v. Farver*, 9 West. Rep. 621, 111 Ind. 195, the operation of a portable steam engine near a highway is held to be not necessarily a nuisance so as to make a person for whom it is operated liable for the negligence of an independent contractor in operating it.

So the owner of a steam threshing machine from whom it is hired by another person is not liable for the latter's violation of a statute by setting it up within a prohibited distance from a highway, where it is done in the owner's absence and without his direction. *Harrison v. Leaper*, 5 L. T. N. S. 640.

In England a statute prohibiting steam engines to be operated within twenty-five yards of a highway, unless concealed by a building, wall or fence, so as not to be dangerous, is held applicable to an engine which is set up for temporary use only. *Smith v. Stokes*, 4 Best & S. 84.

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ously hindered and women and children are afraid to drive that way, especially where the safety of bridges on the road is endangered by the heavy loads.

(March 23, 1892.)

APPEAL by defendants from a judgment of the Court of Quarter Sessions for Bradford County convicting them upon an indictment charging the maintenance of a nuisance. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Rodney A. Marcur, for appellants:

The use being lawful, to constitute an indictable offense it must be charged and laid in the indictment that the effect of the obstruction in the highway unduly or unreasonably prevented the public from their enjoyment of its use. The fact that an obstruction may simply interfere with or prevent for a short time the public from their enjoyment of its use is not sufficient.

See 2 Wharton, Crim. Law, §§ 1410, 1414.

If from the facts stated it appears that no indictable offense has been committed, the indictment will be set aside in the first instance.

1 Bishop, Crim. Proc. § 772, pp. 467-468.

It is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations.

3 Dillon, Mun. Corp. § 730, pp. 721, 722; *Macomber v. Nichols*, 84 Mich. 212, 23 Am. Rep. 522.

The right to partially obstruct a street does not appear to be limited to a case of strict necessity, it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel.

Algheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649; *Com. v. Hauck*, 108 Pa. 586; *Piollet v. Sinners*, 106 Pa. 109.

The use of a steam engine in the heart of a city is not unlawful so long as properly used and managed.

Loore v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; *Wood, Nuisances*, § 151, p. 151; 2 Dill. Mun. Corp. § 684, pp. 680, 681; *Macomber v. Nichols*, *supra*; *Wabash, St. L. & P. R. Co. v. Farver*, 9 West. Rep. 621, 111 Ind. 195; *Elliott, Roads & Streets*, p. 684; *Bennett v. Lovell*, 12 R. I. 166, 84 Am. Rep. 628.

The defendants, having followed the provisions of the Act of June 30, 1885, cannot be convicted of a nuisance, for an obstruction even which would otherwise constitute a nuisance may be legalized by legislative enactment; for that which the state has authorized cannot be a public nuisance.

Elliott, Roads & Streets, p. 484; *Cooley, Torts*, 615; *North Vernon v. Voegler*, 1 West. Rep. 566, 108 Ind. 814.

Messrs. John W. Coddington, Dist. Atty., D'A. Overton and John C. Ingham, for the Commonwealth.

Per curiam:

The defendants were convicted in the court below of maintaining a nuisance. They now
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allege that the indictment does not charge an indictable offense. The first count thereof sets forth that the defendants "set up, established, maintained, kept up, and continued an obstruction in said public road and common highway aforesaid, leading from Rummerfield in Standing Stone township, up the Rummerfield creek, by Phillip Grace's towards Herrickville, by running back and forth several times a day, over said highway, an engine propelled by steam, commonly known as a 'traction engine' which by its smoke, steam, noise, and appearance, frightens the horses driven over said road or common highway, and endangers the safety and lives of people using said road in an ordinary manner, and obstructs and hinders travel thereon, whereby the public road and common highway aforesaid was then and there obstructed and straightened so that the citizens of said commonwealth could not then and there go, return, pass and repass, ride and labor, on foot and on horseback, with their horses, coaches, carts, carriages, and wagons, in, upon, through, and along said public road and common highway, as they ought and were wont and accustomed to do, without great danger of their lives, and also their goods, to the great damage and common nuisance of all citizens of said commonwealth of Pennsylvania, going, returning, passing and repassing, riding and laboring, with horses, coaches, carts, carriages, wagons, on foot and on horseback, upon, through and along said public road and common highway, contrary to the form of the Act of General Assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

Upon the trial below it appears that the defendants had been operating a stone quarry for several years. This quarry is situated on a public road about three miles from Rummerfield station. It is a narrow road, with four bridges between the stone quarry and the station. For several years the defendants hauled the stone from the quarry in the ordinary manner, by horses. Some time during the year 1891 Charles A. Allen, one of the defendants, procured a traction engine, and put it on the road for the purpose of drawing heavier loads of stone. Behind the engine they hitched two wagons, one behind the other, making a train from 50 to 55 feet long, and when loaded, weighing from thirteen to fourteen tons. They made two trips a day from the quarry to the station. It took from an hour to an hour and a half to go over the road one way. There was evidence that the train would sometimes stop for half an hour to get up steam; the steam would blow off frequently, and make a good deal of noise; that it hindered and obstructed travel over the road; that people took other roads several miles out of their way to avoid it; that women and children accustomed to drive to the station for different purposes were afraid to do so; that farmers who had contracted to deliver produce to Rummerfield refused to do so because of the obstruction, and cars partly loaded had to be unloaded on that account; that parties at the station and on the road had been hindered and delayed sometimes for half an hour or more, waiting for this train to get out of the way; that persons who had met it in the road had been obliged to unhitch

their horses, and go off behind school-houses into the woods and lanes and wait until it had gone by. We are not prepared to say that the indictment does not set forth a public nuisance and that the jury were not justified in finding in the evidence the existence of such nuisance. The running of a traction engine over a public highway upon a single occasion would not constitute a public nuisance. That may be necessary to remove it from one location to another, as in the case of a steam threshing-machine, which is at certain seasons removed from one farm to another, for the purpose of threshing out the farmers' crops. Indeed, the Act of June 30, 1885, seems to recognize such necessity, and prescribes the conditions and manner in which machinery propelled by steam may be moved over a public road or highway. This, however, we regard as restrictive legislation. It was not intended to license the unrestricted use of steam upon the public highways of the commonwealth. While a man may have a right under this Act of Assembly, to run a traction engine over a public road for a necessary purpose by complying with the terms of the Act, yet, if he uses that privilege in an unreasonable and in an unusual way, it may constitute a public nuisance. At common law, any obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance. Angell, Highways, p. 255, § 228; 4 Bl. Com. 167; *Com. v. Millman*, 18 Serg. & R. 404. Any such obstruction of a public road as materially interferes with the public convenience is indictable as a nuisance. 2 Wharton, Crim. Law, 15. A man may lawfully use a public highway in the transaction of his legitimate business, either for travel or for transportation; but it is common law and common sense that he must use it in a reasonable manner, and not interfere with its reasonable use by other citizens. And whether a particular use is an unreasonable use and a nuisance is a question of fact, to be submitted to a jury. *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649.

While each citizen is protected in the enjoyment of his own rights, he must so exercise them as not to interfere with the rights of others. We can understand that it may be sometimes necessary to move a traction engine from one place to another, in the reasonable pursuit of a lawful business. It is quite another matter to occupy a particular road continuously, for such purpose, to the inconvenience of the public, and peril to persons using such road. The jury have found such continuous user to be a nuisance, and we cannot say such finding was not justified by the evidence. In the American & English Encyclopedia of Law, (vol. 16, p. 962,) the learned editor mentions, among other indictable nuisances: "The use on a highway of a traction steam engine, which, by its noise and appearance, frightens horses and makes the highway dangerous to persons riding or driving." Aside from this, it was alleged on the part of the commonwealth that this traction engine with the unusual load that it drew, injured the highway, and endangered the safety of the bridges. As a general rule, highways and bridges are constructed for ordinary use, in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed or by the passing of a very large and unusual weight. A township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them. There was evidence upon the trial below that the bridges on this road were built only for the usual and ordinary loads drawn over them, and that such loads were not more than one third or one fourth of the weight of the loads drawn by this traction engine. An examination of the respective specifications fails to disclose error. The case was submitted to the jury under proper instructions as to the law. *Judgment affirmed.*

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota

v.

Martin O. HASLEDAHL, *Piff. in Err.*

(.....N. Dak.....)

***1. In this state, when during the trial of a criminal case, and before the case has been finally submitted to the jury, a juror becomes sick and unable to sit further in the case, the court may order such juror discharged, and a new juror sworn to complete the panel, and that the trial begin anew; or the court may discharge the entire**

*Head notes by WALLIN, J.

NOTE.—The statute construed in the above opinion as to beginning a trial anew when a juror is unable to perform his duty does not seem to have been construed, even if such a statute has been enacted, except in North Dakota and California, and the conflict of the decisions upon it in those states is fully shown by the opinion.

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jury, and then or subsequently impanel another jury to try the case.

2. When the first course is pursued, the prisoner is not thereby entitled to again exercise all the peremptory challenges given him by statute, or to peremptorily challenge any one of the eleven remaining jurors; and in procuring the new juror the prisoner may exercise only such of his peremptory challenges as he has not already exhausted in procuring the other eleven jurors.

3. The information was filed by the state's attorney under chapter 71, Laws 1890, and verified by the state's attorney, as follows: "That the allegations therein contained are true to his best knowledge, information, and belief." Held, that the information was sufficiently verified. Whether such verification is sufficient when made as a foundation for a warrant of arrest, or when made by a person other than the state's attorney, not decided.

4. Where the information was not enti-

tied in an action, and it nowhere appears by the information that the defendant was prosecuted in the name of or by the authority of the state of North Dakota, proper and timely objection to the information being made.—*Held*, that the information was invalid, for the reason that it did not conform to the requirements of section 97, art. 4, of the state Constitution, which contains the following language: "All prosecutions shall be carried on in the name and by the authority of the state of North Dakota."

(May 31, 1892.)

ERROR to the Circuit Court for Richland County to review a judgment convicting defendant of embezzlement. *Reversed*.

The facts are stated in the opinion.

Mr. M. A. Hildreth, for plaintiff in error:

The motion to set aside and quash the information should have been granted.

The Constitution of the state, section 97 of article 4, provides that "the style of all process shall be: 'The state of North Dakota.' All prosecutions shall be carried on in the name and by the authority of the state of North Dakota, and conclude: 'against the peace and dignity of the state of North Dakota.'"

See *Jefferson v. State*, 24 Tex. App. 535; *Gould v. People*, 89 Ill. 217; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Donnelly v. People*, 11 Ill. 552; *Hay v. People*, 59 Ill. 95; *Calvert v. State*, 8 Tex. App. 538, 2 Crim. Law Mag. 122.

Section 378 of the Code of Criminal Procedure is a literal transcript of section 1123 of the Code of Criminal Procedure of California.

4 Decring. Anno. Code; California Stat. 252.

The supreme court of that state passed upon this question in the case of *People v. Stewart*, 64 Cal. 60.

The judgment in that case was reversed, because the court denied to the defendant his peremptory challenges. The case is on all fours with the case at bar, and is decisive of this question.

See also *People v. Brady*, 72 Cal. 490.

The court should have discharged the defendant for the reason that after discharging the juror, the defendant had been in jeopardy.

See *Highlands v. Com.* 1 Cent. Rep. 899, 111 Pa. 1, 7 Crim. Law Mag. 491; *Ex parte Ulrich*, 42 Fed. Rep. 587.

Mr. C. A. M. Spencer, *Atty. Gen.*, for the State.

Wallin, J., delivered the opinion of the court:

The plaintiff in error was convicted of the crime of embezzlement, and sentenced to a term in the penitentiary at Bismarck. The bill of exceptions embraced in the record shows that, after the jury had been sworn, and a portion of the testimony introduced, a juror was taken sick, and was unable to sit further on the jury. The court thereupon made an order discharging such juror, entering the reasons therefor in the order, and directed that a new juror be called and duly sworn as a juror in the case, and that the trial of the case begin anew. In the formation of the original jury plaintiff in error had used nine of the ten peremptory challenges to which he was entitled under the statute. When a new juror was called into the box he was peremptorily chal-

lenged by the plaintiff in error, and such challenge allowed by the court. The second juror called was likewise challenged, and the challenge disallowed by the court, to which ruling plaintiff in error duly excepted. Such juror was sworn, and served as a juror in the case.

Section 7401, Comp. Laws, reads as follows: "If, before the conclusion of a trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled." Under this section plaintiff in error contends that, upon the discharge of the sick juror he was entitled to all his challenges, both as to the 11 jurors remaining in the box and the new jurors called the same as though no jury had been previously selected. This section appears in our territorial Code of 1877, and is an exact copy of a section in the California Code of Criminal Procedure. We have not found the statute elsewhere. Subsequent to its adoption by the territory of Dakota it was construed by the Supreme Court of California in *People v. Stewart*, 64 Cal. 60, and later in *People v. Brady*, 72 Cal. 490. The construction placed upon the section in those cases fully sustains the position taken by the learned counsel for the plaintiff in error. But, under the circumstances, the case comes before us as an original question. Many provisions in our statutes were copied from California, and in their construction our labors have been greatly assisted by the opinions of the very able and painstaking court of that state, but in this instance we are unable to follow where that court leads. In *Stewart v. People*, the court says: "What is implied by the clause, 'and the trial begin anew?' The title of the chapter which provides for the challenging the jury is: 'Of proceedings after the commencement of the trial and before judgment.' We think, within the meaning of the Code, a trial commences when the case is called for trial, unless the trial is then postponed; that everything that transpires in the case after that and before judgment is a part of the trial. That being so, it follows that the defendant was entitled, after the change had been effected, to all the challenges which the law gave him in the first instance. Within that limit he not only had a right to challenge the new juror, but likewise any or all of the original eleven." To our minds that reasoning goes too far. If the word "trial" in the phrase and the "trial begin anew" includes everything from the time the case was called, then necessarily, the names of the remaining eleven must go back in the clerk's box to be redrawn. There cannot be eleven jurors in the jury box when the case is called. If the trial is to "begin again" at the calling of the case, necessarily the jury must be impaneled again, and of course must first be discharged from the prior panel. And we think the reasoning in *People v. Stewart* leads to that result unmistakably. If the accused has the right to challenge any or all of the remaining eleven, then it must be true that there is not an accepted juror in the box. But there were twelve accepted jurors

before the one was taken sick, and they could only be relieved from that condition by being discharged. Hence, in every case the practical effect of discharging the one sick juror is to discharge the entire jury, under that construction. But that could not have been the intent of the Legislature, because in the same connection it is provided that the court may discharge the sick juror, and swear another to fill his place, or may discharge the entire jury, and impanel another. It does not meet the point to say that, unless the accused challenges the remaining eleven, or some of them, they retain their character as jurors. That would always place it in the power of the accused to discharge the entire jury or not, at his election. The law places the election with the court. Moreover, the character of juror cannot attach while the right to challenge remains. Under the English practice when, during the progress of a trial, a juror becomes sick and unable to sit, the jury is always discharged. The names of the eleven men are immediately recalled, and another name taken from the panel to complete the number. The accused is then given all his challenges to the twelve, after which each juror or the person substituted by the challenge must be sworn *de novo*. See Whart. Crim. Pl. & Pr., note to section 509. It thus appears that in England, where the jury is always discharged, the process is precisely the same in effect that is announced in *People v. Stewart*, when the jury is not discharged.

The word "trial" is sometimes used in a broad sense, including all the steps taken in a case prior to final judgment, but in its restricted sense it includes the investigation of facts only. *Jenks v. State*, 39 Ind. 9. We think it is used in the restricted sense in the statute under construction. Our statute defines a trial to be "the judicial examination of the issues between the parties, whether they be issues of law or fact." Comp. Laws, § 5081. A jury trial would be the examination of an issue of fact. The first definition of the word "trial" in Anderson's Law Dictionary is "The examination of the matter of fact in issue." Mr. Wharton, in his note on the English practice, already cited, after stating that the jury must be sworn *de novo*, and charged with the prisoner, adds: "The trial must then begin again." We think that generally where the word "trial" is used in connection with the jury it means the examination of the issue of fact. The sequence of the wording of the statute would indicate that it is so used. It says: "A new juror may be sworn, and the trial begin anew." The trial begins anew after the new juror is sworn. The statute uses the singular number,—"juror;" neither "jurors" nor "jury." Under our practice jurors are sworn separately. *Territory v. O'Hare*, 1 N. Dak. 80. We think the statute clearly intends that when the sick juror only is discharged the condition of the remaining eleven is not affected. They stand as accepted and sworn jurors, subject to no challenge, and but one other man is to be sworn as an additional juror to complete the panel. The condition of the jury after the discharge of the sick juror is identical with its condition when but eleven jurors had been secured. The word

"trial," as used in the first part of said section 7401, is certainly used in the restricted, and not the broad, sense. It says, "If before the conclusion of a trial," etc. Turning to section 7418, we find what course is to be pursued if a juror is taken sick after the jury has retired. Certainly the "trial" mentioned in section 7401 terminates with the termination of the investigation of the facts, otherwise section 7418 would be superfluous. This indicates that the word "trial," as used in section 7401, is restricted in its significance to the investigation of the facts, commencing after the jury is sworn and ending with the charge of the court. The meaning of the word is so limited by both section 7401 and section 7418. This construction deprives the accused of no constitutional right, and involves no hardship. In securing the twelfth juror he may, as he always may, use any peremptory challenges that he has not already exhausted in procuring the eleven. If he has already exhausted all his peremptory challenges, then, in this case, as in every other, the first man called against whom no challenge for cause can be interposed must be sworn as a juror. But the accused exhausted no peremptory challenges in disposing of the sick juror. He has used all the peremptory challenges which the statute gives him in securing the jury of twelve men by whom he is tried, and he has no ground for legal complaint. We think it radically unsound to assume that the Legislature intended to place the accused, so far as his peremptory challenges were concerned, in the same position when one juror was discharged as when twelve men were discharged. To prevent all possibility of prejudice to accused parties, the statute has given the trial court full discretion to discharge the entire jury, and we must presume the court will adopt that course in all cases when there could be a suspicion of prejudice to the rights of the prisoner in adopting the first course. We think the trial court committed no error in the formation of the jury.

Two other errors are assigned, both arising upon the information upon which defendant was tried, viz.: (1) That the information was verified upon "information and belief," and was not verified positively; (2) that the information omits to state in terms or in any other manner that the prosecution of the defendant is instituted either in the name or by the authority of the state of North Dakota. We think the assignment of error relating to the verification of the information is not well taken. The statute allowing an information to be filed in lieu of an indictment in criminal cases (section 8, chap. 71, Laws 1890) declares: "The state's attorney, prosecuting witness, or some other person shall verify the information." The manner of verification is not prescribed in the statute, nor does the statute expressly provide, as is the case in the statute regulating verifications in civil cases, that an attorney may in certain cases verify a pleading to the effect that the same is true to his "best knowledge, information, and belief." But, inasmuch as the statute allows the state's attorney to verify the information in all cases, it would, in our opinion, be unreasonable to say that that officer must swear to the information positively and without qualification in

all cases. We think such a construction would, in a majority of cases, necessarily prevent a verification by the state's attorney, and in not a few cases prevent a verification by any witness; in which event, of course, no information could be filed, as all informations are required by the statute to be verified. It rarely occurs that the state's attorney has such personal knowledge of the essential facts of a crime as will permit him to swear to their existence in positive and unqualified terms. In many cases the crime can only be proven as a result of the testimony of several witnesses, each giving testimony as to separate links in the chain of evidence necessary to convict. In such cases no witness would be prepared to testify to all the essential facts constituting the crime positively and without qualification. This view is sustained by the Michigan cases. *Mentor v. People*, 80 Mich. 91; *Washburn v. People*, 10 Mich. 873. See also *State v. Montgomery*, 8 Kan. 851; *State v. Nuff*, 15 Kan. 404. We think the verification sufficient, and hence overrule the assignment of error on that point. But we limit the decision to the facts of this case, and do not wish to indicate in advance what we should hold in a case where it appeared that the information had been verified on information and belief as a foundation for issuing a warrant of arrest, or by a witness or person other than the state's attorney, or in a case where no preliminary examination had been held or waived.

The remaining assignment of error presents a question of great difficulty. The information was first attacked by a motion to set it aside, and, that motion being denied, defendant demurred to the information, and the demurrer was overruled. Subsequently the defendant moved the court to arrest the judgment. In all these modes of assailing the information defendant's counsel claimed, among other things, that the information is invalid, because it does not appear by the information that the prosecution of this defendant is carried on either in the name of the state of North Dakota or by its authority. The information is not entitled in an action in which the state appears as a party, nor in any action, nor does the information aver in terms or indirectly that the defendant is prosecuted either in the name or by the authority of the state. It does appear on the face of the information that it was filed by the acting state's attorney of Richland county in the district court of said county and state of North Dakota. In support of his contention defendant's counsel cites section 97, art. 4, of the state Constitution, which contains the following language: "All prosecutions shall be carried on in the name and by the authority of the state of North Dakota." In support of the information the attorney-general cites the case of *Davenport v. Bird*, 84 Iowa, 526. This case is one where the city prosecutes under its charter for violating a city ordinance forbidding loud and unusual noises in the streets. The Supreme Court of Iowa, construing a section of the Constitution of Iowa substantially like that above quoted, says in effect, that such prosecution is not one which should be had in the name of the state,

because the language in the Constitution does not relate to such prosecutions, but has reference wholly to cases brought in the courts established by the Constitution, and for offenses arising under the criminal laws of the state. For this reason the prosecution was sustained, but the court says further: "It is fitting and appropriate that prosecutions for the violation of criminal laws of this state should be carried on in the name of the government." We think the case tends to sustain the position of defendant's counsel. See *Sains v. State*, 14 Tex. App. 144; note to 10 Am. & Eng. Encyclop. Law, p. 708; *Jefferson v. State*, 24 Tex. App. 535; *Hay v. People*, 59 Ill. 94; *Gould v. People*, 89 Ill. 316; *Ca'vert v. State*, 8 Tex. App. 538; *Donnelly v. People*, 11 Ill. 553. The omission in the information could, before trial, on leave of court, have been readily supplied by amendment (10 Am. & Eng. Encyclop. Law, p. 709); but nothing appears in the record showing that leave to amend was asked by the prosecutor. We are aware that the caption or commencement of indictments and informations is merely preliminary and formal, and not a part of the accusation proper, and hence courts have gone a great length in construing such formal parts, and have uniformly held that informalities and omissions in them are curable by amendment, and comparatively of small account, inasmuch as they cannot prejudice the substantial rights of the accused upon the merits. But in the case at bar the omission to state, either directly in the information or indirectly by means of entitling it in an action, that the prosecution of the case is carried on in the name of the state and by its authority, is nothing less than a plain violation of the explicit mandate of the state Constitution. It may be that the requirement is formal and arbitrary, and that to disregard it would not prejudice the defendant in his substantial rights, but we do not feel at liberty to completely ignore any provision of the organic law. On the contrary, our duty is to give effect to all of its terms. Our conclusion is that the information in this case is invalid, because it does not conform to the requirements of the state Constitution. An indictment, moreover, is required, among other things, to contain the title of the action specifying "the names of the parties." Section 213, Code Crim. Proc.; section 7241, Comp. Laws. Informations are to be tested, as near as may be, by the statutes regulating indictments. Chapter 71, Laws 1890.

Defendant objected to being tried before the new jury impaneled after the discharge of one of the original jurors on account of his illness, and based his objection upon the theory of a former jeopardy. But the discharge of the juror, when he became unable to perform his duties, was entirely proper, as it was occasioned by an obvious legal necessity. In such cases, the plea of former jeopardy cannot be allowed under the modern decisions. Wharton, Crim. Pr. & Pl. 9th ed. § 508, and cases cited.

The judgment will be reversed, and a new trial ordered.

All concur.

MICHIGAN SUPREME COURT.

James H. BAKER

v.

FLINT & PÈRE MARQUETTE R. CO.,

Plff. in Err.

(.....Mich.....)

1. A judgment in favor of a minor in an action brought by his father as next friend, which includes damages for loss of earning capacity from the time of injuries occasioned by defendant's negligence is a bar to an action by the father personally to recover for loss of services of the son during minority.
2. The question whether or not parents allowed their son to play about a railroad track and depot grounds so as to be regarded as having contributed to injuries received by him there, is for the jury where they testify that they had forbidden him so to do after receiving notice that such was his habit and were ignorant that he was there at the time he was hurt.

(April 8, 1892.)

ERROR to the Circuit Court for Bay County to review a judgment in favor of plaintiff in an action brought to recover damages for loss sustained by, and expense caused to, plaintiff, by reason of the injury of his minor son through defendant's alleged negligence. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. T. A. E. Weadock, with **Mr. William L. Webber**, for plaintiff in error:

Where the parent has been, as in this case, carelessly negligent of his parental duties, it is against public policy to reward him for such neglect.

Bellevontaine & I. R. Co. v. Snyder, 18 Ohio St. 899, 98 Am. Dec. 175; *Bellevontaine R. Co. v. Snyder*, 24 Ohio St. 670; 3 Thomp. Neg. 1191, § 87; *Glasey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *Beach, Contrib. Neg.* p. 187, § 44; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 87 Am. Rep. 705; *Pennsylvania R. Co. v. Bock*, 98 Pa. 427; *Williams v. Texas & P. R. Co.* 60 Tex. 205; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475, *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 593; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Birmingham v. Dorer*, 3 Brewst. 69; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *Albertson v. Keokuk & D. M. R. Co.* 48 Iowa, 292; *Wright v. Malden & M. R. Co.* 4 Allen, 293; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Chicago v. Major*, 18 Ill. 849, 68 Am. Dec. 553; *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522.

If the plaintiff, James H. Baker, included in the first suit any part of his personal claim, then he is precluded from asserting other items which might have been included.

Hempstead v. Des Moines, 63 Iowa, 36; *Pfiffeld v. Edwards*, 89 Mich. 267; *Freeman*, Judgm. §§ 241-249.

Messrs. Simonson, Gillett & Court-right, with **Mr. W. C. Green**, for defendant in error:

In case of an injury to a minor, two causes of action arise; one in favor of the infant for his personal injuries, and one in favor of the parent for loss of service by him or her.

Sibley v. Rutcliffe, 50 Ark. 477; *Durkes v. Central Pac. R. Co.* 56 Cal. 888; *Lehigh Iron Co. v. Rupp* (Pa.) 7 Am. & Eng. R. R. Cas. 25; *Shearm. & Redf. Neg.* § 608; *Smith v. Smithson*, 48 Ark. 261.

Can these two actions be united? Clearly not.

In the son's suit the only damages alleged were such as were personal to the son and in this action only such damages are alleged as are personal to the parent.

It was not necessary to allege that the injury was occasioned without any fault or negligence on the plaintiff's part.

Black, Brief and Pleading in Accident Cases, 206, § 143; *Holt v. Whalley*, 51 Ala. 569; *Lopes v. Central Arizona Min. Co.* 1 Ariz. 464; *Chicago & N. W. R. Co. v. Coss*, 73 Ill. 894; *Wilson v. Denver South Park & P. R. Co.* 7 Colo. 101; *May v. Princeton*, 11 Met. 443; *Hocum v. Weatherick*, 22 Minn. 152; *Lee v. Troy Citizens Gas Light Co.* 98 N. Y. 115; *Urquhart v. Ogdensburg*, 23 Hun, 75; *Street R. Co. v. Nothensius*, 40 Ohio St. 876; *Lee v. Union R. Co.* 13 R. I. 888, 84 Am. Rep. 663; *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *Baltimore & R. R. Co. v. Whittington*, 30 Gratt. 805; *Snyder v. Pittsburgh, O. & St. L. R. Co.* 11 W. Va. 14; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579; *Kelley v. Chicago, M. & St. P. R. Co.* 50 Wis. 881.

There was no sufficient evidence of contributory negligence in this case.

Morgan v. Illinois & St. L. Bridge Co. 7 Cent. L. J. 811. See also *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *O'Flaherty v. Union R. Co.* 45 Mo. 74; *Kay v. Pennsylvania R. Co.* 65 Pa. 276, 8 Am. Rep. 628; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 257.

The negligence of the parents or guardian of a child in allowing it to stray away or go out unattended is one for the jury to determine, and no rule of law can be laid down which interferes with the jury judging each case on its own merits.

Brittishill v. Humphreys, 7 West. Rep. 806, 64 Mich. 504; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 21; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 54; *Boland v. Missouri R. Co.* 36 Mo. 484; *O'Flaherty v. Union R. Co.* 45 Mo.

NOTE.—The decision that a judgment obtained by a person as next friend for his minor son binds him personally so far as to prevent a subsequent recovery in his own behalf upon the same demand is a plain exception to the rule that a party is bound by a judgment only in the same capacity in which he was a party to it. But the real basis of 16 L. R. A.

the decision seems to be an equitable estoppel rather than any technical conclusiveness of the prior adjudication. Having actively aided a recovery by another person he is clearly estopped thereby from claiming that he himself is the only person who is lawfully entitled to such recovery.

90; *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121; *Lynch v. Smith*, 104 Mass. 52; *Slattery v. O'Connell*, 10 L. R. A. 663, 153 Mass. 94; *McGreary v. Eastern R. Co.* 185 Mass. 363, 3:2; *Com. v. Metropolitan R. Co.* 107 Mass. 236; *Hunt v. Salem*, 121 Mass. 294; *Callahan v. Bean*, 9 Allen, 401; *Mangam v. Brooklyn R. Co.* 88 N. Y. 455, 98 Am. Dec. 66; *Kune v. Troy*, 6 Cent. Rep. 493, 104 N. Y. 844; *Birkett v. Knickerbocker & O. Co.* 110 N. Y. 506; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 861; *Fallon v. Central Park, N. & E. R. Co.* 64 N. Y. 13; *Prendegast v. New York Cent. & H. R. R. Co.* 58 N. Y. 652; *Bahrenburgh v. Brooklyn City, H. P. & P. P. R. Co.* 56 N. Y. 652; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 3:6; *Drew v. Sixth Ave. R. Co.* 26 N. Y. 49; *Oliffeld v. New York & H. R. Co.* 14 N. Y. 810; *It v. Forty-second St. & G. St. Ferry R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; *Pittsburgh, Ft. W. & C. R. Co. v. Bunslead*, 48 Ill. 221; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Gavin v. Chicago*, 97 Ill. 66; *Chicago v. Hesing*, 83 Ill. 204; *Pittsburg, A. & M. R. Co. v. Pearson*, 72 Pa. 169; *Kay v. Pennsylvania R. Co.* 65 Pa. 219, 3 Am. Rep. 623; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357; *Johnson v. Chicago & N. W. R. Co.* 49 Wis. 529; *Euen v. Chicago & N. W. R. Co.* 38 Wis. 614; *Dahl v. Milwaukee City R. Co.* (Wis.) 19 Am. & Eng. R. R. Cas. 121; *Johnson v. Chicago & N. Y. R. Co.* (Wis.) 8 Am. & Eng. R. R. Cas. 471; *Karr v. Parks* 40 Cal. 188, 193; *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Payne v. Humeston & S. R. Co.* 70 Iowa, 584; *Smith v. Atchison, T. & S. F. R. Co.* 25 Kan. 738; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Robinson v. Cone*, 22 Vt. 213.

In the following cases the court refused to disturb the verdict:

Roller v. Sutter St. R. Co. (Cal.) 19 Am. & Eng. R. R. Cas. 333; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Collins v. South Boston R. Co.* 142 Mass. 301, 56 Am. Rep. 675; *Bliss v. South Hadley*, 5 New Eng. Rep. 124, 145 Mass. 91.

It has been held not to be contributory negligence in parents to permit a child of eighteen months to play in close proximity to a railroad line under the guardianship of another child eight years old.

Pittsburg, A. & M. R. Co. v. Pearson, 72 Pa. 169.

Or to permit a boy eleven and one half years of age to drive a team by night, accompanied by a younger son of nine years.

Parish v. Eden, 62 Wis. 272.

Or to permit young children to play upon the sidewalk unattended.

Barry v. New York Cent. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377; *Minick v. Troy*, 83 N. Y. 514; *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 60.

Or to permit a boy four years of age to go upon the street with his sister only eleven years old.

Collins v. South Boston H. R. Co. 2 New Eng. Rep. 649, 142 Mass. 301, 56 Am. Rep. 675.

Or to send a child six or seven years of age, 16 L. R. A.

accompanied by an older brother into a village through which a railroad track runs.

Chicago & A. R. Co. v. Becker, 84 Ill. 483.

When children are old enough to go to school, the question whether or not it is safe for them to go through the streets unattended, is usually for the jury.

Lynch v. Smith, 104 Mass. 52; *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121; *Hunt v. Salem*, 121 Mass. 294; *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447.

It has been held that poor parents of infant children are not contributorily negligent if they do not prevent their infant children from straying into the public streets or upon the lines of railways.

Pittsburg, A. & M. R. Co. v. Pearson, 72 Pa. 169; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 257; *Pennsylvania Co. v. James*, 81 * Pa. 194; *Pennsylvania R. Co. v. Lewis*, 75 Pa. 33; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *O'Flaherty v. Union R. Co.* 45 Mo. 70; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 542.

The father has a right of action for loss of services and expenses occasioned by injuries to his minor child, while the child by his next friend, may recover damages for the injuries.

Sibley v. Ratcliffe, 50 Ark. 477; *Wilton v. Middlesex R. Co.* 125 Mass. 190; *Texas & P. R. Co. v. Morin*, 66 Tex. 133; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 275, 49 Tex. 822; *Central R. Co. v. Brinson*, 84 Ga. 475; *Durkee v. Central Pac. R. Co.* 56 Cal. 888; *Little Rock & Ft. S. R. Co. v. Barker*, 88 Ark. 350; *Covington St. R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 866; *State v. Baltimore & O. R. Co.* 24 Md. 84; *Oregon v. Brooklyn City R. Co.* 75 N. Y. 192, 81 Am. Rep. 459; *McGovern v. New York Cent. & H. R. R. Co.* 67 N. Y. 417; *O'Mara v. Hudson River R. Co.* 88 N. Y. 445; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Oakland R. Co. v. Fielding*, 48 Pa. 320; *Pennsylvania R. Co. v. Zebe*, 88 Pa. 818; *Euen v. Chicago & N. W. R. Co.* 88 Wis. 618; *Evansich v. Gulf, O. & S. F. R. Co.* 57 Tex. 123; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164; *Cumming v. Brooklyn City R. Co.* 24 N. Y. S. R. 718; *Shearm. & Redf. Neg.* 608; *Patterson, Railway Law*, 411; *Dacey, Parties*, 349; *Thomp. Neg.* 1242; *Sawyer v. Sauer*, 10 Kan. 519; *Cooley, Torts*, 682.

To constitute a bar, the former judgment must have been upon the merits and for the same causes of action and between the same parties.

Tucker v. Rohrback, 13 Mich. 73; *Beeson v. Comly*, 19 Mich. 103.

A parent cannot release her child's right of action for an injury by the admission that it had been warned to avoid the danger.

Power v. Harlow, 57 Mich. 107.

The services of a minor during minority belong to the parent and when a minor is injured so that his ability to labor is decreased, the parent alone can recover damages for the decreased ability of the minor to labor during minority.

Texas & P. R. Co. v. Morin, *supra*.

Parents are required to exercise such care as

the circumstances of the case and their circumstances in life permit, which, being a question of fact, is for the jury.

Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *Pittsburg, A. & M. R. Co. v. Pearson*, 72 Pa. 169; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 257; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *O'Flaherty v. Union R. Co.* 45 Mo. 70; *Kay v. Pennsylvania R. Co.* 65 Pa. 260, 8 Am. Rep. 628.

Long, J., delivered the opinion of the court:

This is a suit to recover damages sustained by plaintiff, arising out of the same accident that resulted in his son, Oscar, losing his leg by being run over by defendant's train of cars on November 5, 1886, at Eleventh Street depot in Bay City, which case is reported in 68 Mich. 90. The facts are so fully stated in that case that it becomes unnecessary to restate them here. The claim of damages in the present case is for the loss of Oscar's services during minority, and money expended for nursing, medicine, and professional treatment for him. There are but two questions raised upon this record which we need discuss. They relate to the ruling of the trial court, and its charge to the jury upon the questions: (1) Whether the plaintiff is estopped from recovery for loss of his son's services during minority by reason of a claimed recovery for the same services in Oscar's suit, where the plaintiff appeared as his next friend. (2) The ruling of the court upon the question of the plaintiff's contributory negligence as affecting his right of recovery. As touching the first question, it appears that the defendant, under its plea of the general issue, gave notice that the said Oscar Baker mentioned in plaintiff's declaration heretofore brought suit in said court, claiming damages for the same cause of action set forth in the declaration in this cause; that said suit was duly tried by said court and a jury, and judgment was rendered therein in favor of the plaintiff; that judgment and costs of said suit have been paid by the defendant herein to the said James H. Baker as next friend to his said son, Oscar Baker; and that said James H. Baker has signed a receipt therefor in full satisfaction of said judgment and costs. After the jury had been impaneled in the present case, and plaintiff had offered testimony to support his action, defendant's counsel objected to any proof being received under the declaration for the reason that in this court, prior to the commencement of this suit, the same plaintiff, James H. Baker, had commenced a suit for the injury of his son, Oscar, in which suit he recovered verdict and judgment, which suit was taken to the supreme court, and there affirmed, and that judgment had been satisfied by the defendant; that in that suit plaintiff had recovered damages for the boy, or for himself as next friend to the boy, for his crippled condition, and his loss of ability to labor, and therefore plaintiff is estopped from maintaining this suit. The court overruled the objection, and rejected the offered proof, 16 L. R. A.

to which the defendant excepted. The case then proceeded to trial, and at the close of the testimony the counsel for defendant, in his second request, asked the court to charge the jury as follows: "The plaintiff in this case cannot recover, because he has failed to make out a case, in that (a) he previously brought a suit in this court as next friend for his son Oscar Baker and recovered, and in his declaration in that suit he complained of the same injury sued on here, and did not limit the claim for damages to those accruing only to said Oscar Baker; (b) because the uncontradicted evidence in this case shows that Oscar Baker was guilty of contributory negligence; (c) because the uncontradicted evidence in this case shows that the plaintiff and his wife, parents of said Oscar Baker, were guilty of contributory negligence." These requests were refused, and the court charged the jury: Then comes the loss of the boy's services for the fourteen years without lapse between the time of this accident and the time he would arrive at the age of twenty-one. On the amount of this you have no direct evidence, but you have the evidence derived of an inspection of the boy himself, and the father, and the whole family. . . . One question to be got at in the case of damages is: How much worse off in dollars and cents will this plaintiff, James H. Baker, be by reason of the boy having been crippled in the way he is, counting in the loss of his services, and the expenses of taking care of him while he was sick and in the curing of his wound, and the expense of the nurse?" The court further directed the jury that, as none of the items involved in this suit could be legally proved or recovered for in the suit brought by Oscar, therefore the plaintiff would not be barred from recovering such damages in this action.

We have looked into the former record,—the suit of Oscar against the defendant company,—and find that the declaration in that case contains two counts. The allegation as to damages in the first count is, after stating the injury and the disorders arising therefrom: "He so remained for a long space of time, to wit, from thence hitherto, during all of which time the plaintiff suffered great pain, and was injured and prevented from doing any work and from attending school, and is still so prevented, all to the damage of the plaintiff," etc. In the second count it is stated that "he so remained for a long space of time, to wit, from thence hitherto, during all of which time he, the plaintiff, suffered great pain, and was and is injured and prevented from doing any work and from attending school, and is, and always will be, injured and disabled from earning his own living; wherefore the plaintiff says he is injured and has sustained damages," etc. Evidence was introduced under that declaration by the plaintiff to sustain his cause of action, and the court charged the jury as follows: "If you conclude that the plaintiff is entitled to recover, consider then the extent or the amount of damages that he has suffered. . . . Now, in determining that question the jury are to take into considera-

tion the pain and suffering the plaintiff has endured. . . . Also the nature of the injury, and how it will affect him in his future life, so far as ability to earn money is concerned." It will be seen from this that the jury must have taken into consideration, in fixing the amount of damages which Oscar was entitled to recover, his inability to labor from the time the injury occurred during the remainder of his life. The \$5,000 which Oscar recovered in his suit included therefore, the damages which are sought to be recovered by the plaintiff in this suit.

It is contended upon the part of plaintiff's counsel in this court that, though Oscar did recover for the value of such services in his suit, yet the plaintiff in the present suit would not be barred from recovery, or estopped from making claim therefor, for the reason that, as matter of law, Oscar had no right to recover for such damages in his suit. In support of this proposition counsel cites: *Wilton v. Middlesex R. Co.* 125 Mass. 130; *Texas & P. R. Co. v. Morin*, 66 Tex. 133; *Central R. Co. v. Brinson*, 64 Ga. 475; *Durkee v. Central Pac. R. Co.* 56 Cal. 388.

As we have before stated, the sole ground upon which the plaintiff's counsel now contends for the right to recover damages in behalf of the father, which have once been recovered in behalf of the child by his next friend, is that the child had no legal right to recover for such damages in the action brought by him. In the case of *Texas & P. R. Co. v. Morin*, *supra*, the action was brought by the minor, by his father as next friend, against the company for personal injuries. The trial court charged the jury that in estimating damages they had a right to take into consideration his capacity to earn money. This was held error, for the reason that the services of the infant belonged to the parent during his minority, and not to the infant, unless it was shown that the child had been emancipated by the parent; and the court cited in support of this *Houston & G. N. R. Co. v. Miller*, 51 Tex. 275, and *Sawyer v. Sauer*, 10 Kan. 519. The question of the right of the father to recover such damages, though the same had been recovered by the infant in another action, was not involved in the case.

In *Durkee v. Central Pac. R. Co.* the action was by the father to recover damages for negligent injury to his infant son, and it was said by the court that "whatever was merely personal to the infant should not enter into what was the father's damages, because for them the son would have a right of action;" and that the court states the rule laid down by Shearman & Redfield, in their work on Negligence, (§ 608,) as follows: "The damages recoverable by a parent, guardian, or master for a negligent injury to the person of his child or servant are strictly limited to an amount fully compensatory for the consequent loss of services for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as

for surgical attendance, nursing, and the like. . . . Damages awarded upon any other ground than these clearly belong to the person corporally injured, whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master. If the latter should be allowed to recover for the pain and suffering of the servant (or child) it would follow either that the servant (or child) could not recover himself for the same cause, or that the negligent person would be liable to pay twice the amount of damage done. Either alternative is contrary to justice and common sense."

The case therefore did not involve the question involved in the present suit, and no such rule is contended for there as here.

In *Central R. Co. v. Brinson*, *supra*, the action was by the father, as next friend to his son, to recover damages for negligent injuries. To this suit was filed the plea of the general issue, and a special plea in bar, which was that the father of the plaintiff had brought his individual suit for the same cause of action and for the same injury which was then pending and undetermined in the same court. On motion this plea was stricken out, and the cause proceeded to trial under the general issue, and plaintiff had judgment. It was held that the striking out of this plea was not error, for the reason that a minor, being damaged in his person, may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority, while the father may sue for trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred in and about the healing and restoring of said child's health. It will be noticed that the question involved in that case is not the same as that involved in the present case; the court holding that it would not bar the infant's right of recovery simply because the father had brought his action in the same court, and had set up in his complaint or declaration a claim for damages of like character as those claimed by the infant in his suit, the court laying down the proper rule of damages under which each might recover.

In *Wilton v. Middlesex R. Co.*, *supra*, the action was by the father for the loss of services of Ellen Wilton, his daughter, occasioned by her being run over by one of defendant's cars. At the trial it appeared that Ellen, in the name of her father as next friend, had brought an action and recovered \$5,000 for the injuries done her by this accident. This case is reported in 107 Mass. 108. The trial court was asked to rule upon this that, the former action having been brought by the plaintiff, and money having been paid to him as next friend, he could not bring an action for any loss of service, because he had already been paid therefor. The trial judge refused so to rule, and held the plaintiff entitled to recover the reasonable value of Ellen's net earnings to her father over and above what, but for the accident, her support would have cost, and gave judgment for the plaintiff. The court said of that case: "The previous suit is

not a bar to the present. The money which the plaintiff received in the former action is not his money, nor can he appropriate it to the payment of labor which the child was bound to perform. The measure of damages in the former action was the injury to the child, and not the injury to the father. It is analogous to the cases, formerly quite frequent, in which for injuries to a wife the husband and wife must join for personal injuries to the wife; but for the expenses incident thereto the husband must bring his sole action in his own name." It does not appear in that case that in the action which the father brought as next friend for his daughter any claim was made or recovery had for damages for loss of service of the child, or expenses incurred in and about the restoration of the child to health; and the court says that the measure of damages in the former action was the injury to the child, and not the injury to the father. The court very properly held, therefore, that the money which the plaintiff received could not be appropriated to the payment of labor which the child was bound to perform. If the case had been presented to that court which is presented in the present case,—as to whether the father, as next friend, having recovered for the loss of services of the child, could again recover in an action brought by himself for the value of the loss of the same services,—there can be no doubt that that court would have said that it would be contrary to justice and common sense to allow the plaintiff, first, as next friend, and, second, in his own personal interest, to recover damages for the value of the loss of the services of his infant daughter.

It appears that the plaintiff in this case, as next friend of his son Oscar, took part in the trial of the former case, and insisted upon a recovery by his son for the very damage—that is, the value of the loss of Oscar's services—which now seeks to recover in the present case. It is undoubtedly true that as matter of law Oscar had no right in his suit to recover such damages without the consent of his father, but he did recover with the consent of his father; therefore the father is now estopped from setting up claim for the same damages in this action in his own name. It is true that the earnings of a minor son belong to the father, unless the father has given him his time and earnings; but the father could not recover for such earnings when he has emancipated him. *Shoenberg v. Voigt*, 36 Mich. 310; *Allen v. Allen*, 60 Mich. 635; *Bell v. Bumpus*, 63 Mich. 375, 6 West. Rep. 130. If the case here had been for the earnings of the minor son, and it appeared that in a former action by the son—the father acting as his next friend—he had recovered the value of his wages in such former suit with the consent of the father, that fact would be held tantamount to manumission of the infant, so far as that suit was concerned, and the father would be estopped from recovery of the same wages. There can be no distinction between such a case and the present; and the fact that the father appeared and prosecuted as next friend was tantamount to a relinquishment of such

loss of services. The court should have admitted the evidence, and have directed the jury that no recovery could be had by the father for the loss of such services, as their value had already been recovered by the son with the father's consent.

The amount expended by the father in nursing, medicine, and medical attendance does not seem to have been litigated in the former action, and it therefore becomes necessary to discuss one other question raised. It is contended that the parents of the child was guilty of contributory negligence in permitting the boy to make a play-ground of the railroad tracks and yard there, and for that reason the plaintiff could not recover. Upon that branch of the case the court charged the jury that "before the plaintiff can recover he must prove not only that the defendant was negligent, but that the negligence of the defendant was the cause of the injury, and that this means that there was no negligence on the part of the plaintiff himself or of the boy which caused or helped or contributed to cause the injury; that the boy cannot carelessly run into danger, and then complain, or lay the foundation for the father to complain, if he gets hurt, but that children are only required to exercise so much care and discretion as ought reasonably to be expected for their mental capacity when placed in that situation. If the boy did all that could reasonably be expected of such a boy as we find him to have been at that time, he did all that the law requires, and was not guilty of such contributory negligence as will prevent the father from recovering damages in this suit. If he did not do so, then his father can have no verdict." Again, the court directed the jury: "If the plaintiff himself was negligent, and his negligence contributed to bring about the injury, he cannot recover. If he was negligent in allowing the boy—such a boy as this was—to be playing there, or in not preventing him from being there, or omitted any precaution that he ought to have taken under the circumstance, he cannot recover." Some testimony was given upon the part of the defendant that the boy, Oscar, was frequently about the freight-car in front of the depot, and was in the habit of catching on and jumping off from the cars, and was told by the employés of the railroad company that he would get hurt. Defendant's testimony also shows that the father was advised that his boy, Oscar, was in the habit of coming to the defendant's grounds and jumping off and on cars, and that he ought to chastise him for it. The father does not deny in his testimony but he was told of the custom of his boy in playing about the grounds at the depot, but claims it was about a year previous, and that he had cautioned Oscar about playing about the grounds, and when at home would not allow him to play about the depot, and gave him particular instructions not to do so. The father was a barber, and left home early in the morning for his work, returning to his meals, and was absent during the day and evening. On the day in question the father was away from home. The boy had been to

school, crossing the railway track on his way home. Mrs. Baker testified that he got home at 4 o'clock, got a lunch, and went into the yard to play, back of the house; that she looked out, and saw him twice playing there; and within twenty or twenty-five minutes after he first went out to play she heard of his injury upon the railroad track; and until that time she did not know he was out of the yard. We think, under these cir-

cumstances, it was a question of fact for the jury to determine whether the plaintiff or Mrs. Baker was guilty of such negligence that the plaintiff could not recover. We find no error in that part of the charge, for the errors pointed out, however, the *judgment must be reversed*, with costs, and a new trial ordered.

The other Justices concurred.

CALIFORNIA SUPREME COURT.

LOWENBERG, *Resp't.*,

v.

LEVINE, *App't.*

(.....Cal.....)

A discharge under state insolvency laws will not release a judgment obtained in another state upon a contract made there if the creditor does not participate in the insolvency proceedings, although he resides within the jurisdiction of the court granting the discharge and the judgment appeared on the insolvent's schedule.

(February 4, 1892.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to enforce payment of a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry I. Kowalsky and Rein-stein & Eisner for appellant.

Mr. George A. Rankin for respondent.

De Haven J., delivered the opinion of the court:

Action upon a money judgment recovered by plaintiff against defendant in a court of general jurisdiction in the territory of Montana, while plaintiff and defendant were residents of that territory, and upon a contract made to be performed there. Subsequently to the rendition of this judgment the defendant filed in the superior court of the city and county of San Francisco his petition in insolvency; and such proceedings were thereafter had in the matter that upon August 14, 1888, the court duly made and entered its decree discharging defendant from all his debts and liabilities. At the date of this decree, and during the entire time of the pendency of these insolvency proceedings, both plaintiff and defendant were residents of this state. In his answer the defendant pleads this decree in insolvency as a bar to this action. The case was submitted to the court below upon an agreed statement of facts showing the matters hereinbefore stated,

NOTE.—For note giving authorities on the point that state insolvent laws have no extraterritorial efficacy, see *Phoenix Nat. Bank v. Bacheeller* (Mass.) 8 L. R. A. 644.

For effect of proving claim by nonresident creditor, see *Murray v. Roberts*, 6 L. R. A. 346, and note 150 Mass. 363.

16 L. R. A.

and in addition thereto the following facts: "That in the schedule of indebtedness of defendant, Levine, filed with said petition in insolvency, was set forth as required by law, a statement of the judgment rendered against him and in favor of the plaintiff, Lowenberg, by the district court of the third judicial district of the territory of Montana in and for Lewis and Clarke county as set forth in plaintiff's complaint. That said plaintiff, Lowenberg, never filed a verified or other statement of his claim and demand in said proceedings in involuntary insolvency, or in any other manner whatever participated in any of the proceedings connected therewith; but such failure to participate therein was due to no neglect, default, or omission on the part of the defendant, Levine." The court below gave judgment for the plaintiff, and the defendant appeals.

The only question presented in the record before us is whether, in view of the facts as above stated, the decree discharging defendant from his debts and liabilities is a bar to this action. It is claimed by the appellant that as the parties hereto were resident citizens of this state at the time when the insolvency proceedings were begun, and until their completion, the decree therein discharging him from all his debts is conclusive upon the plaintiff, and is a bar to this action, and that the binding force of such decree is in no wise affected by the fact that the judgment sued upon was recovered in the territory of Montana, and is based upon a contract made and to be performed there.

In support of this proposition counsel for appellant rely upon *Felch v. Bugbee*, 48 Me. 9; *Hawley v. Hunt*, 27 Iowa, 803; *Bedell v. Scruton*, 54 Vt. 493; *Marsh v. Putnam*, 8 Gray, 551. These cases, however, with the exception of *Marsh v. Putnam*, are not in point, as in each of them, with the one exception stated, the only matter before the court for decision was as to the effect of a discharge in insolvency upon debts held by non-residents of the state in which the discharge was granted, the creditor not having proved his claim in the insolvency proceedings, nor otherwise participating therein; and it was with reference to this question that it was said in those cases that the binding effect of the discharge in insolvency then before the court upon the citizenship of the parties, and not upon the place of the contract. Thus, in the case of *Bedell v. Scruton*, *supra*, it is said: "The debt attends the

person of the creditor, and unless he is within the jurisdiction of the court, no discharge granted by it can affect his rights. It is a question of citizenship, and state courts and state laws are powerless to affect the rights of non-resident creditors by any jurisdiction they may have or exercise over the person of the debtor, or by any proceedings *in rem* affecting the debt itself." So, also, in *Hawley v. Hunt*, *supra*, the only matter before the court was whether a discharge in insolvency made by the courts of one state would affect non-residents not parties to it; and, in holding that it would not, Dillon, *Ch. J.*, in delivering the opinion of the court, says: "I have said that the settled law now is that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or is made payable. In other words, the citizenship of the parties governs, and not the place where the contract was made or is to be performed." There can be no doubt of the correctness of this proposition, when considered in connection with the question which the court had before it. Indeed, it is only the statement of a very familiar principle, which is not at all peculiar to decrees in insolvency proceedings, that no court can render a valid personal judgment against a defendant, or one affecting property which attends or follows his person, without first obtaining jurisdiction of his person. But the rule itself has no application whatever to the facts of this case, as the question here is not whether the superior court, when it made the decree upon which appellant relies, had jurisdiction over the person of respondent, but whether the court was authorized to discharge, by its decree in insolvency, the obligation of the contract made in another state or territory.

Section 58 of the Insolvent Act of this state declares: "A discharge duly granted under this act shall . . . release the debtor from all claims, debts, liabilities, and demands set forth in his schedule or which were or might have been proved against his state in insolvency." This language is broad enough to include the debt sued upon in this action; but if the state is without authority to pass an insolvent law affecting the obligations of contracts made without the state, then the general terms of the statute must be restricted, and the act construed as not intended to effect or apply to them. *Danforth v. Robinson*, 80 Me. 466. So that after all the real question for decision in this case is as to the power of the state to enact a law having the effect to discharge the obligation of contracts made elsewhere, when the creditor in no wise participates in the proceedings in which the discharge is entered, although he may have been a resident of this state at the time of the insolvency proceedings. This precise question came before the Supreme Court of New York in the case of *Witt v. Follett*, 2 Wend. 457, and was there determined in the negative; and such seems to be settled doctrine of the Supreme Court of the United States. In the case of *Cook v. Moffat*, 46 U. S. 5 How. 308, 13 L.

ed. 165, that the court, while conceding the authority of a state to pass an insolvent law in the absence of a law of Congress establishing a uniform system of bankruptcy, nevertheless held that in view of section 10 of article 1 of the Constitution of the United States which denies to a state the power to pass any law impairing the obligation of contract, the insolvent law of a state "could have no effect on contracts made before their enactment beyond their territory. And in the later case of *Baldwin v. Hale*, 68 U. S. 1 Wall. 238, 17 L. ed. 531, that court, after reviewing the previous cases decided by it as to the effect of state insolvent laws, takes occasion to again state upon what contracts such laws cannot operate, and in so doing uses this language: "Undoubtedly a state may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the state; but we repeat what the court said in *Cook v. Moffat*, *supra*, that such laws 'can have no effect on contracts made before their enactment, or beyond their territory.'"

The rule upon this subject, and the reason upon which it is founded, is thus stated in section 1890 of Story on the Constitution, as the result of all the cases: "The question is now understood to be finally at rest. The state insolvent laws, discharging the obligation of future contracts, are to be deemed constitutional. Still, a very important point remains to be examined; and that is, to what contracts such laws can rightfully apply. The result of the various decisions on this subject is (1) that they apply to all contracts made within the state between citizens of the state; (2) that they do not apply to contracts made within the state between a citizen of a state and a citizen of another state; (3) that they do not apply to contracts not made within the state. In all these cases it is considered that the state does not possess a jurisdiction, co-extensive with the contract, over the parties, and therefore that the Constitution of the United States protects them from prospective as well as retrospective Legislation. Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a state which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned this extra-territorial immunity." In the case of *Marsh v. Putnam*, 3 Gray, 551, cited and relied upon by appellant, a contrary rule was declared. But this case stands alone, and, in our opinion, should not be followed.

The plaintiff not having in any manner participated in the insolvency proceedings had in this state, and relied upon as a bar, and the judgment sued upon having been recovered in Montana upon a contract made there, it results from the foregoing views that the plaintiff is entitled to recover in this action.

Judgment affirmed.

We concur: *Sharpstein, J., McFarland, J.*

CALIFORNIA SUPREME COURT.

Wilbur F. DOUGHERTY, *Respt.*,

v.

John L. AUSTIN, Treasurer of Marin County, *Appt.*

(.....Cal.....)

1. An order of the board of supervisors of a county made during the term of office of a county clerk, allowing him a deputy whose salary is to be paid by the county is void, though authorized by a statute in force prior to his election, where the Constitution forbids an increase of his compensation after his election or during the term of his office.
2. A statute classifying the counties of the state according to population for the purpose of regulating the compen-

sation of county officers according to their duties, cannot be amended so as to provide that in certain classes of counties the supervisors may order that some of the officers be allowed deputies whose salaries shall be paid by the county where the Constitution requires all laws of a general nature to have a uniform operation.

3. The Legislature has no power after fixing the salaries of county clerks, to authorize the boards of supervisors to allow them one or more deputies at the expense of the county if in their opinion the salary provided is insufficient, where the Constitution requires the Legislature to regulate the compensation of all such officers in proportion to duties performed.

(January 20, 1892.)

NOTE—*Delegation of legislative power to county boards of supervisors.*

The above decision that the Legislature cannot delegate to a board of supervisors the power to change a provision of the general law, is plainly based on an express constitutional provision that the Legislature shall by general and uniform laws provide for the matter in question; but on the general question of the power of the Legislature to delegate legislative power to a county board of supervisors, where no express constitutional provision against it exists, there is little explicit authority to be found.

In New York the Constitution expressly provides that the Legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the Legislature may from time to time deem expedient. Substantially the same provision is found in the Constitutions of Kansas, Michigan and Wisconsin.

The Maryland Constitution says that the Legislature may confide to the county authorities "all powers necessary for the management of the public local concerns." But the Constitutions of most states are silent on the subject or confer in terms administrative and police powers only.

There is no express constitutional provision to be found in many if in any Constitution against the delegation by the Legislature of its law-making power. The usual provision is simply that "the legislative power of the state shall be vested in the General Assembly," or equivalent words. Nevertheless it is established as a fundamental principle of constitutional law subject to the exception of local government that legislative authority cannot be delegated. An exception is too well established to need citation of authorities in case of the delegation to municipal corporations of the power to enact ordinances.

In Cooley's Constitutional Limitations it is said that fundamental as the maxim is that the Legislature cannot delegate its power to make laws it is "so qualified by the customs of our race and by other maxims which regard local government, that the right of the Legislature, in the entire absence of authorization or prohibition to create towns and other inferior municipal corporations and to confer upon them the power of local government and especially of local taxation and police regulations usual with such corporations, would always pass unchallenged." In fact the delegation of legislative power to county supervisors seems to have been generally unchallenged.

In Alabama a general statute allowing the court

of county revenues in a county, on petition of freeholders to establish a stock district where cattle shall not be allowed to run at large, was held to be valid. *Stanfill v. Dallas County Ct.* 80 Ala. 287.

The court said that intrusting to county authorities quasi legislative powers and functions has never been considered a violation of the maxim that legislative power cannot be delegated. The same decision was made in respect to a statute authorizing the court of county revenues in a specified county to establish such a district as against an objection that it was in violation of a constitutional provision that "the General Assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the state." The court based the decision on the fact that a county is not a municipal corporation within the meaning of that provision and also that the power given by this statute was not a power to "pass laws" but was only a quasi legislative police power. *Dunn v. Wilcox County Ct.* 85 Ala. 144.

In this case it will be seen that a larger freedom in delegating legislative power was allowed to counties than to municipal corporations.

In *State v. Wood County Suprs.* 61 Wis. 278, the court in speaking of the legislative powers of county authorities under the provision of the Constitution, which is similar to that of New York, above quoted, says the powers are limited only by the provisions of the statutes.

It is clearly apparent that the status of counties in different states varies. In New York, at least, legislative functions are commonly exercised by boards of supervisors and the statutes have for many years expressly given them authority "to make such laws and regulations as they may deem necessary, and provide for the enforcing of the same" in respect to various specified subjects. Also in the latest statute concerning counties, (1892) provision is made in respect to the enactment and publication of "every act or resolution of such board in the exercise of its legislative powers" while it expressly declares by way of definition that, "a county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law."

No reason is apparent why the Legislature of any state without express constitutional provisions on the subject may not make a county a municipal corporation of a distinctive kind and give it as much legislative power as is given to other municipal corporations.

B. A. R.

A PPEAL by defendant from a judgment of the Superior Court for Marin County granting an application for a writ of mandamus to compel respondent to pay a certain warrant. *Reversed.*

The facts are stated in the opinions.

Messrs. Carter P. Pomeroy and F. M. Angellotti, for appellant:

The Constitution provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say: . . .

"9. Regulating county and township business, or the election of county and township officers. . . .

"29. Affecting the fees or salary of any officer. . . .

"38. In all other cases where a general law can be made applicable."

Cal. Const. art. 4, § 25.

The provision in question is clearly in violation of each of the above divisions.

It is a provision regulating county business. *Earle v. San Francisco Board of Education*, 55 Cal. 490.

This provision for the relief of officers of certain classes of counties is entirely confined as to its subject and in its operation to specified localities. It is therefore local, as contradistinguished from general, and within the constitutional inhibition.

Ibid.; *Miller v. Kister*, 68 Cal. 142.

By "uniform operation," is meant an operation which is equal in its effect upon all persons or things upon which the law is designed to operate at all.

Brooks v. Hyde, 87 Cal. 875.

The County Government Act is essentially a law of a "general nature,"—must be so to be a valid law at all.

Const. art. 11, § 5; art. 4, § 5, subsecs. 9, 28, 29.

Being so, it must operate uniformly upon all persons or things upon which it is designed to operate at all, or it or any portion thereof failing to operate uniformly is void.

Miller v. Kister, *supra*. See *People v. Henshaw*, 76 Cal. 444; *Manning v. Klippel*, 9 Or. 387; *People v. Central Pac. R. Co.* 88 Cal. 398; *French v. Teschemaker*, 24 Cal. 544.

By excepting any particular persons or corporations from the operation of any law, the uniformity thereof is at once destroyed.

Omnibus R. Co. v. Baldwin, 57 Cal. 165.

The Legislature had no authority to delegate to the boards of supervisors of certain classes of counties the power therein attempted to be conferred.

Longan v. Solano County, 65 Cal. 125.

The judgment of the board of supervisors in such matters, if this provision be upheld, would be final, and not reviewable by the courts.

San Mateo County v. Maloney, 71 Cal. 208; *Porter v. Haight*, 45 Cal. 680.

Where the Constitution has located the authority, there it must remain.

People v. Riordan, 73 Mich. 508.

Mr. Hepburn Wilkins for respondent.

Messrs. Works, Gibson & Titus, on behalf of other counties interested, filed a petition for rehearing.

The real question is, Was the statute authorizing such an order valid, or was it unconstitutional.

Unless the statute is unconstitutional the order must be valid.

This statute was not enacted after the term of office of the clerk had commenced, but before.

Suppose that it had been enacted that the officer should receive \$2,000 until the population of the county should increase to a certain number, and that thereafter he should receive \$3,000. Could the objection now urged against it be maintained? We think not.

Hanton v. Floyd County Comrs. 58 Ind. 123.

And yet we see no legal difference between the supposed provision and the one under consideration.

We might name section after section of this whole statute that is not uniform with other sections relating to the same matter and fixing the compensation of the same officer. But we contend that these discrepancies in the statute do not violate this requirement of the Constitution. The evident purpose of this constitutional provision is that all laws of a general nature shall "bear equally in their burdens and benefits upon persons standing in the same category."

Smith v. Judge of Twelfth Dist. 17 Cal. 548; *McGill v. State*, 84 Ohio St. 228.

The very object of a classification is that such provisions may be made for each county as will require it to pay a reasonable compensation to each of its officers, according to the services to be performed.

State v. Reitz, 62 Ind. 159; *Clem v. State*, 33 Ind. 418.

Without some such enactment the statute could not possibly have been made uniform throughout the state under existing circumstances.

Wheeler v. Philadelphia, 77 Pa. 388.

Some of the counties needed no such provision because they were not changing in population as others were, and fixed salaries could be made permanent and would work no injury.

State v. Judges, 21 Ohio St. 1.

Before the adoption of the present Constitution it was held in this state that a law fixing fees or salaries of officers was not a general but a local law.

Ryan v. Johnson, 5 Cal. 87.

And the present Constitution does not prohibit local legislation for each county but only as to one officer or office.

Const. art. 4, § 25, subsec. 29.

Mr. W. H. H. Hart, Atty. Gen., for respondent upon the rehearing.

Garoutte, J., delivered the opinion of the court:

This was an application for a writ of mandate to compel the defendant to pay a warrant for services rendered by plaintiff as deputy county clerk of Marin county. The trial court ordered the writ to issue, and this is an appeal from the judgment and order denying a new trial. The facts of the case are: One Bonneau was, at the commencement of this proceeding, and had been for more than four years next preceding thereto, the county clerk of Marin county. Said Bonneau was last elected in 1888, his term of office beginning January 7, 1889. Upon January 10, 1889, he filed an affidavit with the supervisors of said county by which he showed that a deputy was required

by him in the proper discharge of his duties as such county clerk, and said board at that time made an order allowing him a deputy at a salary of \$50 per month, to take effect from January 7, 1889. The order of the board of supervisors was made by authority of a provision of section 211 of the County Government Act as amended, found at page 207 of the Statutes of 1887, which reads: "Provided, further, that whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, fifth, twelfth, twentieth [and several others] classes as fixed and provided in this Act is insufficient to pay a reasonable compensation for the services required to be performed, then said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such officer in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid at the times and in the manner said principal is paid: provided, that an affidavit shall be filed by such officer with the said board showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer."

It is insisted by appellant that the order of the board of supervisors made January 10, 1889, allowing the county clerk a deputy at a salary of \$50 per month to be paid by the county, was an increase of the compensation of such county clerk after his election and during his term of office, and that such order for those reasons was void and of no effect, being in violation of the provisions of section 9, art. 11, of the Constitution of this state, wherein it is provided that "the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." The order of the board under consideration was made after the election and during the term of office of said Bonneau, and the question presented is, did the order allowing the clerk a deputy, and ordering that his salary be paid from the county treasury, increase the compensation of the county clerk? If it did increase his compensation, it is violative of the provision of the Constitution just quoted, and must give way for that reason. That part of the order wherein it is recited that "the clerk is allowed a deputy" of itself is practically of no effect and force, because the clerk by virtue of his office has the power to appoint one or more deputies to perform or assist him in the performance of the duties of such office, entirely regardless of the wishes or demands of the board of supervisors, and this order of the board, construed in connection with the statute is substantially as follows: "In the opinion of the board of supervisors of Marin county, the salary of the county clerk of said county, as now provided by law, is insufficient to pay a reasonable compensation for the services required to be performed by him, and, it further appearing by the affidavit of the said clerk that a deputy is necessary to a proper performance of the duties of his office, it is ordered that such deputy be paid fifty dollars per month from the county treasury."

The duties resting upon Bonneau when he qualified as county clerk and entered upon his 16 I. R. A.

office were plain and unmistakable, for they are enumerated in detail by the statute, and upon every principle he was bound to discharge those duties. The law would not even allow him to take a single step in the performance of them until he agreed under the solemnity of his oath that he would "perform all the duties of his office to the best of his ability." If his duties as county clerk during the life of his term of office becomes so burdensome and assume such proportions that he has not the ability, either mental or physical, to perform them, he is not thereby released from the obligations he assumed at the inception of his term of office. His services are purely ministerial, and if, through simple desire or actual necessity, assistance is wanted, the law allows him to call to his aid as many deputies as he may see fit to appoint. If unwilling to adopt this course, and unable to perform the duties of the office personally, he can resign; but as long as he remains in office he is bound to perform the duties of the office under his official oath, or remain and render himself amenable to charges and removal for neglect of official duty. In *Evans v. Trenton*, 24 N. J. L. 766, it is said: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services; nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office, for the compensation stipulated, whether these duties are diminished or increased; and whenever he considers the compensation inadequate he is at liberty to resign." The Constitution provides that the Legislature shall, by general and uniform laws, provide for the election or appointment of county officers, and that it shall regulate the compensation of all such officers in proportion to duties. Art. 11, § 5. In pursuance of this provision the Legislature, by an Act entitled "An Act to Establish a Uniform System of County and Township Governments," found at page 299, Cal. Stat. 1888, proceeded to carry into effect this provision of the Constitution, and as amended by Stat. 1885, p. 178, fixed the salary of county clerks of counties of the twentieth class (of which Marin county was one) at \$2,500 per annum, which was to be for the "services required of them by law or by virtue of their office;" and section 211 of the same Act (Stat. 1887, p. 207) further provided: "The salaries and fees provided in this Act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or *ex officio* officers, their deputies or assistants, unless in this Act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this Act otherwise provided." It will thus be seen from the foregoing principles and provisions of the statute and Constitution cited that a public officer accepts an office upon the condition that he will perform all the duties of the office, and while

he remains in such office the public have the right to demand that he perform such duties. In accordance with the mandate of the Constitution, the Legislature fixed the salary of the county clerk of Marin county in proportion to the duties of the office, not in proportion to the duties of the office the county clerk could personally perform, for the statute itself expressly provided that it should be in full compensation for the performance of all the duties of the office; although such would be the necessary construction of the provision of the Constitution, regardless of the statute.

The fact that the law under which the board of supervisors acted in making the order was in force prior to the election of the county clerk is immaterial to the question involved, for it is not the Act of the Legislature that increases the compensation, but the order of the board of supervisors, passed long after the Act took effect, long after the election of the county clerk, and during his term of office. The provision of the statute is entirely ineffectual, save simply as a delegation of power to the board of supervisors to order these things to be done. The Legislature had no power upon the 10th day of January, 1889, to increase the compensation of the county clerk of Marin county; and, not having the power itself so to do, much less could it authorize such board to do so. This provision of section 211 of the County Government Act applies to twenty classes of counties, and the county clerks in some of those classes of counties have salaries ranging from \$10,000 to \$18,000 per annum. Every reason that can be urged and every principle of law that can be invoked to sustain the validity of this order can be urged and invoked with the same force to sustain an order made by the various boards of supervisors of these counties, allowing their county clerks all the deputies necessary for the proper administration of their offices, the counties paying therefor, and thus leaving their entire salaries remaining as compensation for their personal services. If such is the law, all the deputies of all the county officers of twenty classes of counties, under the general election of 1888, by order of the various boards of supervisors, could have been paid out of the county treasury of the respective counties. The doctrine can only be sustained upon the theory that the word "compensation," as used in the Constitution, refers simply to the personal services of the public officer, and not as compensation for the performance of all the duties of the office. The fact is directly to the contrary, and is so recognized by the Legislature throughout these various provisions of the County Government Act. The board can only allow such deputy upon the request of the principal, and only when the principal insists that his services are necessary in the performance of the duties of the office. If not paid by order of the board from the county treasury, the principal, being bound to perform all the duties of his office, and a deputy being necessary, would be bound to employ the deputy and pay him from his own salary. The county, by order of the board, pays \$600 per annum as part of compensation for the performance of the duties of the clerk's office. From a pecuniary standpoint such course is a very

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substantial benefit to the county clerk. The deputy is under his control, is impowered by law to act in the place and stead of his principal in all matters, the principal is liable for his salary, and a payment by the county of such deputy's salary is for all practical purposes a payment to the principal, and in this case necessarily results in an increase of the principal's compensation to the extent of \$600 per annum. It is perfectly immaterial to the clerk whether his salary is increased to \$3,100 per annum, and from that sum he pays his deputy \$600 per annum, or that it remains at \$2,500 and the county pays the deputy the \$600. The clerk reaps the full benefit of the \$600 in both cases. To be sure, this reasoning concedes that the clerk must have the deputy, but such must be the fact, for the clerk is bound to perform all the duties of his office, and a deputy is a necessity to the performance of those duties, for, by his affidavit, he himself has so declared. To construe the provision of the Constitution so that a county clerk's salary could not be increased during his term of office. But that an Act of the Legislature would be valid which provided that all of his deputies, men whom he was bound to employ and bound to pay, in the absence of such an Act, should be paid by the county, independent of and in addition to the clerk's salary, would be to allow that to be done indirectly which could not be done directly, and would be establishing a medium for the practice of the very abuses which the constitutional provision was inserted to destroy. The provision of the statute appears to be a crude and ill-conceived effort to evade a very plain and very wholesome provision of the Constitution of this state.

Let us take a broader view of this provision of the County Government Act, which authorizes the boards of supervisors of twenty classes of counties to pay the salaries of the deputies of all county officers of the counties of those classes under certain conditions and contingencies, and estimate its true worth by another test. Article 1, § 11, of the Constitution, requires that "all laws of a general nature shall have a uniform operation." The County Government Act is essentially a law of a "general nature." It must be so to have any validity whatever, and with the provision under discussion before our eyes, can it be said the County Government Act has a uniform operation? In *Ex parte Smith*, Justice Sanderson said, referring to the meaning of the Constitution in the use of the words "uniform operation:" "Its meaning, as repeatedly declared by the highest judicial tribunal in the state, is not that general laws must act alike upon all subjects of legislation or upon all citizens or persons, but that they shall operate uniformly, or in the same manner, upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it or the acts which it prohibits." 38 Cal. 702.

We must view this question in the light of the fact that the County Government Act was intended to establish a uniform system of county governments, and that the classification of counties and regulation of the compensation

of county officers, in proportion to duties, were important elements in the formation of that Act, and were material portions to which the principle of uniformity was to be applied. When amended in 1887 by the provision delegating these powers to the boards of supervisors in twenty classes of counties, that provision simply became a part of the whole,—a strand of the rope which formed the County Government Act. That provision certainly gained no additional strength or weight, simply by being a more recent creation of the Legislature than the Act of which it became a part, and its validity must be weighed and tested as if it were a provision placed in the Act of 1883. Now, does it disturb the uniformity of the operation of that Act? We find the Act first classified the counties of the state according to population, for the sole and express purpose of regulating the compensation of county officers according to their duties. It then regulated the compensation of county officers according to their duties, but it did not stop there. It provided, further, that in twenty classes of counties, naming them, the supervisors of those counties might relieve the county officers of some of their official burdens by ordering that their deputies be paid from the county treasury. By this provision the Legislature destroyed the uniformity of the operation of the Act. In twenty-eight classes of counties the compensation of county officers is fixed at an amount certain and definite,—an amount that cannot be changed, save by an Act of the Legislature; but in the remaining twenty classes of counties the compensation for the performance of the duties by the various officers may fluctuate every month in the year, at the mere whim of the boards of supervisors. The County Government Act, upon the same matters and under the same state of circumstances, should operate equally upon all classes of counties, but the Legislature has said that in twenty classes of counties only, whenever the salary of county officers is insufficient to pay a reasonable compensation for the services required to be performed, the board of supervisors may allow them deputies at the county's expense. Now, if the salaries should prove insufficient to pay a reasonable compensation to the county officers for the duties to be performed in the remaining twenty eight classes of counties of the state, why should they not be allowed the same relief? In twenty-eight classes of counties the Legislature fixed the salaries of county officers at a definite sum, in proportion to the duties of the office. In twenty classes of counties the minimum sum only is fixed, and the boards of supervisors have the power to fix the compensation for the performance of the duties of the various officers at any sum which the board may think is a proper proportion, as compared with the duties of the office. This certainly is a very unjust discrimination against twenty-eight classes of counties, and, not acting alike upon all classes of counties, necessarily destroys the uniformity of the operation of the Act.

Respondent's counsel insist that an amendment to the Act of 1883, relating to the compensation of county officers of one class of counties is a law of a general nature in itself, 16 J. R. A.

and that consequently this provision of section 211, applying to twenty classes of counties, is no less a general law; and, purporting to deal with twenty classes of counties only, and having a uniform operation as to those classes, the provision complies with the test in both respects, and is therefore within the Constitution. This contention is true to a limited extent, and was so held by this court in *Cody v. Murphey*, 88 Cal. 522, wherein it was decided that legislation pertaining to the compensation of officers of one class of counties was a law of a general nature, and in that case uniform in its operation, it being directly in line with all other provisions of the County Government Act, pertaining to the same subject-matter. But there is a broad distinction between that provision of the Act and the one under consideration in this case. If the Legislature, as has been attempted here, can delegate the power to the supervisors to regulate the salaries of county officers of twenty classes of counties, it could provide a separate and distinct means for the regulation of the salaries of the county officers of each separate and distinct class of counties; and thus the uniformity of the operation of the County Government Act, upon the question of the regulation of salaries of county officers, would consist solely in the fact that the operation of the Act was uniformly different in each class of counties. It would seem that the case of *Miller v. Kister*, 63 Cal. 142, is conclusive against respondent upon this question. In that case the section under consideration was section 4 of the Act of 1885, amending the County Government Act as to salaries (Stat. 1885, p. 195), which section provided that in three classes of counties the salaries fixed in said amendment (all reductions, which were within the power of the Legislature to make) should take effect on the first day of the following month, while the amendment provided that in all other classes the salaries should not take effect during the terms of the then officers. Held, (1) that the same was special legislation; and (2) that the operation of the law is exceptional and eccentric, and causative of discrimination between the officers upon whom it is to operate,—“the few are excluded from the privileges given to the many;” and the section was held to be void. We think this provision destroys the uniformity of the operation of the County Government Act in respect to the matters upon which it attempts to speak, and is a violation of a plain requirement of the Constitution, which should be scrupulously guarded and upheld.

Let the judgment be reversed and the cause remanded, with directions to dismiss the proceedings.

We concur: **De Haven, J.; Sharpstein, J.; Harrison, J.**

Beatty, Ch. J., concurring:

I concur in the judgment of reversal. If the amendment to the County Government Act under which the respondent claims applied equally to all the counties of the state; if, in other words, it was general, and not special and local, in its operation,—I think it is susceptible of the construction which would not bring it in conflict with section 9 of article 11 of the Constitution forbidding the increase of

a compensation of a county officer during his term. What I think the Legislature really meant by the provision in question was to empower the boards of supervisors in those classes of counties to which it applies to allow deputies or additional deputies in county offices, and to pay their salaries whenever, from some unusual increase of population or other cause, the business of such offices was so increased as to require for the discharge of its duties a deputy or deputies in addition to the number employed at the date of the Act fixing the salary of the office. I do not think it was the intention of the Legislature to authorize the boards of supervisors in their discretion to relieve county officers of the payment of the deputies employed at the time their compensation was established by the County Government Act. To give the law in question such a construction would render it invalid as an attempt to delegate to the supervisors of the respective counties a power and a duty conferred and imposed by the Constitution in express and mandatory terms upon the Legislature itself. Art. 11, § 5. Such a construction is, of course, to be avoided if possible. Giving to this law, then, the construction above indicated, it would not have the effect, if properly administered, of increasing the compensation of any county officer during his term, and the only constitutional objection to which it is exposed, in my opinion, is this: That it is special and local in a case where general law could be made applicable, and perhaps in some of the enumerated cases in which special and local legislation is prohibited (art. 4, § 25), or that it is an amendment to a general law which destroys the uniformity of its operation. To all these objections the respondent's answer is that the law is neither special nor local, because it applies to classes of counties created in pursuance of authority expressly conferred by the Constitution itself, viz., the authority to classify counties by population for the purpose of regulating the compensation of county officers according to their duties. Art. 11, § 5. But while this would be a sufficient answer to such objections in case of a law regulating the compensation of county officers, it is no answer to the same objections to a law passed for a wholly different purpose. In other words, a classification of counties made for a special purpose authorized by the Constitution cannot be made the basis of discriminating legislation of any and every kind. Classification which is proper and rational and necessary for one purpose may be utterly arbitrary and unnecessary for another purpose, and it is necessarily so with reference to a law with relation to which every county in the state stands upon the same plane. Such is the character of the law in question. If it is right that the supervisors should have the power to make allowance for the unexpected increase of business in the county offices, by authorizing the payment out of the county treasury of the salaries of such additional deputies as may be needed, then it is right that the supervisors of every county should have the same power. This law, however, selects certain classes of counties apparently at random, some large, some small, some of intermediate size, omitting others of every grade of population above, below, and intermediate, and con-

fers upon the classes so arbitrarily selected a power and a privilege in the transaction of the county business which is denied to others standing in precisely the same relation to the subject of this enactment. This case is much stronger than that presented in *Miller v. Kister*, 68 Cal. 142, in which a similar law was held unconstitutional upon the ground that it was special legislation. But even if this law could be held a general law, in accordance with the contention of the respondent, I think his case is not within it. One deputy clerk was employed in 1885, at the date when the salary of the office was fixed, and it must be presumed that the salary was fixed with reference to that fact. There has never been any increase in the number of deputies required, and the respondent is the only deputy that was employed by the clerk during the time for which a salary is claimed. As there was no increase in the number of deputies, the case did not arise in which, according to my construction of the law, the supervisors were empowered to make the allowance of a deputy's salary. Upon these grounds I concur in the judgment.

We dissent: **McFarland, J.; Paterson, J.**

A rehearing was subsequently granted after which, on May 30, 1892, **DeHaven, J.**, on behalf of the court delivered the following opinion:

In the former decision of this case (28 Pac. Rep. 834) the court, in its opinion, held that the order of the board of supervisors of Marin county, upon which the respondent bases his right to the relief which he asks, was, in effect, an increase of the compensation of the county clerk of Marin county, made after his election to such office, and was for this reason void, as being in conflict with section 9 of article 11 of the Constitution of this state; and, secondly, that section 211 of the County Government Act, as amended in 1887; (Stat. 1887, p. 207.) under which the board of supervisors acted in making such order, was invalid, as it made the County Government Act, of which it formed a part, lacking in that uniformity of operation which is required by section 11 of article 1 of the Constitution of this state. It being supposed that the decision thus made would affect officers in other counties who had not been heard, and that the question presented for decision was of sufficient importance to justify it, it was deemed proper by a majority of the members of the court to grant a rehearing, in order to give an opportunity for further argument. The case has been reargued, and upon a reconsideration of the questions involved we adhere to the conclusions announced in the former opinion of *Mr. Justice Garoute*, and the reasoning by which those conclusions were reached.

There is, however, an additional ground which is equally fatal to the right of respondent to maintain this action, which will be briefly referred to. The Constitution of the state declares: "The Legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks. . . shall regulate the compensation of all such

officers in proportion to duties, and for that purpose may classify the counties by population." Art. 11, § 5. Under this section it is made the imperative duty of the Legislature to regulate—that is, to fix or adjust—the compensation of all county officers in proportion to their duties. In the exercise of the authority thus conferred upon it by the Constitution, the Legislature, in the County Government Act of 1888, (Stat. 1888, p. 299.) and the Act amendatory thereof, passed in 1889, (Stat. 1889, p. 178.) fixed the salary of the county clerk in the class of counties to which Marin belonged at \$2,500 per annum, with the special provision that this sum should be in full compensation for that officer, and that all deputies employed by him and deemed necessary to properly discharge the duties of such office should be paid by him out of the salary thus fixed by the Act. But in 1897 section 211 of the County Government Act was again amended, and by such amendment the Legislature undertook to confer upon the supervisors of Marin—and certain other counties—the power to change that provision of the law which required their county officers to pay their own deputies. This amended section, so far as it is necessary to be here set out, is as follows: "That whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, . . . twentieth, . . . classes, as fixed and provided in this Act, is insufficient to pay a reasonable compensation for the services required to be performed, the said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such office in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid, etc.; . . . provided, that an affidavit shall be filed by such officer with the said board, showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer." It was under this section, as thus amended, that the board of supervisors of Marin county acted in making the order by virtue of which plaintiff claims the right to be paid his salary as deputy county clerk from the treasury of the county.

The question is thus squarely presented whether it was competent for the Legislature thus to delegate to the board of supervisors of that county the power to change or suspend that part of the general law fixing the salaries of county officers, which provided that the county clerk of Marin county should himself pay the deputy or deputies employed by him. There can be, under well-settled principles of constitutional law, but one answer to this question, and that is one which denies to the Legislature any right to thus delegate to any other body or tribunal what is most clearly a legislative power, the exercise of which the Constitution has confided to that department of the state alone. This principle is one so universally accepted as true, that *Judge Cooley*, in his work on Constitutional Limitations, states it as a maxim of constitutional law. He says: "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot

be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Page *117. A general statute of the state of Missouri concerning roads and highways contained a provision that, "if the county court of any county should be of opinion that the provisions of the Act should be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the Act should become inoperative in such county for the period specified in such order," and in that event roads in such county should be opened and kept in repair under previous statutes. The Supreme Court of that state, in *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275, held such Act unconstitutional, as an attempt to delegate to the county court of the county a power vested exclusively in the Legislature. There is no difference whatever, in principle, between the statute held invalid in the case just referred to and section 211 of the County Government Act as amended in 1887, and under which the board of supervisors acted in making the order upon which the plaintiff relies. By this section, as thus amended, an attempt is made to delegate to the board of supervisors of Marin county the authority to change the law fixing the salary of the county clerk of that county whenever it shall appear to such board that the salary as thus fixed is insufficient to pay him a reasonable compensation for his services. The salary of this officer was fixed by the Legislature, with direct reference to the fact that out of it he was to pay his own deputies, and the purpose of this amended section is to authorize the board of supervisors of that county to suspend the operation of this law, in so far as he is thereby required to pay such deputies, and to place that burden upon the county. The power thus to change a law of the state is necessarily legislative in character, and is vested exclusively in the Legislature, and cannot be delegated by it to the board of supervisors of the county. It follows from this that the order of the board of supervisors of Marin county, allowing the plaintiff a salary of \$50 per month as deputy county clerk of that county, and payable out of the treasury, is void, and plaintiff is not entitled to the judgment which he demands. As already stated, the Constitution of this state has made it the imperative duty of the Legislature to fix the salaries of county officers in proportion to their duties. Whether, if that body should wholly fail to discharge this obligation in respect to any county, the board of supervisors of such county would by virtue of its general authority in relation to the government of such county, have power to provide for the payment of its officers, is a question

not involved in this case, and upon which we express no opinion.

Judgment reversed, with directions to dismiss the proceeding.

We concur: **Garoutte J.; Harrison, J.; Sharpstein, J.**

Beatty, Ch. J., concurring:

At the first presentation of this case I was impressed with the conviction that very serious consequences must flow from any conclusion the court might reach, and have therefore given it the most careful and anxious consideration. It was apparent that so important a provision of the County Government Act as that which is in question here could not be held unconstitutional without producing disorder and confusion in the public business of a number of the most populous counties of the state, besides injuriously affecting the pecuniary interests of the deputy county officers whose compensation it was intended to secure. It was therefore with great reluctance that I yielded to the conviction that, upon any construction of the proviso under which the respondent claims, it could not be upheld without disregarding the manifest intention of the Constitution. Actuated by the same feeling, I willingly united in the order for a rehearing, hoping that a fuller discussion of the case by additional counsel representing the state and the several counties affected by the decision might lead to the discovery of some happier solution of the difficulty. I regret to say, however, that, after carefully weighing and considering every argument that has been advanced from the beginning to the end of the discussion, the conflict between the Act of the Legislature and the Constitution still seems to me plain and irreconcilable. Unless by express words declared to be otherwise, every provision of our Constitution is mandatory and prohibitory. Art. 1, § 22. Among these mandatory and prohibitory provisions are found the following: Art. 11, § 5. "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of the boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession." Art. 11, § 9; "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." It is not denied, and it cannot be, that by section 5 of this article the Legislature is commanded to regulate the compensation of all county officers in proportion to duties. A comparison of sections 5 and 9 makes it equally plain that such regulation must be made to take effect before the election of the officers whose compensation it controls, and that it

cannot be subsequently changed so as to increase the compensation of any officer during the term for which he has been elected. It may be conceded that to regulate the compensation of an officer does not necessarily mean to ascertain or fix the exact amount which he is to receive for discharging all the duties of his office. Indeed, it seems plain to me that the Legislature might have satisfied this requirement of organic law, without any classification of counties according to population, by the simple expedient of adopting a uniform fee bill, and allowing each county officer to retain for his compensation all the fees by him collected, not exceeding a certain amount, and a percentage computed according to a sliding scale, such as that used in determining the compensation of executors and administrators, upon all higher amounts collected. This is one example of a regulation by which a just correspondence between the duties and compensation of county officers might be maintained without trenching upon the apparent design of the last clause of section 5, requiring provision to be made for the strict accountability of county and township officers for all fees by them collected, and without the necessity of dividing the counties into classes. No doubt other, and perhaps better, examples might be suggested of regulation by other means than the fixing of a definite sum to be paid to each officer for discharging all the duties of his office, and requiring him to provide all necessary deputies.

But the Legislature has not seen fit to adopt a regulation of the character suggested. On the contrary, by the first County Government Act (Stat. 1888, p. 299), the duties of all county and township officers were prescribed by general provisions, and every county and township officer, except supervisors and judicial officers, was authorized to appoint as many deputies as might be necessary for the prompt and faithful discharge of the duties of his office. Sec. 61, p. 316. The Act then proceeded to classify the counties of the state by population for the express purpose of regulating the compensation of the officers therein provided for. Section 162, p. 332. By the next section (sec. 163) the compensation of each officer in every class of counties except the first (the city and county of San Francisco alone constituted the first class, and was left subject to the provisions of its old charter) was fixed at a certain sum of money (or sometimes certain fees), which, by a subsequent and general provision (sec. 164, p. 361), was declared to be "in full compensation for all services of every kind and description rendered by the officers named in the Act, their deputies and assistants." To leave no doubt of the meaning of this clause the Act proceeds: "and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided." As an example of the provisions of section 163 we quote those relating to counties of the second class: "Sec. 163. In counties of the second class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: (1) The county clerk, \$18,000 per annum; (2) the sheriff, \$15,000 per annum; (3) the recorder, \$15,000 per annum; (4) the auditor,

\$2,000 per annum; (5) the treasurer, \$4,500 per annum; (6) the tax collector, \$8,000 per annum; (7) the assessor, \$14,000 per annum; (8) the district attorney, \$6,500 per annum; (9) the coroner, such fees as are now or hereafter may be allowed by law; (10) the public administrator, such fees as are now or hereafter may be allowed by law; (11) the superintendent of schools, \$2,400 per annum; (12) the surveyor, such fees as are now or hereafter may be allowed by law; (13) justices of the peace, such fees as are now or hereafter may be allowed by law; (14) constables, such fees as are now or hereafter may be allowed by law; (15) supervisors, \$1,000 per annum." Now, conceding again that to regulate the compensation of officers does not necessarily mean to fix the exact amounts to be paid them for discharging all the duties of their offices, including the services of deputies, it cannot be denied that this is one method of regulation by which the requirement of the Constitution is satisfied, without denying that the County Government Act of 1888, and all subsequent acts on the same subject, were and are in this respect unconstitutional and void. But the contrary has been decided in *Longan v. Solano County*, 65 Cal. 122, and no one here—least of all the respondent—is disputing the correctness of that decision. Assuming, then, what is conceded on all sides,—that the Act of 1888 did regulate the compensation of county officers according to duties,—let us consider for a moment the nature of that regulation and its effect in limiting the compensation proper of the officers themselves. The sum allowed to any given officer being a lump sum, out of which he must pay for the services of all deputies and assistance necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that, just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased.

The cases reviewed by the Supreme Court of Illinois in deciding *Daggett v. Ford County*, 99 Ill. 334, cover this point very completely. By the Constitution of Illinois the duty of "fixing the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel, and other expenses," is imposed upon the respective county boards, with the proviso that the compensation of no officer shall be increased or diminished during his term of office. It was shown in the opinion delivered in the case cited that this clause of the Illinois Constitution had been construed in a series of decisions, by which it had been held, among other things, that the county boards might either allow a lump sum to cover the compensation of the officer and his expenses for clerk hire, etc., or that they could allow a certain amount for his proper compensation, and a separate amount for his expenses; that, if the latter method was pursued, he could retain out of the fees collected by him the amount of his fixed compensation, and also the actual amount of his expenses, and no more, provided they did not exceed the amount allowed; that, if the board, after allowing a separate amount for expenses found that it was

insufficient, they could from time to time during the term increase such allowance, though they could not increase or diminish the certain sum fixed as the compensation of the officer. In other words the supreme court recognized this distinction between the allowance for compensation and for clerk hire, etc., when separately fixed; that the latter could, but the former could not, be increased or diminished during the officer's term. But when the board allowed a lump sum to cover compensation and expenses, so that the compensation proper consisted of the residue remaining over after payment of expenses, it was held that they could not, during the term of the officer, make any increased allowance, though convinced that their original estimate of expenses had been too low; nor could they require the officer to refund any part of the gross amount allowed upon the ground that his actual expenses had fallen below the estimate upon which the gross allowance was made; and this for the reason that any increase or decrease of the gross allowance necessarily increased or diminished the compensation of the officer. Here, then, is most respectable authority—if authority were needed—for the proposition that our Legislature could not, either by direct enactment or by authorizing the boards of supervisors to so order, impose upon a county treasury the payment of the salary of any deputy of a county officer elected while the Act of 1888 remained in force and unamended as to the provisions under discussion.

This being so, it remains to consider what changes have been made by amendments or additions to the original Act. By the amendments of 1885 the sections of the Act were renumbered, and salaries in some counties reduced, but no change was made that need be considered here. In 1887, however, the Act was revised and re-enacted. In the revision, section 164 of the original Act became section 211, and among other changes therein were the following: Instead of the words above quoted from section 164, section 211 was made to read as follows: "Sec. 211. The salaries and fees provided in this Act shall be in full compensation for all services of every kind and description rendered by the officers herein named either as officers or *ex officio* officers, their deputies and assistants, *unless in this Act otherwise provided*, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, *unless in this Act otherwise provided*. . . . And provided, further, that whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, fifth, twelfth, thirteenth, fifteenth, twentieth, twenty-second, twenty-third, twenty-fourth, twenty-sixth, twenty-ninth, thirty-third, thirty-fourth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, and forty-first classes, as fixed and provided in this Act, is insufficient to pay a reasonable compensation for the services required to be performed, the said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such office, in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid at such times and in the manner that said principal is paid: provided, that an affidavit shall be

filed by such officer with the said board showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer." By their terms these amendments (which I have put in italics) were applicable to the county officers then in office, and who had been elected while the system of compensation established by the Act of 1883 was in force, and (if so construed) were, for the reasons above given, clearly unconstitutional. But the respondent's case does not require such a construction, and he does not contend that said amendments went into operation until after the expiration of the term of the county officers in office at the date of their enactment. His principal, Bonneau, was clerk of Martin county—a county of the twentieth class—when the Act of 1887 was passed, and respondent was his deputy. But Bonneau was re-elected for a new term in November, 1888, and entered thereon January 7, 1889. On January 10 he filed the affidavit prescribed by the statute, showing that he required a deputy in his office, and on the same day the board of supervisors made an order allowing him such deputy at a salary of \$50 per month, to take effect from January 7. In pursuance of this order respondent was appointed, and, having obtained a warrant for the amount of his salary for the month of January, presented it to the appellant, the county treasurer, who refused to pay it on the ground that the proviso above quoted from the Act of 1887 was unconstitutional, and the order of the board of supervisors therefore void. Thereupon this proceeding by mandamus was commenced for the purpose of enforcing payment. The learned judge of the superior court, in awarding a peremptory writ of mandamus, held (if he is correctly quoted in the respondent's brief) that Bonneau, having been elected subsequent to the passage of the Act of 1887, went into office with "a right to the amount of salary named in the statute, and a contingent right, dependent on the facts, to have additional clerical assistance."

This being a fair statement of the proposition for which the respondent contends, it becomes necessary to consider whether it will bear the test of a critical examination. It is to be observed, in the first place, that it assumes a construction of the proviso which is more restricted than its terms, and more restricted than its application in this case, viz., that it was intended to apply only when, from change of conditions, an officer might require additional clerical assistance, meaning, as I understand the expression, clerical assistance in addition to that which was required at the date of the passage of the Act. If this is the construction placed upon the proviso by the superior court, it must be admitted that it is not very fully borne out by the terms of the statute. The Act says nothing about change of conditions through increase of population, or from any other cause. No facts are enumerated upon which the action of the board is made to depend. The only condition is that the officer shall file an affidavit showing that for the proper discharge of his duties he requires the assistance of a deputy or deputies, which it is apparent might be the case in a county in which the conditions were unchanged, or where the change of conditions had resulted in lightening

the duties of the office. Nor does the statute require the board of supervisors to find that the duties of the office have become more onerous since the passage of the Act. All they have to do is to reach the conclusion in the exercise of their own discretion that the salary as fixed and provided in the Act is insufficient to pay a reasonable compensation for the services required to be performed, and, if they are of that opinion, they shall allow such officer not "additional clerical assistance," but "a deputy, or such number of deputies as in their judgment may be required to do the business of such office, in connection with the principal," with salaries payable out of the county treasury. Giving to this language its literal and obvious construction, the working of the law may be fairly illustrated by applying it to counties of the second class, which, by the amendments of 1889, were brought within its operation. Referring to the clause of the statute above quoted, it will be seen that the compensation allowed to the different officers of this class of counties is fixed upon a scale which clearly indicates that it was intended to cover the salaries of a number of deputies in each of the principal offices. The clerk, for instance, has \$18,000, the sheriff \$15,000, and so on. Now, let it be supposed that the Legislature intended the clerk to have for his proper compensation the sum of \$8,000 (which is equal to the maximum allowed by the Constitution to the state treasurer, secretary of state, comptroller, and other state officers), and that the remaining \$10,000 was allowed for his necessary deputies, say six in number. This is the condition of things when the law is passed, and when the clerk is elected. On assuming the office, he can truthfully swear, although the conditions are entirely unchanged, that he requires the assistance of six deputies for the proper discharge of the duties of his office, and he files an affidavit to that effect. Thereupon it becomes the duty of the board of supervisors to consider whether his salary, as fixed and provided in the Act, is sufficient to pay a reasonable compensation for the service of the clerk and six deputies; and, if they happen to be of the opinion that \$8,000 is not a reasonable compensation for the clerk, or that \$10,000 is not sufficient for the compensation of the six deputies, they must make an order allowing the clerk to appoint, not additional deputies, but as many deputies as he requires in connection with himself to perform the duties of the office, and order their salaries paid out of the county treasury. This result of a literal construction of the law is so flagrantly absurd, when applied to counties of the second class, that it must be rejected in favor of one more reasonable, though certainly less consonant with the terms of the statute. And it may be conceded that the most reasonable construction that can be given to his proviso is that indicated in the foregoing extract from the opinion of the judge of the superior court. It seems to me, however, that, although the law may have been construed by him according to the actual intention of the Legislature, it was applied in this case in its literal sense, for the respondent was Bonneau's sole deputy when the law was passed, and when he was last

elected. It was not shown that an additional deputy was required, and in fact none was required. Respondent continued after the order of the board, and his new appointment, to be as he had been before, the sole deputy in the office, and what was in fact done in Marin county by its clerk and supervisors was precisely what I have supposed done in attempting to illustrate the working of the law according to its express terms in a county of the second class. If, therefore, the order under which the respondent claims, can be upheld, all the proceedings above supposed to have taken place in a county of the second class would be entirely legitimate and proper.

In making this statement I have not overlooked the fact which appears in the evidence, though not in the findings or decision of the court, that the business of the clerk of Marin county did increase, after the passage of the Act of 1887, so much that the respondent, who had before given but a part of his time to his duty as deputy clerk at a small salary, was subsequently compelled to devote his whole time to the duties of the office, and necessarily earned and received a larger salary. If this fact—testified to but not found—is to be considered as bringing the respondent's case within his construction of the law, it will be necessary to bring the law so construed to the test of the Constitution. According to this construction, the Legislature, after dividing the counties of the state into forty-eight classes for the express purpose of regulating the compensation of the county officers, and having regulated such compensation by the system of allowing to each officer a certain fixed sum, or certain fees out of which he must pay the salaries of all necessary deputies and assistants, has proceeded to ingraft upon this system a proviso applicable to twenty classes, to the effect that the supervisors may, after the election of any officer, if they think the compensation allowed him by the Act in force at the date of his election is insufficient, pay out of the county treasury the expense of employing any deputies he may require in addition to those required at the date of the passage of the Act. Assuming this to be the true meaning of the proviso, it either is or is not a mode of regulating the compensation of the officers of the selected classes of counties. If it is a mode of regulation, how does it regulate, and through whose agency? Clearly, it seems to me, through the agency and subject to the discretion of the board of supervisors. If, under the law in force at the date of his election, an officer is to receive for his proper compensation one sum (viz., what is left of his fixed salary after paying his necessary deputies), and under order of the board made after his election a larger sum (viz., what is left of his fixed salary after paying at most only a part of his necessary deputies), it is the discretion of the board, and not that of the Legislature, which fixes the amount, and such amount, instead of being fixed in advance of his election, can only be fixed after his election, for by the terms of the proviso the affidavit of the officer is a necessary preliminary to the order of the board. Passing over this last objection, which, in view of the evident purpose of sections 5 and 9 of article 11, is serious enough,

let us consider only the first. For myself, I am far from believing that the plan of regulating the salaries of local officers by local boards is a bad one. On the contrary, I think the best plan would be to leave such matters to the control of those who are most directly interested and most capable of deciding for the best. But it is very certain that the framers of our Constitution distinctly intended to give this power to the Legislature, to the exclusion of the boards of supervisors. This is not only evident from the language of section 5 of article 11, but is shown by the debates of the convention. When this article was reported to the convention, Mr. Webster, of Alameda, offered an amendment to section 5, providing in effect that the respective boards of supervisors should regulate the compensation of other county officers. After a short debate, in which the only argument against the amendment consisted of a statement of the supposed mischiefs involved in conferring such a power upon local boards, the amendment was voted down, and the section adopted substantially as reported. Deb. Const. pp. 1048, 1049. The framers of the Constitution having thus deliberately rejected the proposition to invest the board of supervisors with discretionary authority in this particular, and having committed the whole matter to the discretion of the Legislature, under a mandatory injunction to exercise the power by regulating in advance the compensation of all officers according to their duties, it is clear that the Legislature cannot delegate such power to the supervisors, to be exercised according to their discretion. But counsel for respondent seek to avoid the force of this argument, by insisting that the proviso in question, according to their construction of it, does not in any way regulate or affect the compensation of the county officers. They make a distinction between the compensation of the officer and the expenses of his office, and contend that the County Government Act itself fixes the compensation of the officers beyond the power of the board of supervisors to change or alter it, and that the proviso merely gives the board power to allow and pay the expenses of the office occasioned by the changed conditions and unforeseen contingencies. I understand this to be the position to which the respondent commits himself, and upon which he feels the most confident of sustaining the judgment in his favor.

In view of the foregoing discussion it would seem rather difficult to maintain that the proviso in question does not affect, and was not intended to regulate, the compensation of county officers; but, conceding for the moment that the respondent is right in his construction of it, what is the result? The result is that we have an Act in direct conflict with various provisions of the Constitution prohibitory of local and special legislation. If there is any one feature of the Constitution more marked, and any characteristic more pervasive, than all others, it is this oft reiterated, this general and specific inhibition of local and special laws. I cite the following clauses as bearing more directly upon the matter under discussion: Art. 1, § 11: "All laws of a general nature shall have a uniform operation." Art.

4, § 25: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say; . . . *Ninth*. Regulating county and township business, or the election of county and township officers. . . . *Thirty-third*. In all other cases where a general law can be made applicable." Now this law, which for the present we assume has nothing to do with the compensation of county officers, but merely empowers the board of supervisors to allow and pay the expenses caused by changed conditions and unforeseen contingencies, is certainly a law of general nature, relating, as it does, to a matter of equal interest to every part of the state. It ought, therefore, to have a uniform operation throughout the state, instead of being confined to less than half of the counties. But, passing over this objection to the law as one founded upon a disputed, and perhaps doubtful, construction of section 11, art. 1, it seems clear that this proviso is in direct conflict with the ninth and thirty-third subdivisions of section 25, art. 4, for certainly it is a regulation of county business, and the case not only admits, it demands, the application of a general law. But this law is local and special. It selects certain classes of counties, apparently at random, some large, some small, some of intermediate size, omitting others of every grade of population, above, below, and intermediate, and confers upon the classes so arbitrarily selected a power and a privilege in the transaction of the county business which is denied to others standing in precisely the same relation to the subject of the enactment. The fact that it is made applicable to classes of counties created in pursuance of authority expressly conferred by the Constitution itself, viz., the authority to classify counties by population for the purpose of regulating the compensation of county officers, does not make it a general law; for, on the construction which is here assumed, it is not a regulation of the compensation of officers, but a provision for contingent expenses; and a classification permitted for one kind of legislation cannot be made the basis of a different kind of legislation to which it is manifestly inappropriate. It is this consideration which distinguishes this case from *Cody v. Murphey*, 89 Cal. 522, and *People v. Henshaw*, 76 Cal. 444. In the first-mentioned case an Act was upheld, although it applied to but one class of counties; but it was an Act to regulate the compensation of the county officers. In the *Henshaw Case* the Act upheld affected only one class of cases; but it was an Act relating to municipal organization, for which purpose the Constitution expressly authorizes the classification of cities and towns in proportion to population. Art. 11, § 6.

The case of *Miller v. Kister*, 68 Cal. 142, on the other hand, holds that the classification of counties established by the Act of 1883, for a legitimate purpose, cannot be made the basis of discriminating legislation, even when it relates to the compensation of county officers. The case of *Espartero Waterfield*, 55 Cal. 550, is also directly in point on the proposition that a law is not general merely because it applies equally to all of a class arbitrarily defined. *Mr. Justice McKinstry* says in that case: "A general law must be as broad as its object." There-

fore a law, the object of which is to provide for the payment of county expenses arising from unforeseen contingencies, must be as broad as the state, for it is absurd to say that unforeseen contingencies will happen in some counties, but not in others. In the case of *Pasadena v. Stimson*, 91 Cal. 288, a law applying to two classes of municipal corporations was held unconstitutional, because it related to a subject foreign to the purpose for which the classification of such corporations is authorized, and the discussion on this point was summed up in the following words: "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." Pages 251, 252, 91 Cal. In view of these decisions, the conclusion cannot be avoided that the proviso, construed as something distinct from a regulation of the compensation of county officers, is local and special legislation, and therefore void. And this vice of the statute in question distinguishes it broadly from the law which was sustained in *Kirkwood v. Soto*, 87 Cal. 894, upon which the respondent so confidently relies. That was a general law, allowing superintendents of schools in every county in the state certain necessary official expenses, and was in this respect similar to many general provisions of the Codes allowing for extraordinary expenses of county offices; such, for instance, as the preparation of a new great register (Pol. Code, § 1118), to which I see no constitutional objection. If I am correct in the views above expressed, the proviso in question is void as special legislation, even if construed according to respondent's contention,—that it does not affect the compensation of county officers. But, although I have for the moment conceded the correctness of his position as to this point, I do not think it can be maintained. The proviso, in my opinion, is an attempt to regulate such compensation by committing to the discretion of the supervisors a duty which the Constitution had confided to the Legislature exclusively,—a duty which, under the terms of the Act, the supervisors cannot perform until after the election of the officers to be affected, whereas the Constitution requires it to be performed by the Legislature in advance of their election. For these reasons I concur in the judgment of reversal.

McFarland, J., dissenting:

I dissent. I have not the time, and there is no necessity, to state my views at large on the questions here involved. I will state some of them, however, briefly.

1. The undisputed general rule is that all presumptions are in favor of the constitutionality of statutes; that before an Act of a co-ordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, abrupt, and unquestionable; and that, in case of fair, rea-

sonable doubt of its constitutionality, the statute should be upheld. I state this old rule here because I think it particularly applicable to the case at bar; for, at best, the unconstitutionality of the statute here in question is certainly not so clear as to be seen without a good deal of microscopic aid.

2. The Amendment of 1887 was not, in my opinion, in violation of section 9 of article 11 of the Constitution, which provides against increase of compensation "after election." Bonneau, the county clerk, whose deputy Dougherty, the plaintiff, is, was elected after the passage of said amendment; and he did not "contract," as contended by appellant, that he would do all the work of his office, or pay a deputy, if necessary to employ one. The law which gave the contingent right to have a deputy paid by the county was in force at the time of his election. Moreover, the employment of a deputy paid by the county did not "increase the compensation" of the county clerk. His compensation was the same after the employment of the deputy as before. It is contended that his compensation was increased because his work was lessened. Now, in the first place, there is no such presumption; the presumption is that the board allowed the deputy because there was additional work for him to do. But, in the second place, suppose his work was lessened, shall a solemn Act of the Legislature be declared void by the circuitous reasoning which brings us to the conclusion that a decrease of duties is an "actual increase of compensation" within the meaning of the Constitution? Suppose that the Legislature had created a new county office, and transferred to the incumbent of such new office a part of the business formerly required to be done by the county clerk, would that have been an "increase of compensation" of the county clerk?

3. Neither do I think that the amendment is "special legislation" inhibited by section 25 of article 4, or that it has not a "uniform operation" within the meaning of section 11 of article 1. The Legislature has the power to "establish a system of county governments," (sec. 4, art. 11,) and to "regulate" the compensation of county officers, "and for this purpose may classify the counties by population" (sec. 5, art. 11). Under these provisions the Legislature may create as many classes as its judgment dictates, and such classification is not special legislation. *Longan v. Solano County*, 65 Cal. 122. And, of course, if such legislation is not "special," it has a "uniform operation," because it operates alike on each of the classes upon which it operates at all.

4. And I see nothing in the point that the board of supervisors could not be given the power to allow the deputy and provide for his salary. The Constitution merely declares that the Legislature shall by general laws provide for the election "or appointment" of certain named county officers, and regulate their compensation. Sec. 5, art. 11. The deputy involved in the case at bar can hardly be considered as one of the county officers mentioned in the section just referred to; but, if he were, it is difficult to see why the Legislature could not "provide" for his appointment in the

way mentioned in the statute under consideration. And the Legislature is only to regulate the compensation. I confess that I can find no authority in either common or law literature for giving to the word "regulate" the meaning of "fix,"—that is, to name definitely, exactly, and mathematically the very sum in dollars and cents of the compensation. I find no general or law dictionary which uses the word "fix" at all in defining the word "regulate," or gives one as the synonym of the other. Indeed, the words seem to have quite different significations. Some of the definitions of "fix" are to make "firm, stable, or fast;" "to set or place permanently;" "to fasten immovably." Webster. The common definitions of "regulate" are "to adjust by rule, method, or established mode;" "to direct by rule or restriction;" "to subject to governing principles of law." *Ibid.* These same definitions of "regulate" are to be found in law dictionaries. The latter word therefore, has much greater latitude of meaning than "fix," which includes the notion of inflexibility and rigidity. To fix is to fasten a thing immovably,—as with nail and hammer; while to regulate includes the idea of marking the boundaries and prescribing the methods within and by which the thing may be done by others. I know that words are uncertain things, and must be construed with reference to the context and relations in which they are found; but certainly a word should not be strained from its usual to a restricted sense when the result of such construction is to upset a statute. Therefore, giving to "regulate" what, it seems to me, is clearly its usual meaning, I see no question in the case about unwarranted "delegation of authority" by the Legislature. The Constitution expressly provided that "the Legislature shall provide a system of county governments," which shall have, to a large extent, legislative powers; and I cannot see how the power to employ and pay deputies in county offices, within restricted limits, is different from the numerous other powers which boards of supervisors are exercising every day without question. The Code formerly provided that the board of supervisors shall have the power "to fix the compensation of all county officers not otherwise in this Code, or by general or special law, fixed, and provided for the payment of the same." Section 4046, Pol. Code (Newmark, 1889). And this court held in *Kinsey v. Kellogg*, 65 Cal. 115, that such power was properly granted. This was practically holding that the county governments might be given the power to fix the salaries of all county officers. I do not think that the position of appellant is made any stronger by putting it in the form of the proposition that the Amendment of 1887 undertook to give the board of supervisors the power to change or suspend the law." The amendment is in the very section 211 which contains all the law on the subject; and the change was made by the Legislature itself. In my opinion, the judgment should be affirmed.

Paterson, J. I concur in the views expressed by McFarland, J.

OHIO SUPREME COURT.

Hammond COLEMAN *et al.*, *Plfs. in Err.*,
v.
NEW ORLEANS INSURANCE CO.

(.....Ohio.....)

***A policy of fire insurance, issued by the defendant, which, for a premium in gross, insured the plaintiffs to the amount of \$200 on their storehouse, and \$3,800 on their stock of goods therein, contained a condition that, "if the building intended to be insured stands on ground not owned in fee simple by the assured, the policy shall be void, unless consent in writing by the company be indorsed thereon." Within the period covered by the policy the house and goods were destroyed by fire, and it appeared that the plaintiffs did not own in fee simple the ground on which the building stood. In an action on the policy,—*Held*, that the contract is severable, and that the breach of the condition as to the title to the land does not defeat the plaintiffs' right to recover for the loss of the stock of goods insured by the policy.**

*Head note by the Court.

(April 29, 1892.)

ERROR to the Circuit Court for Scioto County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed*.

Statement by Williams, *Ch. J.*:

The New Orleans Insurance Company, on the 17th day of November, 1882, issued to H. Coleman & Co. a policy of fire insurance, whereby the company insured Coleman & Co. against loss or damage by fire for the period of one year from the date of the policy, to the amount of four thousand dollars, as follows: "\$200 on their one-story frame shingle-roof storehouse; \$3,800 on the general stock of merchandise, consisting principally of dry goods, groceries, clothing, boots and shoes, hats and caps, queensware, glassware, cutlery, and such other articles as are usually kept for sale in a country store; all contained in their one-story frame shingle roof storehouse, situated in Pike county, Kentucky." On the 11th day of April, 1883, the property was totally destroyed by fire; and thereafter proof of the loss was made out and forwarded to the company. The loss not having been paid, Coleman & Co. commenced an action against the insurance company in the court of common pleas of Scioto county, to recover the amount of the policy; the loss exceeding that sum. The petition is in the usual form in such cases, and contains all the necessary averments to entitle the plaintiffs to recover. The answer set up the following defenses: "The said policy was issued and was accepted by the assured upon the following condition and agreement,

expressed therein, to wit, that this policy shall become void 'if the assured is not the sole and unconditional owner of the property.' The said H. Coleman & Co., the assured, were not the sole and unconditional owners of the said storehouse at the time the said policy was issued. The said policy was issued and was accepted by the assured upon the following condition and agreement, expressed therein, to wit, that this policy shall become void 'if any building intended to be insured stands on ground not owned in fee simple by the assured.' The said storehouse intended to be insured by the said policy stood on ground not owned in fee simple by the assured, H. Coleman & Co." To these defenses the plaintiffs replied, denying that they were not the "sole owners of said storehouse;" also denying that the policy became or was void because said storehouse stood on ground not owned in fee simple by plaintiffs; and further denying that the plaintiffs "stated or represented that said storehouse stood on ground owned by them, or agreed in any way that said policy was or should become void if said storehouse did not stand on ground owned in fee simple by them." On the trial of the cause by a jury the defendant prevailed. A motion by the plaintiffs for a new trial was overruled, and judgment was entered on the verdict. Exceptions taken by the plaintiffs to the charge of the court, together with the evidence showing the materiality of the instructions, were embodied in a bill of exceptions, which was duly allowed, and made part of the record. Error was prosecuted to the circuit court, where the judgment was affirmed, whereupon the plaintiffs commenced the present proceedings in error in this court. The charge of the court to which the exceptions were taken will be noticed in the opinion.

Mr. J. J. Harper, for plaintiffs in error:

The contract was not an entirety so as to defeat a recovery for the loss of the personal property insured.

Merrill v. Agricultural Ins. Co. 78 N. Y. 452, 29 Am. Rep. 184; *Curtis v. Leavitt*, 15 N. Y. 128; *Trench v. Chenango Mut. Ins. Co.* 7 Hill, 122; *Koontz v. Hannibal Sav. & Ins. Co.* 42 Mo. 126, 97 Am. Dec. 325; *Lockner v. Home Mut. Ins. Co.* 16 Mo. 247; *Commercial Ins. Co. v. Spanknebs*, 52 Ill. 58, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Schuster v. Dutchess County Mut. Ins. Co.* 8 Cent. Rep. 183, 103 N. Y. 260.

If no inquiry was made as to the state of the title and the record discloses none, then that portion of the policy was waived, otherwise such conduct and such a policy as the one in suit would be a trap for the illiterate and unwary.

NOTE.—As illustrating the disagreement of decisions on the question of the severability of an insurance policy we call attention, without attempting an exhaustive collection of the cases, to the following cases already reported in this series, in which substantially all the cases on the subject will be found cited either in opinions or in briefs of 16 L. R. A.

counsel. *Essex Sav. Bank v. Meriden F. Ins. Co.* 4 L. R. A. 759, 67 Conn. 385; *McQueeney v. Phoenix Ins. Co.* 5 L. R. A. 744, 52 Ark. 237; *State Ins. Co. v. Schreck*, 6 L. R. A. 524, 27 Neb. 527; *Loomis v. Rockford Ins. Co.* 3 L. R. A. 884, 77 Wis. 97, 20 Am. St. Rep. 96

See *O'Brien v. Ohio Ins. Co.* 52 Mich. 181; *Dwelling-house Ins. Co. v. Hoffman*, 125 Pa. 626; *Wood, Ins.* §§ 890, 892, 895; *Bilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *Clark v. Manufacturers Ins. Co.* 49 U. S. 8 How. 235, 12 L. ed. 1061; *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. 157; *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. 568; *Riley v. Commonwealth Mut. F. Ins. Co.* 1 Cent. Rep. 119, 110 Pa. 144; *Susquehanna Mut. F. Ins. Co. v. Elkins*, 124 Pa. 484; *Com. v. Hyde & L. Ins. Co.* 112 Mass. 186, 17 Am. Rep. 72; *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 165; *Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co.* 7 Gray, 261; *Washington Mills E. Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co.* 135 Mass. 503; *May, Ins.* 8d ed. § 292; *Queen Ins. Co. v. Leslie*, 9 L. R. A. 45, 47 Ohio St. 409.

Mr. George O. Newman also for plaintiffs in error.

Messrs. Wells A. Hutchins and Williams & Wambaugh, for defendant in error:

The stipulation does not work a forfeiture. It is not a condition subsequent. On the contrary, it is a preliminary stipulation, and, if not complied with before the making of the contract, prevents the parties from ever entering into the contractual relation.

Langdell, Cont. §§ 26, 28.

As to the building, the policy was void from the beginning.

Gepper v. Kinsinger, 89 Ohio St. 429; *Citizens F. Ins. Co. v. Doll*, 85 Md. 89, 6 Am. Rep. 860; *Mors v. Franklin Ins. Co.* 68 Mo. 127.

The policy was void from the beginning as to the contents of the building. This policy is an entire contract; for:

(1) There is but one consideration.

2 Parsons, Cont. 519; *May, Ins.* 2d ed. §§ 74, 189, 227.

(2) The words of the stipulation are clear, saying that in case the stipulation be broken "the policy" shall be void. It is not the insurance on the building that is void, but "the policy."

(3) The risk on the two items insured, the building and its contents, is necessarily identical.

In Ohio the doctrine of entirety is applied to contracts of all kinds.

Witherow v. Witherow, 16 Ohio St. 288; *Allen v. Curlee*, 6 Ohio St. 505; *Larkin v. Buck*, 11 Ohio St. 561; *Goldsmith v. Hand*, 26 Ohio St. 151.

By a vast preponderance in number and weight the authorities sustain the contention that a breach of the stipulation violated in this case, must avoid the whole policy.

Havens v. Home Ins. Co. 9 West. Rep. 683, 111 Ind. 90; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; *Pickel v. Phoenix Ins. Co.* 119 Ind. 291; *Geiss v. Franklin Ins. Co.* 128 Ind. 172; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 490; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Essex Sav. Bank v. Meriden Fire Ins. Co.* 4 L. R. A. 759, 57 Conn. 835; *McQueeney v. Phoenix Ins. Co.* 5 L. R. A. 744, 52 Ark. 257; *Loomis v. Rockford Ins. Co.* 8 L. R. A. 834, 77 Wis. 87, 20 Am. St. Rep. 96; *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91; *Gottman v. Pennsylvania Ins. Co.* 56 Pa. 210, 94 Am. Dec. 55; 16 L. R. A.

Bowman v. Franklin F. Ins. Co. 40 Md. 620; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159; *Plath v. Minnesota Farmers Mut. F. Ins. Co.* 28 Minn. 479; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 508, 28 Am. Rep. 873; *Schumitsch v. American Ins. Co.* 48 Wis. 26; *Aetna Ins. Co. v. Reah*, 44 Mich. 55, 88 Am. Rep. 228; *Baldwin v. Hartford F. Ins. Co.* 60 N. H. 422, 49 Am. Rep. 324; *American Ins. Co. v. Barnett*, 78 Mo. 364, 29 Am. Rep. 517; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202; *Kelly v. Humboldt F. Ins. Co. (Pa.)* 5 Cent. Rep. 484; *Gore Dist. Mut. F. Ins. Co. v. Samo*, 2 Can. Sup. Ct. Rep. 411.

An examination of the title (which could be made through the records only) is not contemplated by the statute.

Queen Ins. Co. v. Leslie, 9 L. R. A. 45, 47 Ohio St. 409.

There having been a breach of warranty as to the title to the land on which the store building stood, and as to the ownership of the building there can be no recovery for the goods. The contract is entire, not divisible.

May, Ins. §§ 74, 189, 258, note 5, 277; *Wood, Ins.* §§ 152, 328, note 2; 2 Parsons, Cont. pp. 484, 519; 9 Ins. L. J. pp. 56, 61, 62; 3 Ins. L. J. pp. 904, 906; 10 Ins. L. J. p. 83; 11 Ins. L. J. p. 104; *Stein v. The "Prairie Rose"*, 17 Ohio St. 471.

As to warranty of title and its effect—

See *Philips v. Knox County Mut. Ins. Co.* 20 Ohio, 174, 181; *Hutchins v. Cleveland Mut. Ins. Co.* 11 Ohio St. 477; *Smith v. Farmers Mut. F. Ins. Co.* 19 Ohio St. 287; *Byers v. Farmers Ins. Co.* 85 Ohio St. 606, 85 Am. Rep. 623; *Farmers Ins. Co. v. Archer*, 36 Ohio St. 608; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 843; *Phoenix Ins. Co. v. Michigan, S. & N. I. R. Co.* 28 Ohio St. 69; *Gepper v. Kinsinger*, 89 Ohio St. 429; *May, Ins.* §§ 156, 158, 185, 186; *Wood, Ins.* §§ 159, 165, 167, 176; 2 Parsons, Cont. pp. 421, 429, 432, 438.

Accepting a policy amounts to a declaration that the assured's interest is truly stated therein.

Meis v. Insurance Co. 8 Ins. L. J. 505; *Citizens F. Ins. S. & L. Co. v. Doll*, 85 Md. 89, 6 Am. Rep. 860; *Waller v. Northern Assur. Co.* 10 Fed. Rep. 282; *Cleaver v. Traders Ins. Co.* 8 West. Rep. 815, 65 Mich. 527; *May, Ins.* § 167; *Wood, Ins.* § 270; 10 Ins. L. J. p. 392.

Williams, Ch. J., delivered the opinion of the court:

The policy of insurance contains the provisions that, "if the assured is not the sole and unconditional owner of the property, or if any building intended to be insured stands on ground not owned in fee simple by the assured," the policy "shall become void, unless consent in writing by the company be indorsed thereon." The policy was issued without any written application signed by the assured, and the insurance was solicited, as the evidence shows, at the request of the company's agent, by a third person, on whose report the agent made up the application on which the policy was issued. The assured made no statement, nor was any requested, in regard to the ownership or title of the ground on which the house referred to in the policy stood; and it

does not appear that there was any intentional concealment of the title, or of any fact material to the risk. It was shown by the evidence that the fee simple of the land on which the insured building stood was vested in Hammond Coleman, a member of the firm of H. Coleman & Co., and his wife, who was not a member of the firm; but that several years previous to the date of the policy Hammond Coleman executed a deed for the land directly to his wife, with the intervention of a trustee, in which the following provision is contained: "This deed is not to take effect until my death. This deed is in compliance with my will heretofore made." The copartnership of H. Coleman & Co., when the insurance was effected, and at the time of the fire, consisted of Hammond Coleman, Adam Venters, and Henry E. Coleman, and the actual value of the stock of goods and merchandise covered by the policy exceeded the valuation therein set forth.

The court instructed the jury that their inquiry in regard to the title to the land on which the storehouse stood must be: "Did the plaintiffs—not Hammond Coleman—have such (fee simple) estate in this land upon which the building stood? It is not enough to satisfy this provision that Hammond Coleman, one of the plaintiffs, had a life estate in the land. It is not enough that he alone had an interest in the land. This would not constitute an estate in fee simple. If you should find that he has an estate in fee simple in the land, still it must be the insured who must have this estate in fee simple in the land to satisfy this provision, and therefore if you find from the evidence that the plaintiffs were not the owners in fee simple of the land upon which the store building stood, then this policy is void, and the plaintiffs cannot recover in this action." The court further instructed the jury as follows: "This contract, gentlemen, is termed in law an 'entire contract,' and if you find that there has been a breach of any condition of this contract to which I have called your attention, it violates the policy, renders it void, and nothing can be recovered for either building or goods destroyed." The effect of the instructions were that, if the fee simple title to the land on which the storehouse was situated, was not vested in the copartnership of H. Coleman & Co., but was in Hammond Coleman, a member of the copartnership, the policy of insurance was void, and the plaintiffs could not recover, either for the loss of the building or of the goods. These instructions were excepted to by the plaintiffs, who contend they were erroneous, and on account of which the judgment should be reversed. The principal ground of the contention is that the contract of insurance evidenced by the policy is so far severable as to entitle plaintiffs to recover for the loss of the goods, though they may not be entitled to recover for the loss of the building, by reason of the state of the title to the land on which it stood.

Whether such a contract is so severable is a question upon which the adjudications of courts of the highest respectability are in direct conflict. The following are some of the cases which hold the contract to be entire: *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110; *Havens v. Home Ins. Co.* 111 Ind. 90, 9 West.

Rep. 635; *Outthbertson v. North Carolina Home Ins. Co.* 96 N. C. 490; *Essex Sav. Bank v. Meriden F. Ins. Co.* 57 Conn. 835, 4 L. R. A. 759.

On the other hand, such contracts are held severable in the following, and other cases: *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 184, 5 Am. Rep. 115; *Loehner v. Home Mut. F. Ins. Co.* 17 Mo. 247; *Koontz v. Hannibal Sav. & Ins. Co.* 42 Mo. 126, 97 Am. Dec. 325; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452; *Schuster v. Dutchess County Ins. Co.* 102 N. Y. 260, 8 Cent. Rep. 183. And such we understand to be the effect of the decision in *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 343. There the policy, for a gross premium, insured the plaintiffs' "tavern house," to the amount of \$2,200, and his shop, valued at \$900. The act of incorporation of the defendant provided "that, when any property insured by this company shall in any way be alienated, the policy shall thereupon be void, and should be surrendered to the directors, to be canceled." The shop was alienated by the assured, and the "tavern house" was afterwards destroyed by fire. It was held that the alienation of the shop did not prevent a recovery for the loss of the tavern. The court says: "The next ground taken by the defendants is that the shop, which was insured in the same policy, had been alienated by the plaintiff, and that this is such an alienation as will avoid the policy. But the shop was valued separately, and was insured separately, as a separate, distinct, independent, subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern house and the shop being insured separately, the alienation of one would no more affect the insurance on the other than if they had been insured in separate policies." In the case of *Hartford F. Ins. Co. v. Walsh*, cited above, two houses were embraced in the same policy, and insured for different sums for a gross premium paid, the policy providing that, if the insured premises should remain vacant for a certain time without notice to the company, the policy should become void; and it was held that the fact that one of the buildings remained thus vacant without notice to the insurer would not invalidate the policy as to the other. The action in *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, was upon a fire policy covering a dwelling house and furniture therein. It was held: "A policy may be void in part and valid in part, if the subject-matter is capable of being separated; and, although a failure to disclose an incumbrance would avoid the policy as to the house insured, it would not avoid it as to furniture insured in the same policy, but separately appraised, unless the fact concealed was material to the risk." *Koontz v. Hannibal Sav. & Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, was a case where a policy of insurance upon a certain livery stable was made to cover both personal and real property, and the application of the assured contained a false warranty touching incumbrances upon the real estate; and where it further appeared that the personal property was separately appraised,

and nothing showed that the representations as to the incumbrances upon the stable formed any inducement to the execution of the policy covering the personal property. The court held that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty.

The case of *Phaniz Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, is much like the one before us. There, the appellant, (company,) for a premium of \$14, insured J. B. Lawrence & Co., against loss by fire from the 25th of May, 1858, to the 25th of May, 1859, "to the amount of \$200 on their frame storehouse, situated on the Ohio river, in Gallatin county, Kentucky, known as 'Jackson's Landing,' and \$1,200 on the stock of goods in said storehouse." The premises and goods were destroyed by fire on the 5th of April, 1859, and suit was brought on the policy for the value of the goods, but not for the loss of the building. One defense was that Lawrence & Co., when they obtained the insurance, represented themselves to be the owners of the house, when in fact they were not, which, by the terms of the policy, rendered it void. But the court held, "in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods that this does not vitiate the insurance on the goods;" and the plaintiffs had judgment. In the case of *Merrill v. Agricultural Ins. Co.* 78 N. Y. 452, the policy, for one premium, insured the plaintiff against loss or damage by fire to the amount of \$6,000, as follows: "\$1,000 on dwelling house and wood house, if attached; \$300 on household furniture therein; \$200 on provisions etc., therein," and various other items of property described in the policy, each having a specific valuation therein set forth. The policy contained a condition that, if the property insured was incumbered by mortgage or otherwise, unless so represented in the application, the policy should be void; also, that if it should become incumbered by mortgage, judgment, or otherwise, policy should be void until the written consent of the company was obtained. The real estate was incumbered, and that fact was set up in defense of the action on the policy; and it was claimed by the defendant that it not only avoided the policy as to the building insured, but also as to the chattel property; and whether it did or not it was conceded depended upon whether the contract was entire or severable. In a well considered opinion Judge Folger, after commenting upon various decisions on the subject, discusses the question on principle, and in the course of the discussion says: "It is plain from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance that they looked upon them as distinct matters of contract. The effect of a separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed, the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was at the inception of the contract,

distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone. So, too, if but one of the subjects of insurance had been burned, the defendants (*ceteris paribus*) could not have avoided liability to pay for that up to the value put upon it; and, if not wholly destroyed, but so far damaged as to reach in deterioration the value put upon it in the policy, the defendants would have to pay that damage; and that subject would no longer form a part of the general matter insured, and hence not a part of the continuing contract. Thus there would of necessity be a severance of the contract worked out by the operation of its own terms. Again, the principle, in the case of a contract about several things, but with a single consideration in gross, is this: that we are not able to say that the party would have agreed for one, or for more than one, yet less than all of them, without he could at the same time acquire a right to have them all. But our daily experience and observation shows that an insurance company is as ready to insure buildings without insuring the contents, and the contents without insuring the buildings, as to insure them together; so that the principle does not press so hard in considering such a contract as that before us. Besides it is the rule that an agreement embracing several particulars, though made at one time and about one affair, may yet have the nature and operation of several different contracts; as, when they admit of being separately executed and closed as we have instanced just above, where the contract may be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed. Per Washington, *J. Perkins v. Hart*, 24 U. S. 11 Wheat. 287-291, 6 L. ed. 468-467; *Rodemer v. Gonder*, 9 Gill, 294. In our judgment, this rule applies fully to the contract in hand. It admits of being separately executed and closed as to each of the separate subjects of insurance. When one species of the property insured is burned, a contract to insure as to that may be performed as to that alone. The insured has paid the premium. A fire doing damage to that subject, the damage may be paid for by the insurer, and that subject be thus put out of the contract, while it remains *in fieri* as to all the other subjects named in it. When there are several subjects of insurance (as there are fourteen here) separately valued, on which a gross sum is insured not exceeding the aggregate of that valuation for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation and what is the amount of premium on each subject insured. This being so it seems fanciful to say that, if the facts thus easily reached were stated in detail in the contract, it would be severable, while not being specifically spread out it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of the insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one or several of them, unless induced by the advantage and profit of having a risk on all, that would be a rational

cause for deeming the contract entire. But when, for aught that appears it is indeed as likely that the insurer would have taken a risk upon any one or any few of the subjects insured, at the same rate of premium as upon the whole, and has in the policy so separated the subjects, and so singled them out by a specific valuation, as that there is no difficulty in distinguishing the subject from the rest, and closing the contract as to that separately, and carrying forward the contract as to the rest, it does result that the contract is separable in practical operation, and hence, in law. And so, also, that, though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held avoided, and as to the other subjects be held valid."

Forfeitures do not readily find favor in the law, and courts are reluctant to declare and enforce them, if by reasonable interpretation it can be avoided. It is not likely that in this case the small amount of insurance on the storehouse constituted any inducement for the insurance placed upon the stock of goods; and it does not appear that the rates upon these classes of property were different, nor how it could make any difference if they were, since the only effect, in this respect, of holding the contract severable, is that the insurance company is enabled to retain the whole

of the premium, which it accepted as the consideration for the insurance of all the property, for the lesser risk on part of the property only; and it is not to be presumed that the premium for the insurance of part only of the property would exceed that accepted for the risk on all of it. It was not shown at the trial that the plaintiffs were guilty of any misrepresentation or intentional concealment concerning the title to the land on which the storehouse stood. No inquiry was made of them about it. The subject was not a matter of negotiation between the parties in effecting the insurance, and the plaintiffs were ignorant of the condition, for the breach of which the company claims the right to forfeit the whole policy. If the position taken by the company be correct, the condition was broken when the policy issued, and there was, therefore, no consideration for the premium that was paid, for no risk attached; and yet the company, while asserting the invalidity of the contract, holds on to its fruits. This is not a very consistent position, nor a very just one. A just result is reached, and, as we think, the lawful one, by holding, as we do, that the contract of insurance in this case is severable, and the breach of the condition as to the title of the land does not defeat the plaintiff's right to recover for the loss of the stock of goods insured by the policy in suit.

It follows that, in our view of the case, the court erred in the instructions we have referred to, for which error *the judgment is reversed*.

ILLINOIS SUPREME COURT.

PEOPLE, *ex rel.* Village of COLFAX, *Appt.*,

Robert MAXTON *et al.*

(.....Ill.....)

1. The publication in pamphlet form by village authorities of an ordinance

is a sufficient affirmative act by the village on which to base an estoppel against denying its validity in case it is acted on, under a statute which provides that when ordinances are so printed the pamphlet shall be received as evidence of their passage and legal publication in all places without further proof.

2. A village is estopped from denying

NOTE.—Estoppel as to assertion of governmental power.

The question of estoppel in respect to the assertion of governmental power has been almost entirely untouched. The doctrine that municipal corporations are to the same extent that individuals would be in the same circumstances has become well established so far as the property rights of a municipality are concerned. In respect to the assertion of public rights in property, as in case of highways, the liability of a municipality to estoppel is affirmed in some cases and denied in others. But on the question whether a municipal corporation, a state, or the general government can be estopped between it and an individual to assert its governmental power there seems to be an entire absence not only of decisions but of discussion.

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the legal passage of an ordinance disconnecting part of its territory after it has published the same in pamphlet form and the town authorities have taken and maintained possession of such territory for several years, levied taxes, worked the roads, and built a bridge, while the village authorities have made no claim to jurisdiction over it.

November 2, 1891.)

APPEAL by relator from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for McLean County in favor of defendants in a proceeding by mandamus to compel defendant Maxton as county clerk of McLean County to extend

On the question of boundary, as in the main case, where it arises between municipal corporations, states, or nations, there are decisions which recognize the doctrine of estoppel.

Thus in *Rhode Island v. Massachusetts*, 45 U. S. 4 How. 501, 11 L. ed. 1116, it was held that long possession in a case of disputed boundary between states would be protected.

And again in *Indiana v. Kentucky*, 136 U. S. 479, 84 L. ed. 329, the same doctrine was applied to a case of boundary between Indiana and Kentucky, and it was said that the long acquiescence of Indiana in the claim of Kentucky to an island and the rights of property of private parties under grants from that state and the general understanding of the people of both states in the neighborhood forbid any disturbance of Kentucky in her

taxes levied for the use of relator over lands adjacent to the village and which had previously been a part of it but had been disconnected therefrom by an ordinance which was alleged to be invalid. *Affirmed.*

The facts are stated in the opinion.

Mr. A. E. De Mange, for appellant:

It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them.

Logan County Suprs. v. Lincoln, 81 Ill. 159.

This proposed ordinance, because it did not receive the votes of a majority of the members elected to relator's board of trustees, was an absolute nullity. These acts were void in their inception, remain so, and no rights were acquired under them.

Taylor v. People, 66 Ill. 326.

If the Statute of Limitations can operate to bar the village of its right to assert jurisdiction over its territory by mandamus to compel the extending of its taxes, it could only do so after twenty years abandonment of such jurisdiction.

Peoria County Suprs. v. Gordon, 82 Ill. 435.

There is no question of hardship involved. It is simply a question of whether these defendants, guilty of more culpable negligence and ignorance of the law than is chargeable to relator's trustees, shall succeed in nullifying the provisions of the statute, and divesting relator of its title to its territory without due process of law.

Taylor v. People, 66 Ill. 322.

Relator never at any time during the seven years had a right to the writ herein prayed for until demand was made upon the county clerk to extend the taxes levied by it upon the disputed territory, therefore the Statute of Limitations did not commence to run, and relator's action will not be barred until the expiration five years from the date of its demand.

People v. Hyde Park, 6 West. Rep. 815, 117 Ill. 462.

The Statute of Limitations cannot be pleaded to any public right of a municipal corporation.

Alton v. Illinois Transp. Co. 12 Ill. 38;

Logan County Suprs. v. Lincoln, 81 Ill. 157;

Lee v. Mount Station, 6 West. Rep. 329, 118 Ill. 304;

Oran v. People, 19 Ill. App. 174.

Mr. T. F. Tipton for appellees.

Wilkin, J., delivered the opinion of the court:

On the 17th of October, 1882, the village of possession and jurisdiction over it after a lapse of nearly a hundred years since the admission of that state into the Union.

The latter case also declares that the same principle as to the effect of long acquiescence in the possession of the territory and in the exercise of dominion and sovereignty over it is applicable as between nations.

So in *Roane County v. Anderson County*, 89 Tenn. 280, in a contest as to the boundary line between counties it was held that the fact that notwithstanding some difference of opinion between residents of the locality, one of the counties had for a half century claimed the disputed territory and exercised governmental jurisdiction up to the line claimed by it is entitled to great weight in favor of the claim.

In the same case a prior decision of the court is 16 L. R. A.

Colfax, by its president and board of trustees, attempted to pass an ordinance disconnecting certain territory, which had formerly been within its boundaries. The ordinance received a majority of the votes of the members present, but not a majority of the members elect, which was requisite under the statute. The ordinance, therefore, was never legally passed. It was, however, published, and recognized as valid by the officers of the village and the officers of the township in which the territory lay. The latter took charge of it; levied taxes upon it; worked the roads; built a bridge within it, costing \$6,000, one half of which was paid for by the county; and from the time such disconnecting ordinance was published the territory so attempted to be disconnected was recognized and treated by both village and township as not being a part of the village, until the 5th day of August, 1889, when the president and board of trustees of the village passed an ordinance levying a tax upon the real and personal property within its limits for corporate purposes, and a demand was made upon appellee Maxton, who was county clerk, that he extend such taxes; and, upon his refusal to do so, a writ of mandamus issued, to compel him to extend such taxes. No defense was made by Maxton, but the commissioners of highways of the township, by leave of the court, became parties, and filed a demurrer to the petition, which being overruled, they answered, setting up the same facts recited in the petition, and also that relator caused said disconnecting ordinance to be printed in pamphlet form; that they, the said defendants, believing said ordinance to be valid, have each year since 1882 assessed road and bridge taxes on the lands described in the said ordinance; that they opened a public highway through the territory therein described, and worked the same, and expended large sums of money on the same; that they caused a bridge to be constructed, at a cost of \$6,000, and procured county aid therefor to the extent of \$3,000, and that no road tax was assessed against relator's inhabitants for the construction of said bridge, nor the opening of said highway; that the voters residing on said territory have not since 1882 exercised any rights in relator's government, nor has relator exercised any jurisdiction over said territory; and that relator was therefore estopped and barred by the lapse of time from claiming jurisdiction over said territory. The answer also denied that the appropriation ordinance upon which relator's petition for a writ

recited to the effect that acquiescence of one county for about eighteen years in an unconstitutional statute reducing it below its constitutional area defeated the legal right of the county to claim the territory which was taken away.

The question of the estoppel of a city to deny the right of territory attached thereto to elect a member of the city board of education is raised in a Kansas case, which denies that long acquiescence in such election will estop the city from denying the right. *Jay v. Emporia Board of Education*, 48 Kan. 525.

Although this case involves the question of estoppel in respect to the assertion of a political right it is not as to the assertion by the city of its own governmental authority, but as to its denial of an asserted political right of a particular community.

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was based ever passed or became an ordinance. Relator then demurred to all of the answer except that part which denied that the appropriation ordinance was ever passed. The court overruled the demurrer. Relator then filed three pleas to the answer, as follows: "(1) that its board of trustees did not, on the 17th day of October, 1882, or at any other time, pass and adopt said disconnecting ordinance; (2) that its board of trustees did pass said appropriation ordinance; (3) that its village clerk, of his own wrong, and without authority of law, certified that said alleged disconnecting ordinance was properly passed, and of his own wrong, and without authority of law, filed a copy of said disconnecting ordinance in the office of the recorder and county clerk of said county, and that relator did not cause the said clerk to so certify to or so file said ordinance." Defendants demurred to third plea, which was overruled. Defendants then filed a motion for judgment on the issues joined, which the court sustained, and gave judgment to defendants for costs. The appellate court affirmed the judgment of the circuit court, holding that the village was estopped to deny the validity of said ordinance, under the decisions of this court; citing *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, and *Lee v. Mound Station*, 118 Ill. 304, 6 West. Rep. 329.

It is insisted by appellant here that the doctrine of estoppel *in pais* has no application to this case, for the reason that the village authorities are not shown to have done any affirma-

tive act calculated to influence others to act on the faith of said invalid ordinance. Theirs, it is said, is mere non-action. The judgment of the circuit court, being rendered on the issues joined without evidence, must rest on the allegations of the answer, not denied by the pleas; but among such allegations is the averment that, after the attempted passage of the disconnecting ordinance, the village board caused it to be published, with its other ordinances, in pamphlet form. Here certainly was an affirmative act. Was it calculated to lead others to act upon the supposition that the ordinance was valid? Our statute provides that when city or village ordinances are printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city counsel, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances as of the dates mentioned in such book or pamphlet, in all courts and places without further proof. Section 4, chap. 24, Rev. Stat. Certainly respondents and all others had a right to act on that which relators had made legal evidence of the passage of the ordinance which they now seek to treat as invalid. We entertain no doubt that on the authorities cited by the appellate court, as well as upon reason and justice, the village is estopped from claiming any power over the territory in question as being within its limits.

The judgment of the Appellate Court will therefore be affirmed.

NEW YORK COURT OF APPEALS.

RE APPLICATION OF THE BOARD OF STREET OPENING AND IMPROVEMENT of the City of New York to Acquire Title to Lands for a Public Park on the Grounds known as St. John's Cemetery.

(.....N. Y.....)

A private cemetery belonging to a religious corporation may be taken in condemnation proceedings for a public park under Laws 1887, chap. 320, giving power to condemn "any and all lands" within a district which includes the cemetery.

(May 24, 1892.)

A PPEAL by the rector, churchwardens and vestrymen of Trinity Church from an order of the General Term of the Supreme Court, First Department, affirming an order of a Special Term for New York County appointing Commissioners to assess damages for the appropriation of St. John's Cemetery for a public park. *Affirmed.*

The facts are stated in the opinion.

Mr. S. P. Nash, with **Mr. J. McL. Nash**, for appellants:

The taking of the premises for a public park or pleasure ground requires the taking

NOTE.—For note on the right to take by eminent domain property already devoted to public use, see *Barre R. Co. v. Montpelier & W. R. R. Co. (Vt.)* 4 L. R. A. 785.

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and removal of the human remains there interred.

But property which is not required for a proposed public use cannot be taken by the power of eminent domain.

Re Albany Street, 11 Wend. 148, 25 Am. Dec. 618; *Embury v. Conner*, 8 N. Y. 511, 53 Am. Dec. 325. See also *Re South Beach R. R. Co.* 119 N. Y. 141.

The suggestion that the city authorities can proceed to exercise the power of removal overlooks the rule that proceedings for the condemnation of property for public use are *strictissimi juris*.

Re Niagara Falls & W. R. Co. 11 Cent. Rep. 272, 108 N. Y. 375; *Re Poughkeepsie Bridge Co.* 11 Cent. Rep. 283, 108 N. Y. 483.

Human remains in a cemetery do not form part of the land. They are considered as belonging in a most real sense to the relatives of the deceased, and not to the owner of the soil. They do not, like a house built upon the land, or fixtures in the house, become part of the land.

Hunter v. Sandy Hill Trustees, 6 Hill. 407; *Windt v. German Ref. Church*, 4 Sandf. Ch. 471, 7 L. ed. 1175.

Courts of equity will restrain the disturbance of burial places.

Beatty v. Kurtz, 27 U. S. 2 Pet. 566, 7 L. ed. 521; *Pierce v. Swan Pt. Cemetery & M. Proprs.* 10 R. I. 227; *Thompson v. Hickey*, 8 Abb. N. C. 159; *Schroder v. Wanzor*, 36 Hun. 423; *Mitchell v. Thorne*, 57 Hun. 405.

This court has held in several cases, considered in *Re New York, L. & W. R. Co.*, 99 N. Y. 12, that under the general powers conferred to acquire any and all lands, "there is necessarily excepted property already held upon a public trust by the authority and under the ward and control of the state."

There are other cases in which general powers given by legislative Acts have been limited by construction.

Ogswell v. New York, N. H. & H. R. R. Co. 4 Cent. Rep. 225, 108 N. Y. 10; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 789; *Suburban R. Transit Co. v. New York*, 128 N. Y. 510.

The burial of the dead is a matter affecting the public welfare, and grounds may be taken for public cemeteries under the power of eminent domain as being taken for a public use.

Mills, Em. Dom. § 19.

Parks for purposes of pleasure and recreation are certainly not public purposes of a higher character than those which are intended to secure the repose of the dead.

Evergreen Cemetery Assn. v. New Haven, 43 Conn. 234, 21 Am. Rep. 648; *Hyde Park v. Oak Wood Cemetery Assn.* 6 West. Rep. 734, 119 Ill. 141; *Wood v. Macon & B. R. Co.* 68 Ga. 639; *Mills, Em. Dom.* § 19; *Balch v. Essex County Comrs.* 108 Mass. 106.

Unless expressly authorized by law, the disturbance of graves and the removal of human remains is a criminal offense.

1 Russell, Crimes, 629; *Re v. Lynn*, 2 T. R. 733; *Re v. Sharpe, Dears. & B.* 160; *Com. v. Cooley*, 10 Pick. 87.

Messrs. William H. Clark, David J. Dean, and John P. Dunn, for respondents:

Cemeteries or burial places are not excepted from the general rule that private property may be taken for public use on payment of just compensation.

Mills, Em. Dom. § 19; *Lewis, Em. Dom.* § 262; *Schoonmaker v. Reformed Prot. Dutch Church of Kingston*, 5 How. Pr. 269.

The cemetery in question is the private property of the rector, etc., of the Trinity Church, and the use thereof, as a cemetery, when it was so used, cannot be considered to have been a public use.

Re Deansville Cemetery Assn. 66 N. Y. 569, 23 Am. Rep. 86.

Counsel for appellants would, by construction, affix a limitation upon the power conferred by the statute so as to exempt cemeteries.

Such an addition to the statutory provisions is not within the province of the court.

McCluskey v. Cromwell, 11 N. Y. 601; *People v. Woodruff*, 63 N. Y. 364; *Johnson v. Hudson River R. Co.* 49 N. Y. 262; *Benton v. Wickwire*, 54 N. Y. 228; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Re Beekman Street*, 4 Bradf. 508.

The authority to condemn a cemetery for a public park necessarily implies authority to make a proper provision for the removal of bodies therefrom.

Stief v. Hart, 1 N. Y. 30.

Consideration of hardship, or sentimental
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injury, will not avail to forbid the exercise of eminent domain.

Re New York Cent. & H. R. R. Co. 77 N. Y. 268.

Earl, Ch. J., delivered the opinion of the court:

The Act, chapter 320, Laws 1887, provides that the board of street openings and improvements of the city of New York "is authorized and empowered to select, locate, and lay out such and so many public parks in the city of New York south of 155th street as the board may from time to time determine;" and it confers upon the board power to acquire for park purposes, by condemnation proceedings under the statute, "any and all lands, tenements, and hereditaments which said board shall deem necessary to be surveyed, used, or converted for the laying out, surveying, and monumenting of any parks so selected as aforesaid." The board instituted this proceeding under the Act to acquire for park purposes the title to land below 155th street, known as "St. John's Cemetery," which belonged to a religious corporation in the city of New York commonly called "Trinity Church." It was established as a cemetery as early as 1801, and was used for that purpose until 1889, during which time about 10,000 human bodies had been buried therein. In 1889 an ordinance was passed by the city of New York forbidding interments south of Eighty-Sixth street, and since that time no interments have been made in the cemetery, but Trinity Church has preserved and kept it in order, and prevented any disturbance thereof. It is contended on behalf of Trinity Church that, under the general authority given by the Statute of 1887, this land which had been devoted to cemetery purposes could not be taken for a park. The authority conferred upon the board by the Act is broad and general. It is authorized to take for park purposes any land south of 155th street. It is undoubtedly true that this general language would not be sufficient to authorize it to take land which had been previously taken for and was then devoted to a public purpose. *Re New York, L. & W. R. Co.*, 99 N. Y. 12, *Suburban R. Transit Co. v. New York*, 128 N. Y. 510. But this was not a public cemetery, and, so far as appears in this record had never been devoted to a public use. The public general never had any right of burial therein. No burials therein could be made except by permits given by Trinity Church, and all the interments therein had been made by its authority. The cemetery land was therefore devoted to a private and not to a public use. *Re Deansville Cemetery Assn.* 66 N. Y. 569, 23 Am. Rep. 86. The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute, transcendent power, belonging to the sovereign, which can be exercised for the public welfare whenever the sovereign authority shall determine that a necessity for its exercise exists. By its exercise the homes and dwellings of the living and the resting places

of the dead may be alike condemned. It seems always to have been recognized in the laws of this state that under the general laws streets and highways could be laid out through cemeteries, in the absence of special limitation or prohibition. So it is provided in section 10, chap. 188, Laws 1847, entitled "An Act Authorizing the Incorporation of Rural Cemetery Associations," that "no street, road, avenue, or thoroughfare shall be laid through such cemetery, or any part of the lands held by such association for the purposes aforesaid, without the consent of the trustees of such association, except by special permission of the Legislature of the state." The Act, chapter 273, Laws 1866, authorizing the incorporation of associations to erect monuments to perpetuate the memory of soldiers who fell in defense of the Union, contains a similar provision. The Act, chapter 843, Laws 1868, provides that no private or public road shall be laid out or constructed upon or through any graveyard or burying ground in this state, unless the remains therein contained are first carefully removed, and properly reinterred in some other burying ground at the expense of the person desiring such road. The Act, chapter 203, Laws 1878, provides for the incorporation of pipe-line companies, and empowers them to take land by condemnation proceedings; and in section 34 it is provided that "no company formed under the provisions of this Act shall locate or construct any line of pipe or pipe line through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing, duly acknowledged before some officer authorized to take acknowledgment of deeds, and no pipe line shall be constructed through any cemetery or burial ground." It is the necessary implication that, but for the express prohibition contained in these statutes under the general provisions of law authorizing the construction of streets, highways, and pipe lines cemetery lands would not be exempt from invasion.

We have not overlooked the cases in which the general language of statutes has been limited and curtailed of its literal import, so as not to give the statutes effect beyond the intent of the law-makers. But here we can find no sure ground for curtailing the scope of the statute which we have to construe. We certainly cannot be sure that the law-makers, if they had known of this cemetery, disused for burials for fifty years, and never more to be used for that purpose, located in the midst of a dense and teeming population, would have preferred that it should remain appropriated for the resting place of the long since dead rather than that it should be devoted to use for the comfort, welfare, and health of the living. We cannot say that the taking of such a cemetery for such use is such an unreasonable, unnatural, impolitic, or unjust thing that we ought to hold that the general language of the statute does not authorize it to be done. We have examined the authorities to which our attention has been called by the learned counsel for Trinity Church, and none of them in the least degree sustain the

contention that lands devoted to private cemeteries owned by private individuals, or a private corporation, cannot be condemned under the general language authorizing their condemnation for public use. On the contrary, the following authorities give strong sanction to the claim that such lands can be taken under general legislative authority for a public use, unless specially protected by statute: *Wood v. Macon & B. R. Co.* 68 Ga. 589; *Re Opening of Twenty-Second Street*, 102 Pa. 108; *Re Egypt Street*, 2 Grant, Cas. 455; *Re Beekman Street*, 4 Bradf. 503; *Schoonmaker v. Reformed Prot. Dutch Church*, 5 How. Pr. 269; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Windt v. German Ref. Church*, 4 Sandf. Ch. 471, 7 L. ed. 1175.

What are the limits of the doctrine contended for on behalf of Trinity Church? If a cemetery has for a century been disused as a place of burial, can it not, if the welfare of the public require it, be taken for public use? Countless millions of the human race have been interred in the earth, and must their remains be inviolably left where they are found so long as they can be distinguished from the earth which contains them? There is no law which prohibits the removal of human remains from a cemetery for lawful purpose and placing them elsewhere. On the contrary, the law regulates their removal in certain cases. Laws 1878, chap. 349; Laws 1847, chap. 133, § 11, as amended by chapter 566, Laws 1880. The remains of the dead in this cemetery can be removed without violating any law, and certainly without violating the law (Penal Code, § 311) against body stealing. Trinity Church, having given permits for burials in this cemetery without granting any interest in the lots in which the burials are made, could at any time remove the remains of the dead, and place them in a suitable manner in some other cemetery. No one has acquired any right from it that their remains shall forever remain there. It could not remove them and leave them exposed in the street or elsewhere. Such an act would shock public sentiment, and could probably be restrained by action in the name of surviving relatives. But that it could decently remove them, and place them in some other proper place, cannot be doubted. As said by the learned vice-chancellor in *Windt v. German Ref. Church*, *supra*, "the only protection afforded to the remains of the dead interred in a cemetery of this description is by the public laws prohibiting their removal, except on the prescribed terms, and in a still stronger public opinion. Probably these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvelous rapidity, and whose wants leave but little room for the remains of the dead, in the dense and crowded haunts and thoroughfare of the living." By this proceeding the city of New York will acquire all the title of Trinity Church, and it will thus be clothed as owner of the land with all the rights Trinity Church had; and thus it will and must find some way to dispose of the remains in a manner that will not shock the refined sensibilities or the

pious sentiments of the living. It is not needful, however, to determine now what the precise duties and obligations of the city will be in reference to these remains. It is enough now to determine that there is no obstacle in the way of the condemnation of the title to the fee of the land in this cemetery.

The order should therefore be affirmed, with costs.

All concur.

PEOPLE of the State of New York, *ex rel.* Locke W. WINCHESTER, Treasurer of the National Express Co., *Resp't.*,

v.

Michael COLEMAN *et al.*, *Appts.*

(.....N. Y.....)

A joint-stock company created solely by agreement of the members and in which their individual rights and liabilities are not merged as in the case of a corporation is not taxable on its capital as a "stock corporation."

(May 24, 1892.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County vacating an assessment of taxes upon the capital stock of the National Express Company. *Affirmed.*

The facts are stated in the opinion.

Mr. George S. Coleman, with Mr. William H. Clark, for appellants:

A corporation is known by its attributes. If shown to possess the essential characteristics of a corporation, an associated body must be deemed in law to be a corporation, whether brought into being by a special Act of the Legislature or by compliance with the provisions of general law; or acquiring its powers by accepting from the Legislature the grant of corporate privileges. The only requirement is that corporate character must in some manner be derived from the supreme power of the state.

Thomas v. Dakin, 23 Wend. 9; *Warner v. Beers*, 23 Wend. 103; *People v. Niagara County Suprs.* 4 Hill, 20, affirmed, 7 Hill, 504.

Every artificial body must act through officers or agents. And the individual shareholders have no more control, as individuals, of the property and affairs of the National Express Company than the stockholders of a railroad corporation have of the business of their company. In either case the individuality of the members is merged in the artificial being. But in both cases, in spite of legal fiction, the individual shareholders are, in reality, the corporation.

People v. North River Sugar Ref. Co. 9 L. R. A. 38, 121 N. Y. 582.

NOTE.—The able discussion in the above opinion and briefs of counsel of the fundamental characteristics of joint-stock associations and corporations, and the decision that they are still distinct in character, is of great interest in view of the statutory recognition and regulation of joint-stock com-

The National Express Company possesses all the essential features of a corporation as the word is used in the Constitution and statutes of New York. It is, therefore, a corporation. *People v. Wemple*, 6 L. R. A. 303, 52 Hun, 434, 117 N. Y. 136.

Mr. James C. Carter, for respondent:

The method of inquiring whether the company alleged to be a corporation has its capital represented by transferable shares of stock or governs its actions through by-laws, or can sue and be sued in a collective name, or use a common seal, or buy and sell property in a collective name, which are the common modes of corporate action, for the purpose of determining corporate existence, is fallacious.

They can provide by contract that the death or bankruptcy of a member, or an assignment of his share, shall not work a dissolution, and thus provide for a representation of the capital by transferable shares.

Story, Partn. § 819a; *Tyrrell v. Washburn*, 6 Allen, 466; *Skilman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96; *Lindley, Partn.*, Ewell's ed. 1093, 1094; *Warner v. Beers*, 23 Wend. 103.

The just definition of a corporation aggregate is an artificial person created by the sovereign from natural persons, and which artificial person the natural persons of which it is composed become merged and nonexistent.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *People v. Watertown*, 1 Hill, 616; *Niagara County Suprs. v. People*, 7 Hill, 504; *Gifford v. Livingston*, 2 Denio, 380; *Warner v. Beers*, *supra*.

The weight of authority is decisively in favor of the view that companies like the National Express Company are not corporate bodies.

Bell v. Streeter, 1 N. Y. Transcript, N. S. Jan. 26, 1872, p. 68; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Witherhead v. Allen*, 3 Keyes, 564; *McGuffin v. Dinmore*, 4 Abb. N. C. 241; *New York Marbled Iron Works v. Smith*, 4 Duer, 862; *Whitman v. Hubbell*, 30 Fed. Rep. 81; *Taft v. Ward*, 106 Mass. 518; *Bodwell v. Eastman*, Id. 525; *Taft v. Ward*, 111 Mass. 518; *Gott v. Dinmore*, Id. 45; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Frost v. Walker*, 60 Me. 468; *Bacon v. Dinmore*, 42 How. Pr. 377.

Finch, J., delivered the opinion of the court:

The relator was taxed upon its capital, on the ground that it had become a corporation, within the meaning of the provision of the Revised Statutes which enacts that "all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 1 Rev. Stat. pt. 1 chap. 18, title 4, § 1. The company was formed as a joint-stock company or association, in 1853, by a written agreement of eight individuals with each other, the whole force and effect

panies by which they have been treated in large measure like corporations.

See, in reference to the enlarged statutory powers and liabilities of joint-stock companies, *People v. Wemple*, 6 L. R. A. 303, 117 N. Y. 136.

of which, in constituting and creating the organization, rested upon the common-law rights of the individuals, and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement, and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the Legislature had explicitly recognized the existence and validity of such organizations, founded upon contract, and evolved from the common-law rights of the citizens. Laws 1849, chap. 258. That Act provided that any joint-stock company or association which consisted of seven or more members might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates; but the Act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing into corporations by a section prohibiting any such construction. Section 5. In 1851 the Act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that, when the company was formed and went into operation, the law recognized a distinction and substantial difference between joint-stock companies and corporations, and never confused one with the other; and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations. But two things have since occurred. The Legislature, while steadily preserving the distinction of names, has, with equal persistence, confused the things, by obliterating substantial and characteristic marks of difference; until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the Legislature may create a corporation without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. *Thomas v. Dakin*, 23 Wend. 9; *Bank of Watertown v. Watertown*, 25 Wend. 686; *People v. Niagara County Suprs.* 4 Hill, 20. It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the Act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws 1858, chap. 58; Laws 1854, chap. 245; Laws 1867, chap. 289); that the lines of distinction between the two, however far

apart in the beginning, have steadily converged, until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated; and no reason remains why joint-stock associations should not be, in all respects, treated and regarded as corporations. Some of this contention is true. The case of *People v. Wemple*, 117 N. Y. 77, 6 L. R. A. 308, 52 Hun, 484, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the Acts of 1880 and 1881, which formed the subject of consideration in the *Wemple Case*, the Legislature, dealing with the subject of taxation, and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company, or association whatever, now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest or out of which it grew; for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies, known to our law, which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical, and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara County v. People*, 7 Hill, 512, and in *Gifford v. Livingston*, 2 Denio, 880, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined, on behalf of the respondents, to be "an artificial person created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed be-

come merged and nonexistent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted, if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common-law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing by the intervention of an express command the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never, at common-law, rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in *Rogers v. Decker*, 181 N. Y. 490, but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But, where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities, or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts, for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The Statute of 1853 did interfere with it. That

Act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that Act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence.

We so held in *Withhead v. Allen*, 4 Abb. App. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code, (§§ 1922, 1923,) so that the creditor, at his option, may sue the associates without first bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristic remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members; the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators; the creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we

can say, as we did say, in *Van Aernam v. Bleistein*, 102 N. Y. 380, 3 Cent. Rep. 685, that a joint-stock company is a partnership, with some of the powers of a corporation.

Beyond that we do not think it is our duty to go.

The order should be affirmed, with costs.

All concur.

INDIANA SUPREME COURT.

Emma RYDER, by Next Friend, *Appt.*,

Frank HORSTING *et al.*

(.....Ind.....)

Lack of notice to the owner of premises of proceedings to lay out a highway over them is not fatal to jurisdiction if a tenant or other occupant was made a party duly notified.

(January 5, 1892.)

APP^{EAL} by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendants in an action brought to enjoin them from opening a public highway through plaintiff's lands. *Affirmed.*

The facts are stated in the opinion.

Mr. W. C. Johnson for appellant.

Messrs. W. A. Cullop and C. B. Kessinger, for appellees:

The complaint does not say a word about whether the occupant of the land was named in the petition and notice or not.

If he was that was all that was necessary, and notice to him, and his name mentioned in the petition was all the law required.

Porter v. Stout, 78 Ind. 8.

Every presumption is to be indulged in favor of the proceedings of the board.

Crossley v. O'Brien, 24 Ind. 335, 37 Am. Dec. 329.

Hence the board must have found the occupant of the said land was named in the petition and he was notified by the notice thereof given.

It must be presumed in this proceeding that all jurisdictional steps were taken by the board before the order was made to open the highway.

Binford v. Miner, 101 Ind. 147; *Railback v. Walke*, 81 Ind. 409; *Graves v. Duckwall*, 1 West. Rep. 480, 108 Ind. 560.

The subject-matter herein was one the jurisdiction whereof is given by statute to boards of commissioners of the various counties in the state, and in all such cases jurisdiction is presumed where they act.

Bloomfield R. Co. v. Burress, 82 Ind. 83; *Stout v. Woods*, 79 Ind. 108.

And in such cases where jurisdiction has been taken of a subject-matter and in order to take such jurisdiction it was necessary for it to decide and ascertain facts essential to its jurisdiction its judgment thereon cannot be collaterally attacked.

Ricketts v. Spraker, 77 Ind. 371; *Muncey v. Joest*, 74 Ind. 409; *Stoddard v. Johnson*, 75 Ind. 20; *Argo v. Barthand*, 80 Ind. 68.

The law only requires notice to be given by publication or posting of notices. And it is immaterial whether appellant had actual notice or not.

McIntyre v. Marine, 98 Ind. 193; *McDonald v. Payne*, 14 West. Rep. 102, 114 Ind. 359; *Adams v. Harrington*, 12 West. Rep. 299, 114 Ind. 66; *Erwin v. Fulk*, 94 Ind. 285.

In this case the board assumed jurisdiction of the petition and notice. In order to do so it had to impliedly hold at least that it had jurisdiction. In such case its decision cannot be attacked as is here sought in a collateral proceeding.

Adams v. Harrington, *Muncey v. Joest*, *Stoddard v. Johnson*, and *Ricketts v. Spraker*, *supra*.

Miller, J., delivered the opinion of the court:

This was an action by the appellant against the appellees for an injunction.

The complaint shows that the appellant was the owner of a tract of inclosed land in Knox county, and a resident and tax payer thereof. That at the March term of the commissioners' court of said county, preceeding the filing of her complaint, a petition was filed in said court for the opening of a

NOTE.—*Sufficiency of notice to occupant only of condemnation proceedings.*

The Indiana statute construed in the principal case provides that the petition for the location of a highway in one county only must set forth "the names of the owners, occupants, or agents of the land through which the same may pass," Rev. Stat. 1888, § 5015. The construction there adopted is justifiable, especially under grammatical rules. The rights of land-owners, however, would be better secured by a construction which supplied "and" instead of "or" before "occupants," a construction justified by reason and by the rules of statutory construction. This view is strengthened by the wording of the corresponding section (Ind. Rev. Stat. 1888, § 5001) relating to the location of highways running into more than one county which provides that in such cases the petition shall set forth "the names of the owners and occupants or agents of the lands through which the same may pass."

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The construction of section 5015 here suggested would require both owners and occupants or their agents to be made parties, as they are expressly required to be by section 5001. That they should be parties seems obvious, since they have different interests in the land to be cut off, unless the occupant is also owner.

The Supreme Court of Vermont has decided the same question differently than the principal case, holding that under a statute providing for notice to the "occupants or owners of the land" the interest of the owner was not divested by proceedings of which only the occupant was notified.

Notice to one who without connection with the owner, went upon the land for the purpose of receiving notice in collusion with the petitioner in the condemnation proceeding confers no jurisdiction as to the owner. *Dunlap v. Toledo*, A. A. & G. T. R. Co. 46 Mich. 190 J. G. G.

highway through her land. That in the petition she was not named or set forth as one of the owners of said real estate, nor was the name of her authorized agent or guardian mentioned therein, nor was the real estate described as the property of persons unknown to the petitioners. That no notice of the filing of the petition was ever given to her, her agent or guardian, and that neither she nor her agent or guardian had notice that the petition had been filed or was for hearing in said court; that at said term of the commissioner's court, an order was made by the court, directing the opening of the highway, that the order did not set out or contain the name of the plaintiff, her agent or guardian, or in any way intimate that she was connected with, or interested in the same; that she did not appear in such proceedings, either in person or by her guardian, agent or attorney; that the defendants, one of whom is the township trustee and the other the road supervisor, are proceeding under said order to tear down her fences and expose said lands to depredation, to her damage in the sum of five hundred dollars. Wherefore she asks that they be enjoined.

A demurrer was sustained to this complaint and final judgment rendered against her for costs. The sufficiency of this complaint is the only question before us.

This being a collateral attack upon an order of the commissioner's court, made in a matter presumptively within their jurisdiction, must fail unless the proceedings are so defective as to be void.

McDonald v. Payne, 114 Ind. 359, 14 West. Rep. 102.

The commissioner's court, having ordered the opening of the highway, necessarily passed upon the facts necessary to acquire jurisdiction.

In *Elliott on Roads and Streets*, 219, it is said: "The judgment of an inferior court upon jurisdictional facts is generally regarded as conclusive, and where there is a judgment necessarily affirming that jurisdiction exists, and this judgment could not have been pronounced without passing upon jurisdictional facts it will be conclusive as against all collateral attacks." *Kassier v. Grimmer* (Ind.) at this term; *Lamb v. Cain* (Ind.) 14 L. R. A. 518. Without notice there could be no jurisdiction. *Lewis, Em. Dom.* § 864.

It may now be considered settled that in a petition for the location of a highway the names of the owners, occupants, or agents must be set forth. *Haye v. Campbell*, 17 Ind. 430; *Hughes v. Sellers*, 84 Ind. 387; *Wild v. Deig*, 43 Ind. 455, 18 Am. Rep. 399; *Meyers v. Brown*, 55 Ind. 596; *Porter v.*

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Stout, 78 Ind. 3; *McIntyre v. Marine*, 93 Ind. 198.

In *Porter v. Stout*, 78 Ind. 3, the statute, now sections 5001, 5015, was construed, and it was held that the provisions of the Act were complied with, by making either the owner, the agent, or the occupant a party. In that case it is said: "The language plainly indicates this, for, in legal effect, it is precisely the same as if the words were 'shall set forth the names of the owners, or the names of the occupants, or the names of the agents.' Unless we do violence to the language used, we must hold that the statute requires that one of the three persons designated, the owner, the occupant, or the agent shall be named, but that it does not require that the owner of, the occupant of, and the agent for the same land shall all be named in the petition."

This case must be decisive of the one before us, for with all the care taken to charge that neither the appellant, her agent or guardian, nor any owner of the property unknown to the petitioners were named in the petition, or that either of them had notice or knowledge of the proceedings, no allegation whatever concerning the "occupant" is found in the complaint. The omission seems significant.

We are to presume in favor of the jurisdiction of the commissioners' court and the regularity of their proceedings, where a collateral attack is made upon the same. It may well be, that every statement in the complaint is true, and yet the jurisdiction of the court be complete to order the opening of the highway through the lands of the appellant. In aid of the presumption in favor of the action of the commissioners court we must, upon a collateral attack, infer that the lands of the appellant were occupied by some one as tenant, or otherwise, and that such tenant was made a party to the proceedings and duly notified. Had the complaint disclosed the fact that at the time the proceedings in the commissioners' court were instituted, the appellant was the sole occupant of the land, or that the occupant, if there was such, was not made a party, a different question would be presented. In *Kinney's Case*, 5 Har. (Del.) 18, it was held, that in a petition for a public road, a law requiring a notice to the owner or holder of the land was complied with by serving a notice on any person occupying or in possession of the land, placed there by the owner, and such occupant need not necessarily be a tenant.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

Mary T. FAY, *Resp't.*,

v.

PACIFIC IMPROVEMENT CO., *Appt.*

(.....Cal.....)

1. The fact that a hotel stands in inclosed grounds the gates of which are closed at night, does not prevent it from being a public inn when the patronage of the public generally is solicited.
2. One does not lose the character of guest at a hotel merely by inquiring the price of room and board before being assigned to a room where no agreement is made as to the time of staying or any reduction made from the price charged to transient guests.
3. The burning of a hotel cannot be attributed to an irresistible superhuman cause where the origin of the fire is not shown except that it broke out in a room containing nothing but batteries which supplied the place with electricity.
4. Jewelry daily worn by a woman who is a guest of the hotel need not be deposited with the innkeeper in order to make him liable for its loss by fire.

(June 23, 1891.)*

A PPEAL by defendant from a judgment of the Superior Court for Monterey County in favor of plaintiff in an action brought to recover the value of certain personal property which plaintiff lost in consequence of the burning of defendant's hotel while she was a guest therein. *Affirmed.*

The facts are stated in the opinion.

Meers, Gell & Morehouse for appellant.

Mr. D. M. Delmas for respondent.

De Haven, J., delivered the opinion of the court:

The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor: The court below found the Hotel Del Monte was at the date named a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to

the public as a place where all transient persons who come will be received and entertained as guests for compensation,—an hotel. In *Wintermute v. Clarke*, 5 Sandf. 247, an "inn" is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in *Pinkerton v. Woodward*, 83 Cal. 506, 91 Am. Dec. 657. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation, or agreement as to the duration of their stay, marks the important distinction between an hotel or inn and a boarding-house. This difference is thus stated in *Schouler on Bailments*: "An inn is a house where the keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." *Schouler, Bailm. p. 253.* We think that the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising, and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival, and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of an hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper. *Krohn v. Sweeney*, 2 Daly, 200. Nor was the force of this evidence in any wise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed, and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. An hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it. "Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn; the point being

*A rehearing was subsequently granted and on February 4, 1892, the court stated that it was satisfied with the conclusions set forth in the opinion given herewith. [Rep.]

NOTE.—For notes on relation of innkeeper and guest, see *Cookery v. Nagle* (Ga.) 6 L. R. A. 482, and *Pullman Palace Car Co. v. Lowe* (Neb.) 6 L. R. A. 809; *Glenn v. Jackson* (Ala.) 12 L. R. A. 382.

For notes on innkeepers' liabilities, see same cases, also *Shultz v. Wall* (Pa.) 8 L. R. A. 97.
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rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." Schouler, Bailm. p. 249.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room she ascertained what she would have to pay for the room and board, is not sufficient of itself to show that she was not received as a guest. *Pinkerton v. Woodward*, 88 Cal. 597, 91 Am. Dec. 637; *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112; *Jalie v. Cardinal*, 85 Wis. 118; *Hall v. Pike*, 100 Mass. 495; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417. The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. *Hall v. Pike*, *supra*. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the east. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn." In this case the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts the defendant is liable. *Hulett v. Swift*, 83 N. Y. 571. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause"

are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. 1 Am. & Eng. Encyclop. Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency. *Miller v. Steam Nav. Co.* 10 N. Y. 431; *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use, when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession. "The guest may retain personal custody of his goods within the inn, as of his trunk and its contents, his wearing apparel and other articles in his room, and any jewelry or valuables carried or worn about his person, without discharging the innkeeper from responsibility." *Jalie v. Cardinal*, 85 Wis. 126. We have examined the other points made by appellant, but do not think they call for special discussion. The rule which makes an innkeeper liable for the value of the property of his guest in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere; and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability, in this respect, is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.

We concur: *Sharpstein, J.; McFarland J.*

MISSOURI SUPREME COURT (2d Div.).

GRATIOT, *Recept.*,

v.

MISSOURI PACIFIC R. CO., *Appt.*

(.....Mo.....)

1. Failure of one approaching a railroad crossing to constantly look both ways for the approach of trains will not be pronounced negligence by the court.

NOTE.—We report the above case on account of the full and clear discussion by the court of the relative functions of the court and jury on the question of negligence. For exceptions to the general rule, on this subject, see note to *Emry v. Raleigh & G. R. Co.* (N. C.) 15 L. R. A. 332. 16 L. R. A.

2. Continuing to approach a railroad crossing under the mistaken belief, honestly conceived after investigation, that an engine seen 800 or 1,000 yards away is standing on the track engaged in switching, when it is in fact coming towards the crossing at a rapid rate, is not negligence as matter of law.

3. Whether or not due care requires one, who, after observation as to the safety of crossing a railroad track has received the impression that no trains are approaching the crossing, to test the accuracy of such impression by further observation, before acting upon it, is a question for the jury and not for the court.

4. To sustain the action of the trial court in overruling a demurrer to the evidence which was based on the contention

that it showed contributory negligence, it is not necessary to decide that there was no such negligence.

5. Evidence of negligence in running the train is admissible under an allegation in the petition that plaintiff sustained injuries through the negligence of defendant's servants "while running, controlling, and managing, its locomotive engine and train of cars."

6. Running a train thirty to sixty miles an hour within the limits of a city whose ordinances forbid greater speed than six miles an hour, is such negligence as to render the company liable for injuries to a traveler attempting, with due care, to pass over a highway crossing.

7. Ten thousand one hundred seventy-five dollars damages is not so excessive as to cause a reversal on the ground of corruption, passion, or prejudice, when given to a doctor, sixty years old, who was injured at a railroad highway crossing by the company's negligence, where his horse and buggy were demolished, and he received permanent injuries such as a disfigured and partially paralyzed face, broken ribs, lameness, and constant pain which disabled him to some extent from practicing his profession, the income from which was \$2,500 a year at the time of the accident.

On Rehearing.

8. The question of negligence must be left to the jury when the facts or the inferences to be drawn from them are in any degree doubtful.

9. An instruction that it is the duty of a person attempting to cross a railroad track to exercise the degree of care and prudence that an ordinarily careful and prudent person would exercise under the circumstances, is not erroneous although it fails to state what the man of ordinary prudence would do at such a time and place.

(May 19, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. B. Pike for appellant.

Messrs. Davis & Davis, A. R. Taylor and James P. Maginn for respondent.

Thomas, J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of the city of St. Louis against the defendant corporation for the sum of \$10,175 for personal injuries. The petition charges three distinct acts of negligence as causes of the injuries: (1) That the injury occurred within the limits of the city of St. Louis, and that defendant's train that caused it was running at a rate of speed greater than six miles an hour, in violation of a city ordinance; (2) that defendant's agents in charge of the train at the time failed to ring the bell of the engine constantly, as required by the city ordinance; and (3) that defendant's negligently ran and managed the train. The answer contained a general denial and a plea of contributory negligence.

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1. It is urged with much earnestness and ability that the trial court committed error in overruling defendant's demurrer to the evidence. It is claimed that the evidence discloses contributory negligence on the part of plaintiff which precludes his recovery. There is no disagreement between counsel as to principles of the law of negligence and contributory negligence, but they disagree, and disagree radically, as to the application of these principles to the facts of this case. The only question touching the phase of the case under review, therefore, for us to determine, is whether, upon the admitted or indisputably proved facts, the court can, as a matter of law, declare that plaintiff has no case entitling him to recover. The facts are these: The injury occurred at Campbell's crossing, 150 or 200 yards west of Cheltenham, a station on defendants road, about five miles from the Union Depot, and within the limits of the city of St. Louis, twenty or twenty-two minutes to 10 o'clock on the 19th day of August, 1887. Howard, another station on defendant's road, is about 1,000 yards east of this crossing; and near this station are the Howard Fire-Brick works and the smelting-works. The Manchester road runs near to and parallel with the railroad a mile and a half north of the crossing in question. This goes up an elevation west of Cheltenham, and there is a cut of twelve or fifteen feet deep where the Campbell road crosses the railroad. The Campbell road makes a right angle with the Manchester road; the latter being on the west side of the railroad, and the former running south from it. After getting onto the Campbell road one cannot see the railroad east until he comes within a few feet of the railroad track. The train that caused the injury was the morning mail, and its schedule time for leaving the Union Depot was 9 o'clock A. M. but the morning of the accident it was twenty-five minutes late. The plaintiff is a doctor, and lives at Cheltenham. That morning he was on the road in his phaeton, drawn by a single horse. He knew the time this train ordinarily passed Cheltenham, which he says was about ten minutes after nine. He was near this crossing about twenty minutes before the accident, but would not cross then. He went over to Mrs. Given's, 150 yards distant, to see a clock, and post himself as to the time. It was then twenty-three minutes after 9. He did this in order to be sure he could have the right of way. He drove to and turned into the Campbell road, and halted his horse, he says, within five or six feet of the track, in order to ascertain whether a train was approaching. He could see west a considerable distance, and from where he stopped he could see the railroad track through the cut there to the east 800 or 1,000 yards. He heard a whistle, which he took to be between Howard station and a bridge on the road east of Howard, some 1,200 or 1,400 yards from where he was. He raised up in his buggy, looked to the eastward, and saw an engine about 800 yards away, which he took to be a switch-engine on the track of the smelting-works there situated. He there-

upon proceeded to cross the track, and when his horse got his fore feet on the track the engine struck him, knocking the horse off, turning the buggy over, throwing plaintiff to the ground and injuring him seriously. The train was run at a rapid rate. Its speed was variously estimated, some witnesses fixing the maximum at sixty miles, and some the minimum at thirty miles, an hour. The plaintiff thinks it was very little over half a minute from the time he saw the engine 800 yards east of him before it struck him. He says he stopped a period of three to five minutes before he attempted to cross the track; but he is evidently mistaken about this, for if the train was running at the minimum rate of speed fixed by the witnesses, it would have reached him from where he saw it in one minute. He must be very near accurate in placing the time of the approach of the train at half a minute after he saw what he supposed to be a switch-engine. After seeing this engine he started across the track, and did not look any more to see if a train was coming. He heard no bell nor whistle as the train approached, except just at the time of the collision. He says he did not see the train at all before it struck his horse, but there was a "waver" on his spectacles that indicated to him that a train was coming. He undertook to pull his horse, but it was too late. The crossing in question was a public crossing. The agent in charge of the train testified that the bell was rung all the way from the Union Depot to the place of the accident, and the whistle was blown at stations and crossings. The engineer discovered plaintiff when within 150 feet of him, and then it was impossible to stop the train in time to avoid the collision. It is conceded that the engine plaintiff saw was the engine that caused the injury, and we think conclusively appears from the evidence that plaintiff was honestly mistaken about it, he supposing it was a switch-engine at the smelting-works, as he testified. The train did not stop at Howard or Cheltenham. The ordinances of the city mentioned in the petition were read in evidence.

The proof is unquestioned that the train was running at a greater rate of speed than six miles an hour in violation of the ordinances of the city, and this has been held by a long line of decisions of this court to be negligence *per se*. *Kelley v. Missouri Pac. R. Co.*, 101 Mo. 67, 8 L. R. A. 783, and cases cited; *Murray v. Missouri Pac. R. Co.* 101 Mo. 236.

It was urged in argument that this ordinance was an unreasonable restraint upon defendant's management of its business, and that the traveling public would not tolerate six miles an hour a distance of several miles for a train the character of this. No such issue was made by the pleadings, evidence, or instructions, and that question is not presented by this record for our determination. There can be no question that the collision would not have occurred if the defendant's agents had been running the train at the maximum speed allowed by the ordinance. The plaintiff traveled five or six feet after he saw the train, and before it reached him,

when it was running certainly at thirty, and probably at forty or fifty, miles an hour; and of course it takes only a mathematical calculation to show that he could have gone from five to eight times that distance if the train had been running at the rate of six miles an hour, and this would have put him across the track, and out of danger. We take it, then, that the defendant was guilty of negligence that directly caused the injury. This brings us face to face with the question: Was plaintiff so clearly guilty of contributory negligence that we can say, as a matter of law, that he cannot recover? We think not. It is claimed that it was plaintiff's duty, in approaching and crossing defendant's track, to look constantly both ways. It is said one before crossing a railroad is bound to stop, look, and listen, but we know of no rule of law requiring a party to constantly look even one way, and especially none requiring him to constantly look both ways. We have to deal with man as we find him. When we get information that fixes upon our minds an impression that a certain state of facts exists, we act upon that impression. We satisfy ourselves that we are right, and then go ahead. At least, ordinarily prudent men do this. Dr. Gratiot looked and saw an engine half a mile away that he supposed was on a switch, and of course was not approaching him at all. He accepted this as a fact, and acted on it; and there would be no more reason in requiring him to look constantly up the track to learn whether he was mistaken about this supposed fact than to require men in their multitudinous affairs to hesitate at every step and question not only the correctness of their judgment, but even the truth or falsity of what seem to be the facts that environ them. It would be a great boon to humanity if no mistakes could occur, but to require men to hesitate to act upon what seems manifest to their eyes and ears, simply because it is possible that they may not have seen or heard the fact as it is, would virtually stop business and commerce. But, says counsel for defendant, plaintiff saw the identical train that injured him, and his mistake in regard to it cannot relieve him of responsibility for the damage he suffered. We do not concur in this view of the matter. That plaintiff's mistake was an honest one there is no question. We do not pretend to say that a man might not make a mistake that would not relieve of responsibility. A man may be guilty of making a mistake negligently. Take, as an illustration, the instance when one seeing a train approaching, and, thinking he can cross in front of it, attempt to cross, and is injured, as was the case in *Moody v. Pacific R. Co.*, 68 Mo. 470, he and those representing him cannot be heard to complain. Moody thought (and no doubt honestly thought) the train he saw was the regular mail, and would stop, but yet he knew it was a train approaching him, and he thought he could make it across the track in front of it, and attempted to cross, and was killed. This was held to be negligence on his part which precluded his representative from recovering. But even in such case this court held in *Petty*

v. Hannibal & St. J. R. Co., 88 Mo. 806, 8 West. Rep. 297, that it was not negligence *per se* when a party supposed the train was more than eighty rods from the crossing, though he was mistaken about it, to attempt to cross. The case of *Bonnell v. Delaware, L. & W. R. Co.*, 89 N. J. L. 189 is precisely in point on the question under discussion. There the plaintiff, when about one hundred yards from the railroad, looked and saw a train with the rear towards him, and was deceived by appearances, supposing it was going away from the crossing. He was driving a wagon, and proceeded to cross the track without looking any more. Some men saw his peril and signaled to him, but he misconstrued the signal, and was injured. The court held it a proper case to go the jury. Scudder, J., speaking for the whole court, said: "Where there are doubtful and qualifying circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and, as such, must be left to the jury, as being within their legal province. The law has said in these cases that the plaintiff shall have the judgement of twelve men, and not the opinion of one man. The fact upon which the defendant mainly relied in this case was that the plaintiff did not look up the track as he approached, and before he attempted to cross it. But the plaintiff had looked when about one hundred yards from the crossing, and saw, as he supposed, a train going in the opposite direction, with the rear towards him. He was not required by any legal rule to look continually until he crossed the track. A man of prudence might have received a fixed impression from the appearance of the train that it was going away from the station. Having that belief, his further attention may have been called off by the actions of the men near the station, who were gesticulating, which he misunderstood. . . . It was for the jury to weigh all these facts, and say whether his mistake and consequent feeling of security were unreasonable, and manifested a want of proper care." In the language of *Lord Coleridge*, we think that opinion contains excellent sense, and is elegantly expressed. The principle announced is sound. It is a familiar rule, also, that where a party is placed in a position of peril, or is frightened, a mistake of facts excuses him. *Keim v. Union R. & Transit Co.* 90 Mo. 814, 7 West. Rep. 144, and cases cited *Beach, Contrib. Neg.* pp. 198, 201. As was said in the *Bonnell Case*, *supra*, so we say in this case: It was for the jury to weigh all the facts, and say whether plaintiff's mistake and consequent feeling of security were unreasonable, and manifested want of proper care. It is not necessary for us to decide that he was not guilty of negligence in going upon the crossing to sustain the ruling of the trial court in overruling the demurrer to the evidence. Before the court is justified in taking a case from the jury the facts must be proved in the first place; and then, in the second it must appear that only one fair inference can be drawn from the facts thus

proved. In cases of his character the party has a right to demand a jury to pass not only on the facts, but to determine also what inferences shall be drawn from the facts found; that is, determine the ultimate facts in issue, where men of ordinary ability and judgment might honestly differ. *Tabler v. Hannibal & St. J. R. Co.* 98 Mo. 79, 11 West. Rep. 458; *Huhn v. Missouri Pac. R. Co.* 92 Mo. 440, 10 West. Rep. 405; *Keim v. Union R. & Transit Co.* 90 Mo. 814, 7 West. Rep. 144.

2. It is contended that the court erred in authorizing the jury to find for the plaintiff if they found that defendants agents were guilty of negligence in moving and managing the train, because there was no proper averment in the petition to support such a finding. There is an independent allegation in the petition that plaintiff sustained the injuries complained of "through the negligence and carelessness of defendants agents and servants while running, controlling and managing its locomotive engine and train of cars." We have had occasion to examine this question in the cases of *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, and *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 881, submitted at the same time this was, and we held in those cases, as we again hold in this, that this averment is sufficient to authorize proof of negligence in running the trains. There is another reason, however, in the case now in hand, why this point will not avail defendant, and that is, it was guilty of negligence directly causing plaintiff's injury in running its train from thirty to sixty miles an hour in violation of the city ordinance, and it is utterly immaterial whether it was guilty of negligence in any other form or not; and yet on this issue there was evidence of recklessness in the management of the train in question. It must have been running at break-neck speed. The weight of the evidence is that it was running from forty to sixty miles an hour. Plaintiff saw it, and in the twinkling of an eye, almost, "a waver," and the crash came. The jury might very well find it to be carelessness to go at such a rate, in such a place, under such circumstances, flying by stations and over crossings without halting, aside from the requirement of any ordinance or statute.

3. It is again insisted that the court erred in submitting the question of plaintiff's contributory negligence to jury in the instructions given, and that certain instructions prayed by defendant on that question ought not to have been refused. The court in substance told the jury in its instructions Nos. 1, 2, and 3 that plaintiff was entitled to recover if he was himself exercising that degree of care and prudence that an ordinarily careful and prudent person under like circumstances would have exercised, and that the collision was caused by the negligence of defendant (1) in moving the train at a greater rate of speed than six miles an hour (2) in failing to constantly sound the bell; or (3) in failing to exercise that degree of care and prudence in the handling and managing of the train which an ordinarily careful and prudent person, engaged in like busi-

ness, would have exercised. As we have remarked, it is immaterial in this case what the court says about the sources of defendant's negligence. It being conceded that it was guilty of negligence *per se* in running the train in violation of the city ordinance, the only question of fact that the jury had to deal with and determine was whether plaintiff was guilty of contributory negligence, and on this question the court instructed the jury as follows: "(4) And, on the other hand, it was the duty of the plaintiff, in crossing or attempting to cross the defendant's railroad track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person under like circumstances would have exercised; and a failure to exercise such a degree of care and prudence would render him guilty of negligence." "(6) But although the defendant was guilty of negligence in running its train at a greater rate of speed than six miles an hour, and although you may believe from the evidence that the defendant was also guilty of negligence, as that term is explained in either the second or third of the foregoing instructions, and although you may believe from the evidence that such negligence of the defendant contributed to cause the collision in question, yet if you also believe from the evidence that the plaintiff was also guilty of negligence as that term is explained in the fourth instruction foregoing, and that such negligence of the plaintiff directly contributed to cause said collision,—that is to say, if you believe from the evidence, that said collision was the result, not of the negligence of the defendant alone, but of the joint negligence of both plaintiff and defendant,—then the plaintiff is not entitled to recover, and your verdict should be for the defendant." (7) If the jury find from the evidence that the plaintiff approached the railway crossing with his horse and buggy without paying any attention to his own safety, but trusted to the obligations imposed upon the railway company to warn him of an approaching engine and train, and was injured by reason of his failure to so pay attention, they will find a verdict for the defendant." The defendant asked the court to instruct, and the court refused to instruct, the jury that, unless the plaintiff carefully and constantly looked and listened for a train as he approached and went onto the crossing, he could not recover; or, if he attempted to cross before he had ascertained whether a train was approaching, or if he saw a train which he supposed to be a switch-engine, and then paid no further attention to ascertain whether such engine was approaching in fact, he could not recover. We will not say anything further in regard to the mistake plaintiff made. We think we have said enough to show that the part of the charge prayed by defendant as to that was properly refused. Nor will we add anything to what has already been said about the duty of plaintiff to constantly look and listen, or to look and listen after he honestly supposed he knew the facts of the situation. Defendant urges that the instructions it

asked ought to have been given because the instructions given are not specific enough in informing the jury what contributory negligence is. We differ with defendants' counsel in this regard. In the fourth instruction the court defines negligence to be a failure to exercise that degree of care and prudence that an ordinarily careful and prudent person, under like circumstances, would exercise. Then in the sixth instruction the court says that, although defendant was guilty of negligence, yet if plaintiff was also guilty of negligence, as defined by the court, and that such negligence directly contributed to cause the collision,—*i. e.*, if "the collision was the result, not of the negligence of the defendant alone, but of the joint negligence of both plaintiff and defendant"—then the plaintiff was not entitled to recover. This is terse, vigorous English, and we do not see how the court could have made it more plain to the jury what was meant by contributory negligence of the plaintiff that would defeat his claim for damages. Negligence is admirably defined by the court, and the definition given conforms to the law. Beach, Contrib. Neg. §§ 2, 3; *Tetherow v. St. Joseph & D. M. R. Co.* 98 Mo. 74; *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 93. And then the court tells the jury in an explicit manner when negligence is contributory. The court, in this case, could not have told the jury that plaintiff was negligent if he failed to look and listen. He did both. If he was negligent at all, it was because he failed to exercise proper care in verifying his impression about the engine he saw being a switch-engine. It is a question of fact for the jury, and not of law for the court, to determine whether plaintiff should, under the circumstances, have looked again. It was, we think, properly left to the jury to say whether plaintiff's conduct conformed to that of an ordinarily careful and prudent man. Jurymen are taken from the body of the people, and they are supposed to be men of ordinary care and prudence, and it is peculiarly within their province to determine what care and prudence dictate under given circumstances. But, if anything was lacking in the definition of plaintiffs' duty under the circumstances, it was supplied by the seventh instruction, *supra*, which was given at the instance of defendant. We hold that the instructions, taken as a whole, were exceptionally clear, and presented the issues to the jury in a very concise and yet lucid manner. Under these instructions the jury in their verdict negated the contributory negligence of the plaintiff, and in this we think they were supported by the evidence.

4. Defendant contends, in the last place, that the verdict of \$10,175 is excessive to that degree that it must have been the result of corruption, passion, or prejudice on the part of the jury. We confess that the sum awarded plaintiff is large, but we did not think it so excessive that we ought to interfere. The \$175 we presume was allowed for the damage to the horse and buggy, and the \$10,000 for the injury to plaintiff's person

The evidence tends to show that the plaintiff, after the accident, was found lying on the ground in an insensible condition; that he came to in a short time; that he was terribly scarred and bruised about the face, his nose broken, three of his teeth knocked out, three of his ribs broken, near the spine; that there was partial paralysis on the left side of his face; his left side and spine were injured from the shock; that his hip on the left side was injured, and there was constant pain on that side, and that he was lame at the time of the trial, which occurred in April, 1888, the accident occurring in the previous August; that plaintiff was sixty years old; that the injuries were probably permanent, and disabled him from practicing his profession to some extent, his income previous to the accident being about \$2,500 per annum. It is evident plaintiff's injuries have wrecked him physically. The shock received, under the circumstances of this case, in connection with the injuries inflicted, must of necessity leave its impress for life upon a man of the plaintiff's age. What damage he ought to receive must be left somewhat to the jury. There is no fixed standard by which to estimate damages of this character, and it is unfortunate there is none. This is an imperfection in the administration of law, but it is an imperfection that inheres in all human institutions. We cannot help it if some juries place a high, while others put a low, value on life and limb. All the courts can do is to interfere with the verdicts of juries when it is manifest that they are the result of corruption, prejudice, or passion. We cannot say that of the verdict in this case. It was for the jurors to say what damage the plaintiff ought to have. They fixed the amount at \$10,175, and under the facts of the case we do not feel authorized, and we have no disposition, to interfere. *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Dougherty v. Missouri R. Co.* 97 Mo. 647; *Griffith v. Missouri Pac. R. Co.* 98 Mo. 168; *Sheehy v. Kansas City C. R. Co.* 94 Mo. 574, 18 West. Rep. 658.

Judgment affirmed.
All concur.

A motion for rehearing was subsequently filed in response to which **Thomas, J.**, on behalf of the court delivered the following opinion:

The questions decided in the foregoing opinion are of such gravity and frequent occurrence that we have gone fully over the same ground, on the motion for rehearing. The able counsel for defendant prepared and printed an elaborate argument in support of this motion, and displayed great learning and industry in collecting and arranging the authorities, and thereby the task of re-investigation was made comparatively light for the court.

1. It is assumed in the motion for rehearing that we decided (1) that the plaintiff was not guilty of contributory negligence; and (2) that he did not make the mistake negligently. We decided neither. We simply held that there was some evidence from

which the jury might fairly infer that plaintiff exercised ordinary care in crossing the track, and that, under the facts of the case, it was a question for the jury whether his mistake, and consequent feeling of security, were reasonable.

2. Speaking of what was said in our opinion on the question of plaintiff's mistake, defendant's attorney, in his argument, says: "The standard of judgment set up in this case should be universally applicable, for the law is no respecter of persons; but, with due deference, we submit that, in a suit against a railroad company, the honest mistake of its employes will never be accepted as sufficient to relieve it from liability. We know the court has meant nothing of the sort, but it has, none the less, set up a double and ranging standard of duty, making one requirement of members of the general public, and a different and far higher requirement of railroad men." This is a very grave charge, if true. Counsel contends that he is justified in making this charge by a reference to the varying standards announced in *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 548, 58 Am. Rep. 594; *Werner v. Citizens R. Co.* 81 Mo. 864; and *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475,—on one side, and the case at bar on the other. In the *Isabel Case* "the engineer saw what he honestly took to be a dog on the track; it was a child." The trial court instructed the jury that if they found that the engineer, "by the exercise of ordinary skill and caution might have observed the child on the railroad track and recognized him as an infant, in time to stop the train before it reached and ran upon him," then the corporation was liable. This court approved the instruction. The jury found the fact, and the court declared the law. In the *Werner Case* a "street-car driver saw what he honestly took to be a bag of oats or bunch of hay upon the track. It proved to be a prostrate man." The court again instructed the jury that if the driver of the car "by the exercise of ordinary care and prudence, might have ascertained that the object he saw lying in the track was a human being, before he ran over it, and might have stopped the car and avoided running over the deceased," the corporation was liable. The jury again found the fact, and the court declared the law. In the *Donahoe Case* a child was killed, and the court told the jury: "If the injury of the child could have been avoided after the employes learned of the danger in which the child was, or might have learned of his dangerous situation by the use of reasonable diligence," then the railroad company was liable. Here, likewise, the jury found the fact, and the court applied the law. In none of these cases did the court say that defendant's mistakes were negligent as a matter of law. In each case it was distinctly left to the jury to find whether there was negligence or not. The court did not assume that duty. Nor in the case at bar did the court instruct the jury that plaintiff's mistake excused him, but the court did instruct that, if plaintiff was guilty of contributory negligence in crossing, he could not recover. As in the

other cases, so here, the jury decided the fact; the court, the law. There is a marked difference however, in the cases cited and the one under discussion. The street-car driver in the *Werner Case* and the engineer in the *Isabel Case* saw something on the track, and they knew that anything in that position was dangerous to the life and property under their charge. Hence if they had not been mistaken, but had there been in fact a sack of oats on the track in one case, and a dog in the other, they would have been guilty of negligence, even recklessness, in taking no steps to guard the car under their control from danger. Not so with Dr. Gratiot. If he had made no mistake, that is, if the engine had been in fact what he supposed it was, as to him it would have been perfectly harmless. This, we take it, sufficiently disposes of the argument that this court applies one standard of duty to railroad corporations and another to the general public. The same rule is applied, and ought to be applied, to both. We did not say, nor do we now say, that a mistake excuses a man in all cases and everywhere, nor do we say that a mistake will not excuse him in any case or under any circumstances.

3. There are two contentions of defendant that we will consider together: (1) That the evidence so clearly shows contributory negligence on plaintiff's part that the court, as a matter of law, ought to have declared that he could not recover; and (2) that conceding the facts of the case were of such a character as to authorize the submission of the question of plaintiff's negligence to the jury, yet the court ought to have told the jury what facts, if proved, would have constituted negligence. If we understand the second contention correctly, it is that the court, in its instructions, ought to have informed the jury what a man of ordinary prudence would have done at the time and place of this injury; that simply telling the jury that "it was the duty of the plaintiff in crossing, or attempting to cross, the defendant's railroad track to have exercised that degree of care and prudence that an ordinarily careful and prudent person, under the circumstances, would have exercised, and a failure to exercise such degree of care and prudence would render him guilty of negligence," and that he could not recover "if he approached the railway crossing with his horse and buggy, without paying any attention to his own safety, but trusted to the obligations imposed upon the railroad company to warn him of an approaching engine and train," was not enough. It seems that the question of demurrer to evidence has been so often before the English and American courts, and has been so ably and exhaustively discussed by the courts and text-writers, especially in the last 25 years, that we ought ere this time to have some reliable guides; but we must confess the question is apparently involved in as much difficulty as ever, and in an especial manner do we find a great contrariety of conflicting opinions on what may aptly be termed "the law of the railroad crossing." The difficulty does not lie in the formulation, but application, of gen-

eral rules. That contributory negligence of the injured party, with but few exceptions, will defeat a recovery, and that a party is guilty of contributory negligence when he fails to conform to what the law requires of him, or to what a man of ordinary prudence would usually do under the same circumstances, are axioms of the law. Thus far all is easy, but when we enter upon an inquiry into what men of ordinary prudence would do, under given circumstances, the divergence of judicial opinion begins. The adjudged cases not only show that the courts and judges have been and that they are now divided as to what ordinary prudence is, but also as to who shall determine when a man has exercised ordinary prudence in a concrete case. An effort has been made to find and mark the line where the province of the court ends and that of the jury begins, but it has, in a large degree, been fruitless. Much of the difficulty and confusion involved in the discussion of the subject of negligence and contributory negligence has grown out of a desire on the part of the court to lay down abstract rules touching them, and a failure to make proper distinctions between a question of fact and a question of law. Negligence results from a violation of duty. If the duty be prescribed by law, its violation is negligence *per se*, and the court is bound to so declare it. But whether A. B. violated such a duty is always a question of fact. If the duty be not prescribed by law, then the question whether its violation is negligence is one of fact. Of course, we make a distinction between what the positive law requires and what prudence requires. The law cannot prescribe what men shall do, except in a comparatively few cases. In the majority of cases the law gives no specific instructions, but it requires everyone to exercise ordinary prudence in his dealings with others. In those cases where the law gives no specific directions as to conduct, the question whether A. B. was guilty of a violation of duty, and hence guilty of negligence, is always a question of fact; the law neither prescribing the standard by which to measure A. B.'s conduct nor determining what his conduct was. And here again it is important to note a distinction between the capacity in which the court acts in determining and declaring a fact and the law. Our meaning can be better understood by illustrations. The court declares, as a matter of law, that the running of a train at a greater rate of speed than that prescribed by ordinance is negligence, and, as a matter of fact, that A. B. ran a train at a greater rate of speed than authorized by ordinance. The law never declares that A. B. violated the ordinance, but the court, sitting as a trier of the fact, does. In other words, the court sitting as a jury, finds and declares that A. B. violated the ordinance, and then, as a court administering the law, declares that A. B. was guilty of negligence. Take a case where the law has not prescribed what a party shall do, except that he shall be ordinarily prudent. The law has not prescribed the speed of trains outside of cities

and towns, and not always in them. Hence in this class of cases there are two questions of fact to be determined: (1) What is an imprudent speed of a train. (2) Did the party charged run the train at this imprudent speed? The law does not require a party approaching a railroad to stop, look, and listen, but it does require him to exercise ordinary prudence. When A. B. crosses the track, therefore, two questions of fact must be determined: (1) What did ordinary prudence require him to do? and (2) did he come up to the standard of ordinary prudence? "There is no doubt that, where it appears beyond controversy that a failure to stop, look, or listen was a proximate cause of an injury, the courts will hold such failure contributory negligence as a matter of law. *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Hixson v. St. Louis, H. & K. R. Co.* 80 Mo. 335. But this is a very different matter from holding a failure to stop, look, or listen negligence *per se*, sufficient to bar a recovery. In the one line of cases, it is properly held that a failure to stop, look, or listen negligence *per se*, sufficient to bar a recovery. In the one line of cases, it is properly held that a failure to stop, look or listen was negligence, as a matter of law, upon the undisputed facts, because ordinary care required the precaution, and the failure to take it was a proximate cause of the injury that followed. In other words, there is a difference between negligence *per se*, without regard to the surrounding circumstances, and negligence as a matter of law, in view of all the circumstances." *Note 2*, p. 72, 4 Am. & Eng. Encyclop. Law. This seems to be a refinement without substantial basis; a distinction without a difference. It seems, at first blush, to be somewhat ambiguous. What is the difference between negligence *per se* and negligence "as a matter of law, in view of all the circumstances?" The ambiguity, however, disappears by putting the proposition in another form, and in a form, too, which does not change its significance. Negligence, "as a matter of law, in view of all the circumstances," is simply negligence as a matter of fact under the law, in view of all the circumstances, in a concrete case. That is to say, the court, sitting as a jury, finds the fact of negligence from all the circumstances, and then declares the law upon the fact thus found. That the fact of negligence may be admitted or may clearly appear from undisputed facts does not render it any the less a fact as contradistinguished from law, and, when the court finds and declares it, it proceeds as a jury, and not as a court. Sometimes negligence is called a mixed question of law and fact. This is strictly not an accurate statement, but misleading. In every concrete case there is a question of fact and a question of law, but the fact is an unmixed fact, and the law unmixed law. Simply because the court as a jury finds the fact, and the law is applied by the same court as a court to the fact thus found, does not make them a mixed question of law and fact. In that line of cases where the law does not pre-

scribe what shall be done, the standard of ordinary prudence, in the very nature of things, shifts with the varying circumstances of each case. Men, from nature and habit, vary in their conception of prudence. There is no fixed standard of universal application among men. When the trier, whether judge or juror, determines that a party has not exercised ordinary care, he necessarily fixes in his mind a standard by which to measure the party's conduct, and then finds he failed to come up to that standard. Where the law has fixed no standard, a standard must be adopted before we can proceed in a given case. Who shall fix the standard, the court or jury? The court, in determining a demurrer to evidence, has a delicate and important duty to perform. We think, however, that if the distinction between law and fact, and the capacity in which the court acts when determining the one and the other, as heretofore indicated, be kept in mind, but little difficulty can arise in the disposition of a given case. There is no question about the right and duty of the court to declare the law, but when it assumes to determine a fact as contradistinguished from law, and peremptorily direct the jury to conform to that fact, it enters a field whose boundaries have not been definitely fixed, and the decision must be predicated on the facts of each case. Are there any rules by which the court must be governed? We know of none, but there are rules which, though not infallible, are helpful guides in our concrete investigations. "Where the facts are so clear and decided that the inference of negligence is irresistible, it is the duty of the judge to decide; but when the facts, or the inferences to be drawn from them, are in any degree doubtful," the jury must decide. *Keller v. New York Cent. R. Co.* 24 How. Pr. 172. This language was quoted and approved by this court in *Barton v. St. Louis & I. M. R. Co.* 53 Mo. 253, 14 Am. Rep. 415. "A demurrer of the evidence admits every fact which any of the evidence tends to prove, and also every fact that the jurors may, with any propriety, infer from the evidence before them. It should be allowed only when the evidence thus considered wholly fails to make proof of some essential averment." *Noeninger v. Vogt*, 88 Mo. 590, 5 West. Rep. 390. "If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but, if reasonable minds may differ as to the conclusions to be drawn from the given facts, then the question of negligence must be determined from all the surrounding circumstances." *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62; *Kelly v. Hannibal & St. J. R. Co.* 70 Mo. 604; *Tetherow v. St. Joseph & D. M. R. Co.* 98 Mo. 74; *Huhn v. Missouri Pac. R. Co.* 92 Mo. 440, 10 West. Rep. 405; *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 11 West. Rep. 453; *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 98. Judge Cooley in *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 90, clearly expresses our views on this important subject in the following language: "The case how-

ever, must be a very clear one, which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes, in his own mind, the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent person ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence, a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think that cases are not so numerous as has been sometimes supposed, in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. . . . Negligence, as I understand it, consists in a want of that reasonable care, which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The injury [inquiry] is therefore one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person, under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another, which he could not have reasonably anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances, affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

"Twelve men," says *Justice Hunt* of the Supreme Court of the United States in *Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 659, 21 L. ed. 745, "of the average of the community, comprising men of education, of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous

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conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts, thus occurring, than can one single judge."

Judge Porter's observations in *Ernst v. Hudson River R. Co.*, 32 How. Pr. 91, are apposite in this connection. He says: "Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed, and the inquiry naturally occurs to the mind whether we are less liable than jurors to err on questions of pure fact, pertaining to the ordinary affairs of life. Our law is framed upon the theory that on such questions the citizen can rely with more security on concurrent judgment of twelve jurors than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law. It is otherwise with jurors, charged with determining issues of fact, and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result that there is no room for honest difference between intelligent and upright men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that, if the questions were submitted to the jury they would find the culpable negligence of the plaintiff contributed to the injury. But we have had occasion recently to hear nonsuits of this kind justified on the novel ground that, unless the fact be determined in one way by the judge, it will be sure to be determined the other way by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind." Mr. Beach says: "In the ultimate determination of the question whether plaintiff was guilty of negligence, two separate inquiries are involved: *First*, What was ordinary care, under the circumstances? and *second*, Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which a jury can properly have nothing to do." Beach, Contrib. Neg. § 163.

"Legal," says Holmes in his work on the Common Law, p. 127, "like natural divisions, however clear in their general outlines, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury." Speaking of these doubtful cases, *Torrance, J., in Farrell v. Waterbury H. R. Co.*, 60 Conn. 289, uses this language: "In such cases the law itself furnishes no certain, specific, sufficient

standard of conduct, and, of necessity, leaves the trier to determine both what the conduct is, and whether it comes up to the standard, as such standard exists in the mind of the trier." On this subject, in *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584. Strong, J., says: "When the standard shifts, with the circumstances of the case, it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury. . . . Here the standard of duty was to be found as a fact, as well as the measure of its performance."

Let us view plaintiff's conduct in the light of these authorities, and the principles deducible from them, and see if the court ought to declare, as a matter of law, that he cannot recover. It will be conceded, we presume, that there is no law which gave plaintiff specific direction what he was required to do under the circumstances of this case. His conduct must therefore be judged by what men of ordinary prudence would usually have done if they had been situated as he was, the law having fixed no standard of conduct for him. Two questions of fact, then, must be answered in order to determine his rights: (1) What would a man of ordinary prudence usually have done under the circumstances? And (2) Did plaintiff's conduct conform to that standard? The trial court submitted both of these questions to the jury for determination. This, defendants attorney insists, was error. The contention is that the court ought to have fixed a standard of conduct for the plaintiff at the time and place of the injury, and the standard which, it is claimed, ought to have been thus fixed, is higher than that to which plaintiff did in fact conform; that is, it is claimed that the court ought to have instructed the jury that plaintiff, after stopping within five feet of the track, and being satisfied no train was in dangerous proximity, ought to have looked again, and, having failed to do so, he was guilty of contributory negligence, and therefore could not recover. We think this case lies in the "penumbra or debatable land" of Holmes. In this case, the triers of the fact were properly left to determine the standard of ordinary prudence which plaintiff was bound to conform, at his peril, and also whether plaintiff did in fact conform to that standard. We cannot conceive how we are more competent to determine what a man of ordinary prudence would have done, situated as Dr. Gratiot was, than twelve jurors, taken from the ordinary walks of life. The

demurrer to the evidence in this case concedes that plaintiff stopped his horse within five or six feet of the track; that he looked, and saw the train 800 or 1,000 yards away; that the engine emitted no smoke, and he took it to be a switch-engine, and not approaching him; that the train which injured him was running sixty miles an hour when the ordinance fixed its maximum speed at six miles an hour; that no whistle was sounded or bell rung within 800 yards of the crossing where the collision occurred; and that plaintiff had a right, when he attempted to cross the track, to assume, in the absence of evidence to the contrary, that the train that injured him had passed on schedule time, which was, at least twenty minutes before he attempted to cross. We do not say that we find all these facts in the record, but we say there was evidence tending to prove each one, and, under the rule announced, they must be conceded in determining this demurrer. We do not think that the inference of plaintiff's negligence, from these conceded facts, is so clear and irresistible that it ought to have been taken from the jury. The jury found that plaintiff "exercised that degree of care and prudence that an ordinarily careful and prudent person, under like circumstances, would have exercised," and that he did not approach the crossing "without paying any attention to his own safety," and did not trust "to the obligations imposed upon the railroad company to warn him of an approaching engine and train" and we think there was evidence that warranted such finding.

On the questions of inadvertence, not looking the second time, and mistake, we cite the following additional authorities in support of the view we take of the case: *Rennick v. New York Cent. R. Co.* 86 N. Y. 132; *Ernst v. Hudson River R. Co.* 32 How. Pr. 79; *Beisiegel v. New York Cent. R. Co.* 34 N. Y. 623; *Maginnis v. New York Cent. & H. R. Co.* 52 N. Y. 215; *Plummer v. Eastern R. Co.* 73 Me. 591; *Keess v. New York, N. H. & H. R. Co.* 67 Barb. 205; *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62; *Barton v. St. Louis & I. M. R. Co.* 52 Mo. 253, 14 Am. Rep. 418; *O'Connor v. Missouri Pac. R. Co.* 94 Mo. 150, 13 West. Rep. 587; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247.

This disposes of all the questions presented by the motion for rehearing, not fully covered by the original opinion.

The motion will be denied.

All of this division concur.

KANSAS SUPREME COURT.

RICE, BROWN & CO., *Plffs. in Err.*,
v.

William MOORE.

(.....Kan.....)

*1. An action upon the judgment of a

*Head notes by HORTON, Ch. J.

sister state must be brought in Kansas within five years, or it will be barred.

2. The revivor of a judgment in Ohio is merely a continuation of the original suit, so as to restore the judgment, and such revivor, made without an appearance by or personal service upon the defendant, who has been a resident of Kansas for more than five years

NOTE.—That the revival of a judgment in another state without personal service, will not 16 L. R. A.

prevent the bar of a state Statute of Limitations is established without conflict of authority

after the rendition of the original judgment, will not remove the bar of the Statute of Limitations of this state.

(May 7, 1892.)

ERROR to the District Court for Garfield County to review a judgment in favor of plaintiffs in an action brought to enforce payment of a judgment which had been recovered in the state of Ohio. *Affirmed.*

The facts are stated in the opinion.

Mr. H. R. Boyd for plaintiffs in error.

Mr. Milton Brown for defendant in error.

Horton, Ch. J., delivered the opinion the court:

On the 27th day October, 1879, Rice, Brown & Co., a firm doing business in the state of Ohio, recovered a personal judgment against William Moore in the county of Ottawa, in that state. There is an unpaid balance upon the judgment of \$249.80. The judgment became dormant under the statutes of Ohio; but at the January Term for 1889 of the court of common pleas of Ottawa county it was revived by publication. William Moore was not personally served with any notice that the judgment would be revived, nor did he enter any appearance in the proceedings of revivor. It is not alleged in the petition that the defendant, William Moore, is a non-resident of this state, or that he has ever been out of the state, or has absconded, or concealed himself. This action was commenced on the 1st day of May, 1889, nearly ten years after the rendition of the judgment in Ohio, and a few months after the revivor by publication in January, 1889. A general demurrer was filed to the petition, which was sustained by the court below. Rice, Brown & Co. complain of this ruling.

The question is whether the petition is sufficient, in view of the five-years Statute of Limitations prescribed by our statute. Section 18, Civil Code, *Burns v. Simpson*, 9 Kan. 658; *Marchinney v. Doane*, 40 Kan. 676. Where it is apparent from the face of the petition that the debt or claim is barred, a demurrer is properly sustained. *Zane v. Zane*, 5 Kan. 134; *Standliff v. Norton*, 11 Kan. 218. If there had been no revivor of the judgment in Ohio, we suppose it would be conceded, even if the judgment had not become dormant under the statutes of that state, no recovery could be had upon the judgment in this state, if Mr. Moore had been an actual resident of this state for five years—the full time of our limitation—after the rendition of the judgment. The authorities are to the effect that “remedies are to be governed by the laws of the country where the suit is brought.” The laws of this state where the action is brought must govern the limitation. It was recently decided by this court in *Bauserman v. Charlotte*, 46 Kan. 480, that, “where an action is brought in this state, upon a judgment of a

court of record of a sister state, which is in full force in that state, the Statute of Limitations of this state, and not that of the sister state, will control. *Bank of United States v. Donnelly*, 83 U. S. 8 Pet. 372, 8 L. ed. 978. It is contended, however, as the judgment was revived in Ohio in January, 1889,—a few months only before this action was commenced,—that the bar of the Statute of Limitations is not effective. A *scire facias* to revive a judgment is not a new suit, but the continuation of an old one. *Freeman, Judgments*, § 444; *Elsasser v. Haines*, 52 N. J. L. 10. In *Irwin v. Nison*, 11 Pa. 425, 51 Am. Dec. 559, it is said to be a common, plain, and familiar principle that a *scire facias* to revive a judgment . . . is but a continuation of the original action, and the execution thereon is an execution on the former judgment. The judgment on the *scire facias* is not . . . a new judgment, giving vitality only from that time, but it is the revival of the original judgment, giving, or rather continuing, the vitality of the original judgment, with all its incidents, from the time of its rendition.” *Penn. v. Klyne*, 1 Pet. C. C. 448; 2 T. & H. 379. Hence the proceeding in Ohio in January, 1889, must be regarded as a continuation only of the former suit or judgment. This seems to be admitted in the brief of counsel for plaintiff, for it is stated that “reviving a judgment is the act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force.” The revivor of the Ohio judgment removes its dormant quality only, but does not affect the Statute of Limitations in this state, or in any way prevent its running against the judgment rendered in 1879. We think, within the provisions of our Civil Code concerning limitations, the action upon the judgment ought to have been brought within five years after its rendition, if during all of that time Moore was personally present within this state. If brought after five years, it is too late. If, however, it be claimed that the revivor in Ohio is not a mere order that execution issue, but a new judgment, and therefore of full force as a new judgment of the date of January, 1889, no action can be brought thereon in this state, because Moore was not personally served in the proceeding for revivor, nor entered any appearance therein. *Kay v. Walter*, 28 Kan. 112. In the last case this court decided that a judgment rendered in Pennsylvania on May 26, 1864, and revived in 1867, and again in 1877, but sued on in this state in 1881, “was unquestionably barred by the five-years Statute of Limitations.” In the case of *Hepler v. Davis*, (Neb.) a judgment was recovered against A., in Illinois, in 1879. A. removed to Nebraska soon afterwards, and continued to reside in that state. In 1888 the judgment was revived in Illinois, without personal service upon

so far as we have learned. The decisions on the subject are cited in the above case and in the case of *Hepler v. Davis* (Neb.) 13 L. R. A. 565.

That it is otherwise where the revivor was obtained on personal service within the jurisdiction, see *Packer v. Thompson*, 25 Neb. 688, which is distinguished in *Hepler v. Davis*, *supra*.

tained on personal service within the jurisdiction, see *Packer v. Thompson*, 25 Neb. 688, which is distinguished in *Hepler v. Davis*, *supra*.

A., or an appearance by him. In December, 1888, nine years after the judgment was rendered, an action was brought upon it in Nebraska. In that state, as in ours, the limitation of five years as to judgments exists. It was held in that case, Maxwell, J., delivering the opinion, that an action upon a judgment of a sister state must be brought in Nebraska within five years, or it will be barred, and that the alleged revivor of the judgment in Illinois, in 1888, did not remove the bar of the Statute of Nebraska. That case is very similar to this one. See

also, *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Tessier v. Englehart*, 18 Neb. 167; *Marz v. Kilpatrick*, 25 Neb. 107.

Moore having resided in this state for five years after the original judgment against him was rendered and before the alleged revivor, or the commencement of this action, our Statute of Limitations prevents any action upon the judgment from being maintained.

The ruling and judgment of the District Court will be affirmed.

All the Justices concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel K. WILSON, *Plff. in Err.*,
v.

City of TRENTON.

(.....N. J.)

*1. In a proceeding to lay out and open a street, the charter of Trenton requires notice
*Head note by MAGR, J.

NOTE.—What constitutes "personal service" of papers.

On principle, the view taken in the principal case, that there can be personal service of some papers without direct delivery by the person serving to the one to be served strikes us as unsound and we do not find it supported by authority. Slight support for it is found in Wade on Notice, 2d ed. §134b, where it is said that service of notices by leaving them at the party's place of abode "has been denominated personal, to distinguish it from service by mail; and substituted, as contradistinguished from service strictly personal."

In Hurd v. Davis, 13 How. Pr. 57, where service of an answer by mail was held irregular because not mailed at the postoffice indicated by the defendant's attorney as his residence, Harris, J., remarked: "Had it in fact reached the attorney in time, it might have been treated as a good personal service from that time."

In Burdett v. Lewis, 7 C. B. N. S. 791, Erie, Ch. J., said: "Upon inquiry, we find the rule to be perfectly well settled, that service of a notice or rule by putting it under the door of the attorney's office or chambers would be made complete by calling the next morning to ascertain that it had been received, or by some other evidence that it had duly come to hand; but that, without some such evidence, it would not be good service."

Alderson, B., said in Goggs v. Huntingtower, 12 Mees. & W. 503: "Service means serving the defendant with a copy of the process, and showing him the original if he desires it."

When a statute requires service of a paper on a person, it means personal service, unless some other mode is specified. Rathbun v. Acker, 18 Barb. 388; McDermott v. Board of Police, 25 Barb. 635; People v. Lockport & B. R. Co. 13 Hun, 211.

A statute requiring personal service of a notice is not satisfied by a notice by mail, though it reaches the party to be served. Rathbun v. Acker, *supra*.

A clause in an order to show cause directing "service of a copy of this order on plaintiff's attorney" requires personal service. Marcele v. Saltzman, 66 How. Pr. 206, relying on Rathbun v. Acker, *supra*. In the first case service by mail was held irregular notwithstanding the paper was received by the plaintiff's attorney within the time fixed for service.

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See also 18 L. R. A. 498, 500.

of the report of the board of assessors to be given to nonresident persons, assessed, by publication, and to be served upon residents assessed. *Held*: (a) That the mailing of a copy of the notice to the address of a nonresident was insufficient service.

(b) That the service on residents must be personal; but personal service, within the meaning of the statute, would appear from the fact of the de-

A statutory requirement that a rule be served personally is not satisfied by leaving a copy at the "notorious place of abode" of the party. Bond v. Whitfield, 28 Ga. 537.

In State v. Jacobs, 47 N. C. 52, it was held that under the statute subjecting free negroes immigrating into North Carolina to prosecution if they failed to remove within twenty days after being "informed" thereof, notice to remove must be given personally and was not sufficient if left at the residence of the party.

Under an ordinance providing for prosecution after "the party shall be served with a notice" and fails to comply, notice must be served personally and is insufficient if left at his residence with his wife. St. Louis v. Goebel, 22 Mo. 295.

Service of the notice of tax sale by handing it to the wife of the occupant is not sufficient service upon him, unless done in his presence. Gage v. Bani, 141 U. S. 344, 35 L. ed. 776.

Under a statute giving highway officers power to make certain improvements and charge the expense to the adjoining owner, if he fails to make the same after written notice has been "personally given" to him, the notice is not properly served by leaving it at his residence, although it afterwards came to his hands. Simons v. Gardiner, 6 R. I. 255.

A statutory requirement that a person shall have "notice in writing" is not satisfied by simply reading the notice to the person but a copy thereof must be left. Hart v. Gray, 3 Sumn. 339.

A statute requiring a party taking a deposition to "either cause personal notice to be given by the magistrate taking such deposition to the adverse party, or a citation signed by a justice to be served on the adverse party in the same manner as a writ of summons," &c. by copy, is not satisfied by the officer serving a citation merely reading it to the party to be notified. Fitts v. Whitney, 32 Vt. 539.

Under a statute providing that a notice "shall be served personally, or by copy left with or at the usual place of abode of each occupant" it may be served by reading it to the person to be served. Green v. State, 56 Wis. 533.

The court said, "Of course, leaving a copy with the occupant would be personal service, as ordinarily understood, but it is not the only method of personal service. Here the Legislature have expressly prescribed this method in addition to per-

livery of a copy of the notice to an agent duly authorized to receive it, or from circumstances justifying an inference of the actual delivery of a copy to the person to be affected thereby.

2. The return showed that the only service on some residents assessed was by leaving a copy of the notice at their residence with a member of the family. *Held*, that this did not show the service required by the statute.

(November 17, 1891.)

ERROR to the Supreme Court to review a judgment confirming proceedings for the laying out of a highway and the ascertainment of the damages and assessment of benefits. *Reversed*.

The facts are stated in the opinion.

Mr. George M. Robeson for plaintiff in error.

Messrs. John Bellstab and William M. Lanning for defendant in error.

Magie, J., delivered the opinion of the court:

The principal question presented in this case

was raised by a reason filed on the return of the certiorari in the supreme court, objecting to the assessment upon plaintiff in error on the ground that certain notices had not been given as required by law. The law regulating the mode in which lands in the city of Trenton may be taken and condemned for public highways and assessments may be imposed to pay for the same, is, in the respect now in question, contained in the provisions of the "Act to Provide for the More Efficient Government of the City of Trenton," approved March 19, 1874, (Laws 1874, p. 831.) By the terms of that Act a board of assessors is required to first assess the damages sustained by each owner of land taken, including the value of such land, and to next assess the amount of such damages upon lands benefited, and to then report their action on both assessments to the common council. By section 83 of the Act the common council is required within a month from the presentation of the report, "to cause a notice of the proportion of said assessment and costs to be served upon every person, his or her guardian or legal representative, against whom the same is made, and whose residence

sonal service and have, therefore, pretty clearly shown that by declaring that the notice may be personally served, they meant to include something other and different than leaving a copy with the occupant."

In *Stillwell v. Kennedy*, 51 Hun, 114, it is held that under the statute requiring the poor officer of a city upon being informed by a county superintendent of the poor that a pauper is being supported at his city's expense to "notify" the superintendent that he denies the liability of his city, if he desires to contest it, personal service of a notice upon the superintendent is not necessary but that receipt of the notice by mail in due time is sufficient.

Section 426 of the New York Code of Civil Procedure provides that personal service of a summons upon a defendant being a natural person be made by delivering a copy thereof "to the defendant in person."

The delivery of a summons to the right defendant by one upon whom it was served by mistake at the house of the defendant is not personal service thereof. *Williams v. Van Valkenburg*, 16 How. Pr. 152.

In *Van Rensselaer v. Palmatier*, 2 How. Pr. 24, the defendant concealed himself from the sheriff who had process to serve on him. The sheriff delivered the process to a person occupying a part of defendant's house and requested him to give it to the defendant. The defendant told such person to take the process back to the sheriff with the statement that it had been served on the wrong man. The paper never came to the hands of the defendant although he did not deny knowledge of its contents. This was held not valid personal service.

In *Wallis v. Lott*, 15 How. Pr. 567, a motion to set aside a judgment for irregular service was denied because (forsooth) it appeared that the defendant received the summons the next day after it was served upon another person by mistake, and more than twenty days before judgment was entered, and because he consulted counsel as to the sufficiency of such service, and allowed considerable time to elapse before making the motion.

A service forcibly made by thrusting the papers into the bosom of the person to be served is void. In case such person refuses to receive them after being informed of their nature valid personal service may be effected by leaving them in any appro-

prate place in his presence. *Davison v. Baker*, 24 How. Pr. 39.

In *Van Rensselaer v. Petric*, 2 How. Pr. 94, it was held that to constitute valid personal service of declarations, "they should have been given or offered to the defendant, within his reach, or laid down within his reach."

Placing the paper on the defendant's shoulder after he had refused to receive it is valid service thereof. *Bell v. Vincent*, 7 Dowl. & R. 233.

In *Niles v. Vanderzee*, 14 How. Pr. 547, a special term decision, it appeared that after the commencement of publication for constructive service of the summons in an attachment suit against an absconding debtor, the latter returned and in answer to an inquiry as to the amount claimed was handed a copy of the summons and complaint by the plaintiff's attorney which he examined but laid down and refused to retain. It was held that, inasmuch as the plaintiff's attorney did not inform the defendant that it was intended to abandon the service by publication and to rely upon the personal service, entry of judgment as upon personal service was irregular.

There is no valid personal service of the summons and complaint where after receiving and examining them the defendant handed them back to the person attempting to make the service, who carried them away without offering to leave copies. *Beekman v. Cutler*, 2 N. Y. Code Rep. 51.

An admission of service of a summons and complaint will not support a judgment unless it states that they were personally served. *Mead v. French*, 23 N. Y. 235.

Under Neb. Code Civ. Proc. §72, providing that "an acknowledgment on the back of the summons, . . . is equivalent to a service," such acknowledgment, although made in another state, is equivalent to actual legal service of such summons by the sheriff to whom it is addressed, made in his proper bailiwick. *Cheney v. Harding*, 21 Neb. 65.

Leaving a notice of appeal on a table in an attorney's office in the presence of the attorney who refused to receive it is a sufficient service thereof. *Nathan v. Sutphen*, 68 Cal. 257.

Delivery of a notice of appeal to an attorney which is returned to the party serving with the understanding that the latter shall serve it on the client, is not service thereof on the attorney. *Earl v. Chapman*, 3 E. D. Smith, 214. J. G. G.

is in said city, and also to cause like notice, directed to such persons as do not reside in said city, to be inserted in one or more of the newspapers of said city for the space of one month. It is also provided that, if within two months from the presentation of the report, two thirds of the persons assessed file with the city clerk their refusal in writing to agree to the assessments, no proceeding to enforce their collection shall be had; but if within that period no such refusal is filed, the assessments become binding and conclusive. They may be collected by action, or by sale of the land in respect to which they were made. While the Act does not expressly declare that the assessments will thus become binding only in case notice to those assessed has been given as required, yet this intent is so plain that it was conceded in the argument that such construction must be given to these provisions. The Legislature may prescribe how such notices may be given. The mode prescribed must be strictly followed, and the proceedings must show the prescribed notice. *State v. Guttenberg*, 38 N. J. L. 419; *State v. Elizabeth*, 40 N. J. L. 274; *White v. Bayonne*, 49 N. J. L. 311, 6 Cent. Rep. 536. When no mode of giving notice has been prescribed, it was also conceded that what is called "personal service" is required, and must appear. The Trenton charter directed notice to nonresidents to be given by publication; to residents, to be given by service on them, which must be construed to be personal service. The return shows that assessments were imposed on sixteen persons, of whom one was nonresident, and the others, including the plaintiff in error, were residents. It also shows that the common council directed the city clerk to give notice to them in the manner required by the charter. How he gave the notices only appears by his unverified report to the council. I cannot discover that the charter makes the service of such notices a part of his official duty, and so within the sanction of his official oath. Had the council directed any citizen to serve these notices, and then acted upon his letter stating the manner of service, the cases would seem to be undistinguishable. But this objection was not argued, and has not been considered. Assuming that the report of the city clerk properly exhibits the mode of service of the notices, it thus appears that the only service upon the nonresident was by mailing a copy of the notice to his address at Woodbury, N. J. This was obviously not a compliance with the Act, which required in that case notice to be given by publication in a newspaper.

It further thus appears that service of the notice on ten of the residents assessed, including the plaintiff in error, was only made by leaving a copy of the notice at the person's residence, with a member of the family. It is contended that this does not show such service as is required by the Trenton charter. Personal service, within the meaning of such acts, is to be distinguished on one hand from what may be called "official service," such as the personal service of a summons in an action at law, which is required to be made by the officer on the defendant in person; and, on the other hand, from substituted or constructive service, which is such as by law conclusively results

from the performance of certain prescribed acts, such as publication, posting, and the like. The service required by this and similar statutes need not be made by an official or in any particular mode. If the required notice is conveyed to the person to be affected thereby, it is sufficient. When a question of such service arises in a court of law on the trial of an issue, evidence of actual delivery to the party in person is conclusive proof. But, in the absence of such direct evidence, indirect or circumstantial evidence would be admissible, and, if it justified a reasonable inference that the notice came to the hands of the party to be affected, would be sufficient proof. Whether the required service has been made in a proceeding like that before us must be determined by the facts appearing in the return. It will not, however, follow that the service must be pronounced insufficient because it is not stated that the notice was actually delivered to the person assessed in person; for if the facts stated justify a reasonable inference that the notice actually came to his hands, in the absence of counter-proof, that inference should be drawn. Moreover it cannot admit of doubt that a person to be affected by such a notice may expressly authorize an agent to receive such a notice for him, and that delivery of the notice to such an agent would be a delivery to his principal, which would be a personal service, within the meaning of such statute. But the existence of an agency, and the authority of an agent, may be implied from the acts and conduct of the principal. So if the facts stated raise the implication of an agency, with authority to receive such a notice for the principal, delivery of the notice to the agent so authorized would also be sufficient service thereof.

Similar views have been taken by English courts in the respect to the service of notice to quit, which in order to terminate certain tenancies must be served upon the tenant. In *Buross v. Lucas*, 5 Esp. 153, Lord Ellenborough held that proof that such a notice was left at the house, where the tenant lived would not sufficiently establish its service. But in *Smith v. Clark*, 9 Dowl. P. C. 202, where the proof was that notice had been delivered to the wife of the tenant at the door of his house, she being informed that it was a notice for him, it was left to the jury to say whether an actual delivery should not be inferred. The verdict showed that the jury found that there had been due service of the notice, and Lord Denman held that the inference could properly be drawn from the facts. Of like import are the cases of *Griffiths v. Marsh*, 4 T. R. 464; *Doe v. Dunbar*, Mood. & M. 10; *Doe v. Watkins*, 7 East, 551; *Widger v. Browning*, 2 Car. & P. 523; *Prior v. Ongley*, 10 C. B. 25. In *Tanham v. Nicholson*, L. R. 5 H. L. 561, it was held in the house of lords that when a tenant was shown to have an agent empowered to receive all communications for him the delivery of a notice to quit to such an agent was effectual service on the tenant. Lord Westbury held that, if the circumstances were insufficient to establish an agency, they might raise a presumption of actual delivery of the notice to the tenant, which in the absence of contradiction would be sufficient.

When a question arose in our supreme court in respect to the proper mode of serving a rule of court on a defendant corporation, it was said by the learned justice who delivered the opinion that if a defendant was an individual such a rule must be served on him personally, but if he had appeared by attorney the service might be made on the attorney. *Dock v. Elizabethtown Steam Mfg. Co.* 84 N. J. L. 312. But this does not carry the inference that, when no attorney had appeared, such service could only be established by proof of an actual delivery to defendant in person. The service upon the attorney was sufficient, because he was defendant's agent in the suit. On like grounds the sufficiency of a service upon any agent duly appointed and authorized may be sustained, and the view is not inconsistent with the admission of proof of service from circumstances from which actual delivery may be inferred.

While, therefore, I conclude that the contention in behalf of plaintiff in error that the service of the notices in question upon him and other residents of Trenton must appear to be of that sort which is called personal must be sustained, I do not agree that such service will only appear by a statement of actual delivery thereof to them in person. On the contrary I deem that such service would appear either from the fact of delivery to a duly accredited agent to receive such notice or from circumstances justifying an inference of actual delivery. But, looked at in this light, it is obvious the proceeding before us does not show any sufficient service of notice on the persons assessed who were residents. The only fact stated is that a copy was left at the residence with a member of the family. It does not appear of what age or degree of intelligence the member of the family was, nor whether accustomed to receive communications for the person affected by the notice. There is nothing therefore, which shows delivery to an accredited agent. Nor is the single circumstance which is stated sufficient to justify an inference of the actual delivery of a notice. This conclusion is fatal to the assessment imposed on the plaintiff in

error. But if that assessment be set aside, and the award for lands taken remain undisturbed, plaintiff in error may collect from the city the amount thereof. Unless that amount can by some subsequent proceeding be imposed on lands benefited according to the plain intent of the charter, the city cannot reimburse itself.

Extensive powers have been given to the courts by the "general Act respecting taxes, assessments, and water-rates" (Supp. Rev. 602) to reimpose any defective assessment upon lands in fact liable thereto. So under other general Acts a partial reassessment may be made by the city. But the charter of Trenton is peculiar. Power has been given the city to condemn lands for public streets, and to assess the expense on lands benefited; but if two thirds of those assessed object in the specified mode the assessments for benefits cannot be collected. Moreover the city may within a specified time abandon the proposed improvement, when the right of the owner to collect the award, and the right of the city to take the land, will cease. Section 84. These peculiar features, designed for the relief of the assessed and of the city, remove this case out of the operation of the first Act above referred to. For these lands are not at all events subject to these assessments, but only in case the due proportion of the assessed fail to object, and the city does not exercise its option of abandoning the improvement. The right to object, and to have all parties interested so notified that they may object, and the right to abandon, ought not to be taken from the parties. Those rights can only be preserved by setting aside the whole report, so that a new report can be made; for they can only be exercised within a limited time after the presentation to council of the report. The whole report, with the resolution of January 21, 1890, should be set aside.

Other objections to the proceeding were strongly urged in argument, but on consideration no error has been discovered in the determination of the supreme court thereon.

The judgment must be reversed.

MINNESOTA SUPREME COURT.

Annie PURCELL, *Reept.*,
v.
ST. PAUL CITY R. CO., *Appt.*

(.....Minn.....)

*1. If the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought.

*Head notes by GILFILLAN, Ch. J.

2. A passenger injured by negligence of the carrier is entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury.

(January 12, 1893.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a general demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

NOTE.—For a note on fright as a basis of a cause of action, see *Ewing v. Pittsburgh, C. C. & St. L. R. Co. (Pa.)* 14 L. R. A. 686, in which case it was held that fright alone was not the basis of a cause of action although that case was distinguishable from 16 L. R. A.

this, being one in which a woman was frightened by cars thrown by collision against her dwelling-house, and did not involve the duty of a carrier toward a passenger.

Mr. Henry J. Horn, for appellant :

The alleged negligence of the defendant was not the natural and proximate cause of the injuries complained of.

The plaintiff evidently assigns her fright or mental distress as the direct consequence of the alleged negligence of the defendant, and the alleged physical injury which ensued as the consequence of the fright.

It appears, also, that the plaintiff was in that delicate condition in which one so situated is susceptible to groundless alarms, and which accounts more naturally and fairly for her alleged grievance than the conduct of the defendant.

Johnson v. Wells, Fargo & Co. 6 Nev. 234, 3 Am. Rep. 245; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Canning v. Williamstown*, 1 Cush. 452; *Lehman v. Brooklyn R. Co.* 47 Hun, 355; *Wulstein v. Mohlman*, 25 N. Y. S. R. 691; *Flemington v. Smithers*, 2 Car. & P. 292; *Victorian R. Comrs. v. Coultas*, 13 App. Cas. 222; *Renner v. Canfield*, 38 Minn. 90; *Keyes v. Minneapolis & St. L. R. Co.* Id. 290; 3 Suth. Damages. 259, 260, note 5; 2 Greenl. Ev. § 267; Cooley, Torts, 2d ed. p. 29.

In an action against a common carrier for injuries sustained by a passenger, an instruction allowing the jury in estimating damages to consider the character of the plaintiff's "pain of mind," aside and distinct from his bodily suffering, is error.

Johnson v. Wells, Fargo & Co. supra.

One who obtains property by duress of threats is not liable for consequential mental distress and physical suffering caused by such distress as such damages are too remote.

Wulstein v. Mohlman, supra.

The mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury.

Keyes v. Minneapolis & St. L. R. Co., and *Renner v. Canfield, supra.*

Messrs. Johnston W. Straight, and **Leonard A. Straight**, for respondent:

The physical bodily injury complained of and caused to the plaintiff was the direct and proximate result of the negligent, careless, and tortious act of the defendant.

An efficient adequate cause being found it must be considered the true cause, unless some other cause not incident thereto, but independent of it is shown to have intervened between it and the result.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259.

If the state of facts complained of was brought about through the negligence of defendant and it produced directly, without an efficient intervening cause, the bodily injury complained of, then clearly the defendant is liable. The new cause or force, if any, was set in motion by the first, original cause, the negligent act of the company, and therefore the bodily injury complained of comes equally within the rule and the authorities, whether the effect was produced directly upon the body of plaintiff or through the medium of the mind and nervous system.

Montoya v. London Assur. Co. 6 Exch. 451; *Smith v. St. Paul, M. & M. R. Co.* 30 Minn. 169; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147; 16 I. R. A.

East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315; *Borce v. Danville*, 53 Vt. 183; *Oliver v. LaVale*, 36 Wis. 592; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 351; *Seger v. Barkhamsted*, 22 Conn. 290; *Ford v. Monroe*, 20 Wend. 211; *McKinny v. Chicago & N. W. R. Co.* 44 Iowa, 322, 24 Am. Rep. 748; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Sneeby v. Lancashire & Y. R. Co.* L. R. 1 Q. B. Div. 42; *Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159; *Montoya v. London Assur. Co.* and *Milwaukee & St. P. R. Co. v. Kellogg, supra*; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349; 2 Redf. Railways, 4th ed. 238; Wharton, Neg. §§ 93, 94.

Gillilan, Ch. J., delivered the opinion of the court:

Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson street, St. Paul; that, when the car reached the intersection of that line with the defendant's cable-car line running on East Seventh street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, as follows: "The primary cause may be the proximate cause of a disaster, though it operate through successive instruments; as, an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question al-

ways is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to-wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease, a mental shock or disturbance sometimes causes injury or illness of body especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendants negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavor to escape it by leaping from the car or coach, and in doing so is injured, he

may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach he would not have been injured. The endeavor to escape is not of itself contributory negligence. *Wilson v. Northern Pac. R. Co.*, 28 Minn. 278. In such case though, there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggested that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendants negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as anyone, and is entitled to at least as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, anyone injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not, because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.

DISTRICT OF COLUMBIA SUPREME COURT, GENERAL TERM.

John A. BUTLER

v.

Richard J. JOYCE.

(.....D. C.....)

An action at law on a lost negotiable note cannot be maintained although the loss happened after maturity.

(October 23, 1891.)

MOTION by plaintiff for new trial upon a bill of exceptions taken at the Trial Term during the trial of an action upon a promissory note. *New trial refused.*

The facts are stated in the opinion.

Mr. J. J. Darlington for plaintiff, in support of the motion.

Mr. H. E. Davis for defendant, *contra*.

NOTE.—*Right of action at law on lost negotiable paper.*

In several states as well as in England statutes now provide expressly for bringing actions on lost bills and notes or other instruments, but in some jurisdictions the question is still one to be determined by the decisions.

Non-negotiable paper.

If a note is not negotiable, an action at law will
16 L. R. A.

lie upon it after it is lost, *Wain v. Bailey*, 10 Ad. & El. 616.

Where the negotiability of a promissory note is restrained by statute, a recovery on a lost note may be had in an action at law. *Reynolds v. French*, 8 Vt. 85, 30 Am. Dec. 456; *Clark v. Reed*, 13 Smedes & M. 554; *Wofford v. Holmes County Board of Police*, 44 Miss. 579.

So a sealed note not being negotiable, a suit at law may be brought upon it after its loss. *Whiteside v. Wallace*, 3 Speer, L. 128.

See also 24 L. R. A. 444; 38 L. R. A. 843; 40 L. R. A. 244.

James, J., delivered the opinion of the court:

The papers in this cause having been mislaid or lost, it is heard upon stipulation of the attorneys of the parties that the state of the record was as follows:

"The action was upon an alleged promissory note of the defendant, dated Washington, D. C. September 26, 1876, promising to pay to Ann Joyce, or order, twelve months after date \$512.86, for value received, with interest until paid, at the rate of 6 per cent per annum, payable at the National Metropolitan Bank, and indorsed by the said Ann Joyce to the plaintiff. The declaration contained a special count, in the usual form, upon the said promissory note, together with the common counts, and was accompanied by an attachment in the usual form, of certain property interests of the defendant, based upon his nonresidence in the District of Columbia. The pleas were, that the defendant was not indebted as alleged; that he never was indebted as alleged; that he did not promise as alleged; that the cause of action did not accrue within three years; and that the said promissory note was not

indorsed by the payee, on which pleas there was the usual joinder of issue.

At the trial below, the plaintiff testified that the note was executed and indorsed as alleged, that the consideration for the note was money loaned by him to the defendant, the payee being merely as accommodation indorser; that the plaintiff continued the holder of said note from the time he received it until the time of trial; that it was duly presented, and dishonored; that the defendant acknowledged his liability and promised payment within three years before action brought; that, the said note not being paid, the plaintiff placed it for collection in the hands of John F. Riley, Esq., then a member of the bar of this court; that the said Riley subsequently left the jurisdiction without having collected the note, or returned it to the plaintiff, that the plaintiff made diligent efforts to obtain the said note, both by correspondence with the said Riley, and by having search made among his legal papers which remained in the city, but that the said note could not be found and was hopelessly lost and remained wholly unpaid. Thereupon, upon the motion of the defend-

Presumptions.

A lost note will not be presumed to be negotiable so as to defeat an action thereon at law. *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126; *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 362.

The same rule applies on an objection that no bond or indemnity was given which is necessary by statute only in case the lost note was negotiable. *Wright v. Wright*, 84 N. Y. 437.

It will not be presumed that a lost note was payable to bearer or had been in fact negotiated by the payee prior to its loss if it was payable to order. *Lazell v. Lazell*, *supra*; *Chaudron v. Hunt*, 8 Stew. (Ala.) 31, 20 Am. Dec. 60.

Negotiable paper.

The fair deduction from the decisions is that an action at law will not lie upon a lost negotiable instrument which had not when lost become subject in the hands of any holder to such equities as might exist in favor of the maker.

In early English cases in, which the question of jurisdiction between law and equity was not discussed it was held that there could be no recovery on a lost note without showing that defendant would not be again subject to pay it. *Dangerfield v. Wilby*, 4 Esp. 159; *Davis v. Dodd*, 4 Taunt. 602.

In *Hart v. King*, 12 Mod. 310, an action on a protested bill that was held good on defendant's admission that he drew it.

No action at law lies on a lost negotiable bill which has been accepted. *Ramuz v. Crowe*, 1 Exch. 167.

One who loses a bill indorsed in blank which was given for a debt cannot sue either on the bill or for the debt. *Champion v. Terry*, 2 Brod. & B. 295.

So held also without any showing as to the indorsement of the lost bill. *Crowe v. Clay*, 9 Exch. 604.

If a lost bill was indorsed no action at law will lie upon it even by giving indemnity. *Pierson v. Hutchinson*, 2 Campb. 211.

But it is otherwise if the indorsement was special. *Long v. Bailie*, 2 Campb. 214, note.

The assignee of a note which is lost with a blank indorsement upon it cannot sue thereon at law. *Willis v. Cressey*, 17 Me. 9.

An action at law will not lie on a lost negotiable 16 L. R. A.

note transferable by delivery. *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 610.

The fact that the sum involved is too small for a suit in equity, will not give a right to sue at law on a lost note and establish the loss by plaintiff's own oath. *Chancy v. Baldwin*, 46 N.C. 78; *Grant v. Reid*, Id. 512.

But in several early American cases an action at law was maintained on a lost negotiable bill or note without any discussion of the question of jurisdiction. *Robinson v. Bank of Darien*, 18 Ga. 66; *Meeker v. Jackson*, 3 Yeates, 442; *Aborn v. Bosworth*, 1 R. L. 401; *Anderson v. Robeson*, 2 Bay, 496.

In the Pennsylvania and Rhode Island cases plaintiff's own testimony was allowed to establish the loss.

In Massachusetts it is held that an action may be maintained at law upon a lost note on giving suitable indemnity and that the objection against the jurisdiction of a court of law to order or judge of the sufficiency of an indemnity is rather ideal than solid. *Fales v. Russell*, 16 Pick. 315.

In Connecticut also it is said that an action at law will lie on a lost negotiable note by giving indemnity. *Bridgeport v. Masonville Mfg. Co.* 24 Conn. 546, 91 Am. Dec. 744.

In this case, however, the note was payable to order and was not indorsed.

In an early Connecticut case it was held that plaintiff in an action upon a note which was not produced must show that if not destroyed at least it could not be again collected of the defendant by a bona fide holder, the question of jurisdiction was not raised. *Swift v. Stevens*, 8 Conn. 431.

In Louisiana, where the civil law prevails, the question of jurisdiction as between law and equity on a lost note does not arise, and a suit will lie upon it by indemnifying the defendant. *Nagel v. Mignot*, 8 Mart. 488; *Lewis v. Petayvin*, 4 Mart. N. S. 4.

Paper overdue or otherwise subject to equities.

On notes or bills lost after they were due, an action at law may be maintained. *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571; *Mowery v. Mast*, 14 Neb. 510; *Sloo v. Roberts*, 7 Ind. 128; *Elliot v. Woodward*, 18 Ind. 183.

Other decisions like the main case hold, on the contrary, that although a note payable to bearer was due at the time it was lost, an action at law

ant's counsel the justice presiding at the trial struck out all the testimony of the plaintiff concerning the said note, against the objection of the plaintiff, who then and there excepted to said action of the court.

"Thereupon the plaintiff further offered to prove by testimony of William G. Moore, Esq., notary public, that the said notary presented the said promissory note at its maturity, at the bank at which it was made payable, and demanded payment thereof, but was answered by the discount clerk, "no funds;" that he thereupon protested the said note, and made a true copy thereof, which he produced at the trial; but the justice presiding, upon the objection of the counsel for the defendant, refused to receive any portion of the testimony of said William G. Moore, to which ruling of the court the plaintiff then and there excepted.

"Thereupon, the plaintiff offering no further testimony, the attorney for the de-

fendant moved the court to direct a verdict for the defendant, which motion the justice presiding, against the objection of the plaintiff, granted, and the plaintiff then and there excepted thereto.

"A bill of exception, presenting the foregoing facts, the rulings of the presiding justice and the exceptions thereto of the plaintiff, was thereupon duly settled and signed and sealed by said justice."

The question to be considered is, whether an action at law may be maintained against the maker on a lost negotiable promissory note, and, if it may be, whether such an action may be maintained in the circumstances of this case.

The plaintiff refers to the case of *Boteler v. Dexter*, decided by this court at a recent term, (19 Wash. L. Rep. 374, March 9, 1891,) as an authority showing that an action at law on a lost promissory note was sustained even against one whom was held to have placed

cannot be brought by the owner as the holder could make out prima facie a cause of action and the maker would be exposed to the hazard of showing the facts by legal evidence. *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 236; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609.

So chancery has jurisdiction of a suit on a lost note although it was due when lost. *Chewning v. Singleton*, 2 Hill, Ch. 371.

So in England the indorsee of a bill who has lost it cannot recover at law against the acceptor although it was overdue when lost and he offers indemnity, as by the custom of merchants, the acceptor is entitled for his own security to the possession of the bill when he pays it. *Hansard v. Robinson*, 7 Barn. & C. 90; *Poole v. Smith*, Holt, N. P. 144.

If a note although negotiable was payable to order and was not indorsed at the time when it was lost an action may be maintained upon it. *Chaudron v. Hunt*, 3 Stew. (Ala.) 21, 20 Am. Dec. 60.

In many cases it is said that if a note was not negotiable or if negotiable had not in fact been negotiated before its loss, an action may be maintained upon it after its loss. This statement is apparently intended to apply only to negotiable notes payable to order and by the phrase "had not been negotiated" it is evidently meant had not been indorsed in blank or in such manner as to be collectible in the hands of a wrongful holder. *Ibid*; *Moore v. Full*, 42 Me. 450, 66 Am. Dec. 297; *Pintard v. Tackington*, 10 Johns. 104; *McNair v. Gilbert*, 3 Wend. 344.

If a note pass into the hands of the holder charged with all the equities which exist against the original holder, the action upon it may be at law, although it is lost. *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 371.

A note payable to order lost without any indorsement or with a restricted indorsement upon it will sustain an action at law. *Posey v. Decatur Bank*, 12 Ala. 402; *Branch Bank at Mobile v. Tillman*, Id. 214; *Depeew v. Wheelan*, 8 Blackf. 485; *Bean v. Keen*, 7 Blackf. 152; *Dean v. Speakman*, Id. 317; *Templin v. Krahn*, 3 Ind. 373.

If a bill payable to order is lost without any indorsement, this will not defeat an action against the acceptor for the debt on account of which the bill was drawn. *Rolt v. Watson*, 12 Moore, 510, 4 Bing. 273.

If the Statute of Limitations will be a good defense against a bona fide holder of a lost note an action at law may be brought upon it without any indemnity. *Torrey v. Foss*, 40 Me. 74.

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Action against indorser.

An action at law against an indorser cannot be maintained upon a lost note where a bond to indemnify him against being called on a second time to pay the note, will not afford him adequate protection. *Tuttle v. Standish*, 4 Allen, 451, 31 Am. Dec. 712.

This distinction between an action against an indorser and the maker of a lost note is based on the difference in their relations to it, as the indorser after payment has a property interest in the note and may need it to use in various ways as the evidence of his own right therein. *Ibid*.

Loss pending action.

The destruction of a note pending an action at law upon it is not fatal to such action. *Bilas v. Covington & L. Turnp. Co.* 9 Dana, 235; *Renner v. Bank of Columbia*, 23 U. S. 9 Wheat. 551, 6 L. ed. 166; *Boteler v. Dexter*, 19 Wash. L. Rep. 374; *Moore v. Full*, 42 Me. 450, 66 Am. Dec. 297; *Jones v. Fales*, 5 Mass. 101.

But an action at law cannot be maintained on a lost note payable to bearer, even if it was lost after the commencement of the suit. *Kirby v. Sigson*, 2 Wend. 550.

The loss of a note pending an action upon it does not require the plaintiff to proceed as is required by statute in an action upon a lost note. *German Sav. Bank v. Kerlin*, 53 Mo. 332.

Destroyed bill or note.

If a bill or note is totally destroyed an action may be brought thereon at law. *Branch Bank at Mobile v. Tillman*, 12 Ala. 214; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 371; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609.

So it has been expressly decided that equity never had jurisdiction of a suit on a bill of exchange that was destroyed and not merely lost. *Wright v. Maidstone*, 1 Kay & J. 701.

In *Edwards v. McKee*, 1 Mo. 123, 13 Am. Dec. 474, a count in a declaration declaring on a lost promissory note was held bad on demurrer, but the decision seems to be based on the fact that the note had been destroyed by time and accident, which appeared in other counts and the decision does not directly touch the question of a lost note, while on the question of a destroyed note it stands utterly at variance with other decisions. B. A. R.

his name on the note in the character of indorser. It appears in the report of that case that a prior suit had been brought against the same defendant, that the case came on for trial, that the note was presented and proven at the trial, that then, for some reason, the case was dismissed "without prejudice," and that thereafter the suit in question was brought on June 15, 1887. It further appeared that on or about February 28, 1888, after the suit had been pending for some time, the plaintiff lost the note and never had been able since to find it, although he had searched for it diligently. As to the objection that no recovery could be had at law upon a lost note, the court said: "If the first of these questions (namely, the questions just stated), were an open one, it would be worthy of the utmost consideration, and many potent reasons might be arrayed in support of, as well as against it, and there are many eminent authorities on either side. But we regard it as settled in this jurisdiction by the decision of the Supreme Court of the United States, in the case of *Renner v. Bank of Columbia*, 22 U. S. 9 Wheat. 581, 6 L. ed. 166, where the question was treated as one of evidence, and it was held that where the original note, having been in court but a short time before, and introduced in evidence in another trial, was thereafter lost by accident, and upon thorough search could not be found, there being nothing to indicate a suspicion that it was purposely withheld, and no doubt existing as to its real contents, parol evidence as to such contents might be given and a recovery had upon it. That case was in all material respects like the one under consideration, and must, we think, govern it."

It appears that in the case referred to as binding on this court, the action was against an indorser. *Mr. Justice Thompson*, speaking for the majority of the court, there said: "The only remaining question arises out of a bill of exceptions, taken upon the trial, to the decision of the court below, admitting secondary evidence of the contents of the note. And it has been contended that no such evidence was admissible, unless it appears that the note was destroyed. The rule with respect to the admission of secondary evidence, we think, is not so restricted. If the original is lost by accident, and no fault is imputable to the party, it is sufficient. In the present case, it appeared that the note was in court a few days before, and introduced in evidence in the trial against Foyles, the maker, but had been mislaid, and upon thorough search could not be found. Every case of this kind must depend, in a great measure, upon its own circumstances. This rule of evidence must be so applied as to promote the ends of justice, and guard against fraud or imposition. If the circumstances will justify a well-grounded belief that the original paper is kept back by design no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting the secondary evidence. In this case, the note having been

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in court a few days before, and proved, upon a trial against the maker, there could be no possible inducement to withhold it, and it was, no doubt, mislaid by accident."

It is to be observed that in *Renner v. Bank of Columbia*, and the case decided by this court, the note was lost after the suit on it was brought; in other words, that there was no doubt of the jurisdiction and complete competency of a court of law to entertain an action on the note at the time when the suit was brought. It was assumed by the Supreme Court, though the point was not mentioned, that jurisdiction is not lost by a loss of the proofs on which it would found its judgment. It was for that reason, we must suppose, that the court treated the question as one simply of evidence, and held, notwithstanding the peculiarities of negotiable paper, that the ordinary principles relating to secondary evidence applied.

It was suggested at the argument that, although we might be bound by the decision in *Renner v. Bank of Columbia*, in a strictly analogous case, we should limit its application on the ground that it was opposed to the prevailing doctrine as to lost negotiable instruments. We are not compelled to consider that question in this case. It is enough to say that *Renner v. Bank of Columbia* is not an authority which pretends to govern the case where an action at law is brought on a negotiable instrument already lost at the time of bringing the action. In that case the question is not whether the evidence of contents is admissible in support of an action at law properly brought, but whether a right to bring such an action existed at the time when it was brought. On this question we have an unembarrassed opinion. The prevailing doctrine, to which nothing in *Renner v. Bank of Columbia*, or in our own former decision is opposed, is that a court of law is not competent to entertain an action upon a lost negotiable instrument, inasmuch as such a court must, in doing so, alter one of its terms annexed by usage, being unable to supply the place of possession by providing indemnity.

Mercantile custom, in other words, the law of such transactions, constitutes a part of the contract just as much as does the obligation to pay at all; and according to that custom it is a right of an obligor on a negotiable instrument to have, on paying it, the protection afforded by possession, or, in case possession cannot be given him, by an indemnity. If the instrument cannot be surrendered by reason of its loss, it is nothing to the purpose that the loss happened after maturity, and that the promisor can therefore successfully defend himself against a new holder by proving payment. That is precisely what promisee has no legal right, according to mercantile custom, the law of the contract, to call upon him to do at his own expense. It is immaterial whether the loss occurred by the negligence of the promisee; as between him and the promisor the burden is on him, and when he is unable to surrender possession, and thus to comply with his customary obligation, he is not in a position to enforce payment, unless he se-

cures the promisor against risks which do not belong to him. The promisee simply has no right to enforce payment in departure from the custom of such transactions. It follows that a court which cannot place the promisor on the same footing of safety which a surrender of the instrument would give him—that is to say, by providing an

indemnity—is incompetent to enforce payment, because it has no power to provide such indemnity and must therefore enforce the contract in departure from its terms.

This conclusion renders it unnecessary to consider the other exceptions.

Judgment is affirmed.

NEW YORK COURT OF APPEALS.

Herman WRONKOW, *Appt.*,

v.

Hobart OAKLEY *et al.*

Charles WOLFF, Purchaser Applying for Relief, *Resp't.*

(.....N. Y.....)

1. **A wife's inchoate right of dower may be released by her husband** on his conveyance of the land where under Laws 1878, chap. 300, empowering her to give a power of attorney as if single, she has given him a power of attorney to convey for her and in her name and as her act and to sign, sell, execute, acknowledge and deliver all necessary releases of dower and thirds.
2. **The suspension of a judgment pending an appeal** under Code Civ. Proc. § 1256 by entry of the words "lien suspended on appeal" suspends the lien of the judgment pending the appeal not only as to the property then subject to the lien of the judgment, but as to after-acquired property.
3. **The liability of sureties on an appeal bond is wholly discharged** when the judgment is paid by sureties upon a bond for further appeal to a higher court after affirmance by it.

NOTE.—Release of inchoate right of dower by attorney under power given by married woman.

The common-law disability of a married woman plainly prevented her from giving a valid power of attorney to release her inchoate right of dower. So in *Steele v. Lewis*, 1 T. B. Mon. 43, it was held that in the absence of statutory authority she could not make a conveyance by an attorney.

And even under statutes which authorize a conveyance by a married woman, but which required a private examination as to her execution of the instrument, several cases have held that she could not bar or convey her own land by giving a power of attorney, as the attorney could not be examined in her stead. *Lewis v. Cox*, 5 Harr. (Del.) 401; *Mott v. Smith*, 16 Cal. 533; *Dawson v. Shirley*, 6 Blackf. 531; *Sumner v. Conant*, 10 Vt. 9.

So a power of attorney was held not to be within either the letter or spirit of a statute relating to acknowledgments of conveyances by married women. *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 103.

But in *Munger v. Baldrige*, 41 Kan. 233, it was decided that a wife might by power of attorney, appoint her husband her agent to convey her inchoate interest in his lands which she had been given by statute in lieu of dower, where the statutes gave married women the same rights as married men in respect to contracts with reference to their property and also provided that a "conveyance of land or of any other estate or interest therein may be made by deed, executed by any person having authority to convey the same or by his agent or attorney."

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and the latter cannot, by taking an assignment of the judgment, raise any liability on the part of the former which will give them an interest in the judgment debtor's property and make them necessary parties to foreclosure proceedings against him.

(June 17, 1892.)

A PPEAL by complainant from an order of the General Term of the Supreme Court, First Department, reversing an order of a Special Term for New York County refusing to relieve the purchaser at a sale in foreclosure proceedings from his bid on the alleged ground of defective title. *Reversed.*

ANDREWS, J., delivered the following opinion at General Term:

"The action was brought to foreclose a purchase-money mortgage for \$5,000, dated September 2, 1890. The action was commenced October 22, 1891, and judgment of foreclosure and sale was entered December 22, 1891. By the terms of the judgment the premises were directed to be sold subject to a lease expiring May 1, 1893, and to a first mortgage for \$17,019.22. The property was sold at auction on January 21, 1892, and the

This decision was followed in *Wilkinson v. Elliott*, 43 Kan. 580.

So a conveyance by attorney under power from husband and wife was held good under a statute providing that the wife joining her husband in a deed, mortgage, conveyance, power of attorney or other writing of or relating to the sale, conveyance, or other disposition of land or real estate shall be bound and concluded by the same in respect of her right, title, claim, interest or dower. *Hull v. Glover*, 123 Ill. 123.

A power to sell, mortgage or otherwise dispose of lands given by a nonresident married woman who is given by statute the authority to convey real estate by power of attorney is broad enough to include her dower right without express mention of it. *Parker v. Baker*, 12 N. Y. S. R. 548.

In *Holladay v. Dally*, 86 U. S. 19 Wall. 609, 23 L. ed. 188, a deed given by an attorney in the name of the husband alone under a power from both husband and wife was held good. But in this case the wife's joinder was immaterial as by statute she was entitled to dower only in lands of which her husband died seised.

In the progress of removing the disabilities of married women which has been constantly going on in recent years the right of a married woman to give a power of attorney has been expressly conferred by statute in several states, but the main case is the first one of which we have knowledge to apply the general grant of authority to give a power of attorney to the subject of a release of an inchoate right of dower.

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petitioner, Charles Wolff, was the purchaser, for the price of \$5,600, over and above the incumbrances above mentioned; and said petitioner paid to the referee \$560, 10 per cent on the amount of his bid, together with the auctioneer's and exchange fee, and signed the usual terms of sale. Subsequently a motion was made by the petitioner to be relieved from his purchase, and from the order denying such motion this appeal is taken.

"It appears that one Moritz Bauer became the owner of the equity of redemption of the mortgaged premises, by deed from Hobart Oakley, dated October 4, 1890. By deed dated October 20, 1890, executed by said Moritz Bauer in his own behalf, and also executed by said Bauer in the name of his wife, Cecilia Bauer, as her attorney in fact, such equity of redemption was conveyed to one Randolph Guggenheimer. The power of attorney, under which said Bauer acted as the attorney of his wife, was executed and acknowledged by her, and recorded in the year 1881. It describes both the parties thereto as being of the city of New York, and so likewise does the deed to Guggenheimer. Said power authorizes said attorney, 'to contract for the sale of, and to grant, bargain, sell, and convey, all or any lands, tenements, or hereditaments or real estate to me belonging, situate, lying, and being within the United States of America whether belonging to me individually or jointly with another or others, at public or private sale, for cash or upon credit, or partly for cash and partly upon credit; and for such price or prices, and upon such other terms and conditions, as to my said attorney may seem meet and proper; and for the purpose aforesaid, and in my name, place, and stead, as my act and deed, to sign, seal, execute, and acknowledge and deliver all necessary or proper contracts, deeds, conveyances, releases, releases of dower and thirds, and right of dower and thirds, or other instruments for the conveying, surrendering, and relinquishing all or any part of my estate, right, title, and interest, whether vested or contingent, choate or inchoate therein.' Mrs. Bauer was not made a party to this action. It also appeared that certain persons had obtained judgments against Moritz Bauer prior to the time that he acquired title to the property in question, and which, by orders of court, made also prior to Bauer's acquisition of title, had been marked, 'Lien suspended,' or 'Partially suspended upon appeal,' and that such persons were not made parties to this action.

"The objection to the title based upon the failure to make the wife of Moritz Bauer a party to the action presents the questions (a) of the power of a resident married woman to release her dower by attorney; (b) of her right, if she has such power, to make her husband her attorney for such purpose; and (c) whether the power of attorney, if otherwise valid, authorized the release of the wife's dower in after-acquired property and for a nominal consideration. These questions are important, because the decision of them not only affects the title of the property in question, but may affect many other titles.

The Revised Statutes of this state contain the following provision: 'No act, deed, or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by the acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudices the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.' 4 Rev. Stat. 8th ed. p. 2456. It has been decided by the courts of this state that the only way in which a wife can release her dower during the life of her husband is by joining with him in a conveyance to a third person. *Carson v. Murray*, 3 Paige, 458, 8 L. ed. 241; *Elmendorf v. Lockwood*, 57 N. Y. 323; *People v. Knickerbocker L. Ins. Co.* 66 How. Pr. 115; *Ford v. Knapp*, 51 Hun, 522. It has also been held by the courts of other states, under statutes similar to our own, that the wife must execute the release herself, and that she cannot release by power of attorney. See 5 Am. & Eng. Encyclop. Law, p. 914, and cases there cited.

"In 1873, however, the Legislature of this state passed the following statute: 'Any married woman, being a resident of this state and of the age of twenty-one years or more, may execute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman.' The question presented for decision, is whether, assuming that prior to the passage of this statute a married woman could not release her dower through an attorney in fact, this statute has authorized her to do so. It is suggested that the statute does not authorize a married woman to release her dower through an attorney, because the Act provides that she may execute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman; and that the Legislature in assimilating the case of the wife to that of the single woman could not have intended to authorize the former to act through an attorney in any manner in which the latter could not do so; and that a single woman cannot, of course, ever be vested with such an estate, and cannot, therefore, appoint an attorney for the purpose of releasing dower, therefore a married woman cannot do so. We think this is too narrow an interpretation of the statute. It is a general maxim of the law that whatever a man *sui juris* may do of himself he may do by another, and the same maxim applies of course to a single woman. We think that the true interpretation of the statute is that just as a single woman can appoint an attorney to perform any act which she herself can do, so any act which can be done by a married woman of herself can be done by her duly appointed attorney; and, as a married woman can release her dower by joining with her husband in a conveyance of the property to a third party, she may perform that act through an attorney. It may be said that, as the Legislature origin-

ally prescribed a particular way in which a married woman could release her dower, such special provision of the Revised Statutes should not be considered as modified or affected by the general provisions of the above-quoted Act of 1878, which does not in terms refer to the release of dower, and which authorizes a power of attorney to be acknowledged in the same manner as if the woman executing the power were single. There would be force in this objection if the law in relation to acknowledgments of deeds and other instruments by married women had remained as it was when the Revised Statutes were adopted. It was provided in those statutes that the acknowledgment of a married woman residing within this state to a conveyance purporting to be executed by her should not be taken unless, in addition to the requisites required in the case of other persons, she acknowledged, on a private examination apart from her husband, that she executed such conveyance freely, and without any fear or compulsion of her husband. And the provision of the Revised Statutes above quoted, in regard to conveyances releasing the right of the wife to her dower, provided that the assent of the wife must be evidenced by the acknowledgment thereof, in the manner required by law to pass the estates of married women. It appears to have been considered by the Legislature that these provisions, in reference to the manner in which conveyances executed by married women should be acknowledged, afforded great protection to them, but, whether such opinion was or was not well founded, such provisions have been entirely swept away by later legislation; for, in 1879, the Legislature passed the following statute: 'The acknowledgment by married women, or the proof of the execution by married women, of deeds, or other written instruments, may be made, taken, and certified in the same manner as if they were sole; and all acts and parts of acts which require for them any other or different acknowledgments, proofs, or certificates thereof are hereby repealed.' 4 Rev. Stat. 8th ed. p. 2487. As above stated, under the said Act of 1878, acknowledgments of powers of attorney could be made by married women as if they were single; but, under said Act of 1879, all acknowledgments of married women of the execution of deeds and other written instruments can now be made, taken, and certified in the same manner as if they are single, and the protection—if it was any protection—of married women, in regard to their dower rights, and other rights in real property, afforded by the provisions as to private examination, has been entirely taken away; and, so far as the protection of such rights is concerned, it can make no possible difference whether the married woman releases her dower by joining with her husband in a conveyance, or whether she releases the same through an attorney appointed by her for that purpose. Nor do we perceive any good reason whatever why a married woman may not as well appoint an attorney to execute a deed, which releases her dower rights, as to execute such

deed herself. The reason of the rule ceasing, the rule itself fails, and we think that the objection is not well taken.

"The second question raised is whether, if a married woman has the power to appoint an attorney to release her dower, she can make her husband her attorney for such purpose. We do not think this objection is well founded. It has been held that husbands and wives may legally contract with each other in reference to their separate estates, (*Owen v. Cowley*, 36 N. Y. 600, *Bodine v. Killeen*, 53 N. Y. 98); that they may become agents for each other, (*Knapp v. Smith*, 27 N. Y. 377); that a husband may assign to his wife a chose in action, (*Seymour v. Fellows*, 77 N. Y. 178); and it has very recently been held that the common-law disability of a married woman to engage in a business as a copartner or jointly with her husband, was removed by chapter 90 of the Laws of 1860. *Suau v. Caffé*, 123 N. Y. 308, 9 L. R. A. 593. Under these decisions if a married woman can release her dower rights through an attorney as we think she can, we are of the opinion that she can appoint her husband such attorney.

"The third question raised is as to whether the power of attorney given by Mrs. Bauer to her husband gave him the right to convey property acquired after the execution of such power. The power in question authorized Mr. Bauer to sell and convey all or any lands belonging to Mrs. Bauer situate within the United States. There is nothing whatever in the power which restricted it to lands belonging to Mrs. Bauer at the time the power was executed, and we think that it covers lands subsequently acquired.

"Another objection to the title is that certain judgment creditors should have been made parties to the action. On April 10, 1889, one King recovered a judgment in the court of common pleas for \$2,299.54. On June 12, 1889, an appeal was taken from said judgment to the general term, and, upon the consent of the plaintiff and the sureties upon the appeal bond, the judgment was marked, 'Lien suspended on appeal'; and upon the record in the county clerk's office, where the judgment had been docketed, a similar entry was made. On February 5, 1890, the judgment of the general term was entered, affirming the above-named judgment, and for \$117.67 costs. 8 N. Y. Supp. 466. Subsequently an appeal was taken from said last-mentioned judgment to the Court of Appeals. On July 2, 1890, an order was entered, suspending the lien of both judgments as to property on which said judgments were or might become liens. This order was entered by consent of American Surety Company. On December 3, 1891, the lien was restored by proper entries in the judgment book, and on December 4, 1891, both judgments were assigned to the American Surety Company. Moritz Bauer took title to the property in question on October 4, 1890, and conveyed the same on October 20, 1890. The order entered on July 12, 1889, directing that the lien be suspended on appeal, did not, in terms, apply to after-acquired property. It is not necessary for

the purposes of this appeal to decide, and we do not now decide, whether, under the various provisions of the Code in reference to the suspension of the lien of judgments on appeal, this order suspended the lien of the judgment as to property acquired by Bauer after it was entered. It is not disputed that the order entered suspending the lien upon the original judgment, and upon the judgment for costs, at the general term, was entered upon the consent of the American Surety Company that such lien should be suspended, not only as to property upon which the judgments were then liens, but as to after-acquired property. It is also undisputed that on February 4, 1891, both judgments were assigned to the American Surety Company, and that that company only can raise an objection as to the regularity of the foreclosure, so far as relates to said judgments; and that company is estopped from raising such question by reason of the consent above mentioned.

"Some question is also raised in regard to judgments recovered by one Healy; but, by an order of this court, entered on consent of the plaintiff, all the real property of Moritz Bauer (with an exception which does not include the property in suit) upon which said judgments were or might thereafter become a lien was exempted from the liens of said judgments; and such exemption remained in full force at the time of the recording of plaintiff's mortgage, and at the time of filing the notice of *lis pendens* herein. We are of the opinion that it was not necessary that either of the judgment creditors above mentioned should have been made parties to the action, and that the order appealed from should be affirmed, with costs."

Meera, Henry A. Forster and D. Solis Ritterband, for appellant:

Chapter 300 of the Laws of 1878 completely extinguishes all the disabilities, whether statutory or common-law, upon the power of married women to execute a power of attorney, and gives them complete freedom to execute a power of attorney to do any lawful act whatever.

The construction which the courts have given to the Acts of 1860 and 1862, which are not as broad as the Act of 1878, shows clearly that the Act of 1878 permits a married woman to do any act by attorney which she could do herself.

See *Blaehinska v. Howard Mission & Home for L. W.* 15 L. R. A. 215, 180 N. Y. 497; *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 78; *Suau v. Caffé*, 9 L. R. A. 593, 122 N. Y. 812.

The chief disabilities of a married woman existing after the Acts of 1860 and 1862, other than her inability to sue her husband or to release her dower except to a person in privity to her husband's title, were her inability to make a contract with her husband, except as to her separate estate, *Blaehinska v. Howard Mission & Home for L. W.* and *Noel v. Kinney*, *supra*, or to make a conveyance to her husband which would be enforced at law.

As the disability to contract and the disability to convey to the husband have been since 16 L. R. A.

removed or recognized by statute it is evident that the Act of 1878 was not aimed at them.

Laws 1887, chap. 587; Laws 1884, chap. 881.

A statute authorizing a resident married woman to execute a power of attorney to release her dower is not contrary to public policy.

Ever since 1835 a nonresident married woman could execute a power of attorney to release her inchoate right of dower in lands within this state.

Parker v. Baker, 12 N. Y. S. R. 598, 599; Laws 1885, chap. 275, p. 815.

An ante-nuptial agreement between husband and wife relinquishing all inchoate rights of dower is valid.

Pierce v. Pierce, 71 N. Y. 154, 157, 27 Am. Rep. 22; *Spencer v. Boardman*, 6 West. Rep. 700, 118 Ill. 554; *Barth v. Lines*, 7 West. Rep. 217, 118 Ill. 874; *Freeland v. Freeland*, 128 Mass. 509; *Smith's App.* 115 Pa. 819; *West v. Walker*, 77 Wis. 557; *Forwood v. Forwood*, 86 Ky. 114, 118.

A post-nuptial agreement between husband and wife relinquishing all inchoate rights of dower is valid.

Strayer v. Long, 86 Va. 557, 559; *Garbut v. Bowling*, 81 Mo. 214.

The fact that the power of attorney was executed by Mrs. Bauer alone does not invalidate it.

Savage v. Orill, 19 Hun, 4-6, aff'd 90 N. Y. 680; *Merchants Bank v. Thomson*, 55 N. Y. 12; *Fowler v. Shearer*, 7 Mass. 14.

A married woman need not join with her husband in an instrument conveying her interest in real estate.

Jooss v. Fey, 129 N. Y. 17; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9.

A married woman may execute a power of attorney to her husband.

Warner v. Warren, 46 N. Y. 228, 233, 234; *Freiberg v. Branigan*, 18 Hun, 844, 845, aff'd 82 N. Y. 627; *Wicks v. Hatch*, 6 Jones & S. 95, 110, 62 N. Y. 535, 539-544; *Nash v. Mitchell*, 71 N. Y. 199, 202, 303, 27 Am. Rep. 88.

Under the Married Women's Acts of 1860 and 1862 [chap. 90, Laws 1860; chap. 172, Laws 1862] a married woman can:

Make her husband her agent.

Third Nat. Bank of Buffalo v. Guenther, 123 N. Y. 568, 575; *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 74, 78; *Foster v. Perach*, 68 N. Y. 400; *Adams v. Mills*, 60 N. Y. 533; *Bodine v. Killeen*, 53 N. Y. 98; *Bank of Albion v. Burns*, 46 N. Y. 171; *Abbey v. Deyo*, 44 N. Y. 343; *Merchant v. Bunnell*, 8 Keyes, 539, 541; *Voorhees v. Bonesteel*, 88 U. S. 16 Wall. 16, 31, 21 L. ed. 268, 271.

Hold real estate as a joint tenant with her husband and convey it without his joining in the deed.

Jooss v. Fey, *supra*.

Enter into a partnership with her husband. *Suau v. Caffé*, 9 L. R. A. 593, 122 N. Y. 808.

Take an assignment of a chose in action from her husband.

Fruhauv v. Bendheim, 127 N. Y. 587; *Seymour v. Fellows*, 77 N. Y. 178, 179.

Contract with her husband in relation to her separate estate, for as to that she stood at law on the same footing as if unmarried.

Blaehinska v. Howard Mission & Home for

L. W. 15 L. R. A. 215, 180 N. Y. 497; *Noel v. Kinney*, 106 N. Y. 78; *Suau v. Caffé*, *supra*.
Receive a valid gift from her husband.
Armitage v. Mace, 96 N. Y. 538; *Whiton v. Snyder*, 88 N. Y. 299.

Maintain an action for alienating her husband's affections.

Bennett v. Bennett, 6 L. R. A. 558, 116 N. Y. 584.

A married woman can make her husband her trustee.

Walker v. Walker, 76 U. S. 9 Wall. 744, 19 L. ed. 814.

Even under the Acts of 1848 and 1849 a married woman could make her husband her agent.

Knapp v. Smith, 27 N. Y. 277; *Buckley v. Wells*, 38 N. Y. 518; *Owen v. Cawley*, 36 N. Y. 600.

The power to appoint an agent carries with it by necessary implication the power to execute a power of attorney.

Story, Ag. 9th ed. §§ 24, 25; *Porter v. Hermann*, 8 Cal. 619.

Outside of this state the general rule in the absence of a clear restrictive statute is that a wife may execute a power of attorney to her husband.

Gridley v. Westbrook, 64 U. S. 23 How. 508, 16 L. ed. 412; *Munger v. Baldrige*, 41 Kan. 286; *Wilkinson v. Elliott*, 43 Kan. 590; *Hull v. Glover*, 126 Ill. 123; *Dawson v. Shirley*, 6 Blackf. 531; *Steele v. Lewis*, 1 T. B. Mon. 48; *Shanks v. Lancaster*, 5 Gratt. 111, 50 Am. Dec. 108; *Sumner v. Conant*, 10 Vt. 9; *Holladay v. Daily*, 86 U. S. 19 Wall. 609, 22 L. ed. 188; *Lewis v. Cox*, 5 Harr. (Del.) 401.

An instrument authorizing the sale of all of the grantor's real estate and any interest therein of whatsoever kind or nature, constitutes the agent therein appointed a general agent as distinguished from a special agent.

Wharton, Ag. § 116-118; Mechem, Ag. § 6; Story, Ag. §§ 21, 22; *Butler v. Maples*, 76 U. S. 9 Wall. 773, 19 L. ed. 824, 825; *Anderson v. Coonley*, 21 Wend. 279; *Jeffrey v. Bigelow*, 18 Wend. 519, 28 Am. Dec. 476.

The powers of a general agent are liberally construed within the general scope of his agency.

Martin v. Farnsworth, 49 N. Y. 558.

Where a person is a general agent special authority to do acts within the general scope of his agency need not be specially conferred but is presumed.

Wharton, Ag. § 121; Story, Ag. § 126; *Colten v. Gardner*, 21 Beav. 540; *Munn v. Commission Co.* 15 Johns. 44; *Tradesman's Bank v. Astor*, 11 Wend. 87; *Andrews v. Kneeland*, 6 Cow. 354; *Anderson v. Coonley*, and *Butler v. Maples*, *supra*; *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 80 U. S. 18 Wall. 235, 20 L. ed. 623.

The same rule applies to a general power of attorney.

Parker v. Baker, 12 N. Y. S. R. 599; *Wicks v. Hatch*, 62 N. Y. 541.

Messrs. Glover, Sweezy & Glover, for respondent:

Dower is a peculiar interest jealously guarded by the law, and as to which great strictness is maintained by the courts.

1 Washb. Real Prop. *201, 202.

16 L. R. A.

At common law it could not be released.

1 Washb. Real Prop. *199.

A wife can defeat her dower only by strictly pursuing a mode prescribed by some statute.

Stisk v. Smith, 6 Ill. 563.

At common law a married woman could not make an attorney for any purpose.

Hardenburgh v. Lakin, 47 N. Y. 118.

In the present state of the law a married woman, cannot without express statutory authority, release her dower by power of attorney.

Lewis v. Cox, 5 Harr. (Del.) 401; *Dawson v. Shirley*, 6 Blackf. 531; *Steele v. Lewis*, 1 T. B. Mon. 48; *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108; *Sumner v. Conant*, 10 Vt. 9; *Holladay v. Daily*, 86 U. S. 19 Wall. 609, 22 L. ed. 188.

She must execute the release herself.

Frost v. Deering, 21 Me. 156; *Eslava v. Lopetre*, 20 Ala. 504, 56 Am. Dec. 266.

Inchoate dower is not an estate in lands; it cannot be conveyed, but can only be released. A release takes effect by way of estoppel merely, and not by way of conveyance.

1 Washb. Real Prop. *250; *Martin v. Smith*, 46 N. Y. 571; *Linchliffe v. Shea*, 4 Cent. Rep. 214, 103 N. Y. 153; *Witthaus v. Schack*, 7 Cent. Rep. 257, 105 N. Y. 832.

Our Married Women's Acts have not removed the disabilities of a wife under the common law respecting her inchoate right of dower; she cannot release it to him or contract to release it to him; nor can she release it to a stranger; but can only unite with him in releasing to his grantee.

Guidet v. Brown, 8 Abb. N. C. 295; *MERCHANTS BANK v. Thomson*, 55 N. Y. 7.

If she has power to release her inchoate dower by attorney she cannot make her husband her attorney for such purpose.

The common-law identity of husband and wife continues except in those particular matters as to which the wife has been specifically authorized by the married women's statutes to act as a *feme sole*.

Hendricks v. Isaacs, 6 L. R. A. 559, 117 N. Y. 411.

A power of attorney is to be strictly construed.

Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

Peckham, J., delivered the opinion of the court:

In relation to the question arising upon this application of the purchaser, Wolff, to be relieved from his bid at the judicial sale on the ground that the interest of the wife of Bauer had not been duly conveyed by virtue of her power of attorney to her husband, we are of the opinion that the order of the general term is erroneous, and for the reasons stated in the dissenting opinion of *Mr. Justice Andrews* at the general term. The limitation sought to be imposed upon such power of attorney, that it only authorized Mrs. Bauer's husband to sign his name to conveyances of lands belonging to her is not we think sustained by the language of the instrument. Indeed, the learned judge who so held in his opinion at the general term in order to arrive at his conclusion re-

jects as surplusage the language of the power which authorizes the husband to convey for her, and in her name and as her act and deed to sign, seal, execute, acknowledge, and deliver all necessary releases of dower and thirds. He construes the language used in the first part of the power as confining its application to the execution of a conveyance of any and all lands belonging to Mrs. Bauer, and he says the words "releases of dower," subsequently used, have no relation to the power actually granted, and hence are surplusage. We think, however, that the language as to "releases of dower" was used for the very purpose of authorizing the husband to do as he has done, and that the language of the first part of the power, when speaking of lands, etc., belonging to the wife, does not limit, and was not intended to limit, the operation of the words "releases of dower and thirds," so as to make them of no meaning or importance, but, on the contrary, it was intended by their use to confer authority on the husband to release her inchoate right of dower in lands belonging to him. Indeed, she continues the statement of her purpose by inserting in the instrument a power to execute other instruments for the conveyance, surrendering and relinquishing all or any part of her estate, right, title, and interest, whether vested or contingent, choate or inchoate therein. The language used in the first part of the power should not be held to operate all through it, and limit the otherwise plain meaning of the paper. We think there is no objection to the title arising out of the power of attorney given by the wife to the husband. She had the right to execute a power of attorney under the Act, chapter 300 of the Laws of 1878, and in executing such power she could appoint her husband her agent or attorney in fact.

As to the objection that certain creditors by judgment against Bauer were not made parties, nor the sureties on certain appeal bonds, we think a sufficient answer is made by the fact of the entry of the memorandum by virtue of section 1256 of the Code of Civil Procedure, "Lien suspended on appeal." We think the meaning and purpose

of the Legislature in the enactment of that and the succeeding sections were to release the lien of the judgment so suspended on appeal in regard to all property upon which it otherwise would become a lien until the court orders that it be restored by a redocket. The sureties upon the first appeal to the general term consented to the entry of the order, which did not in terms provide as to subsequently acquired property, but, if we are right in our construction of the statute, it was not necessary to so state it in the order. The law itself provided for the fact. The sureties, upon a further appeal taken to the Court of Appeals, consented, in terms, to the order suspending the lien, including after-acquired property. Upon the affirmance of the judgment by the latter court, the sureties on the last appeal bond took an assignment of the judgments, and in their hands there was no longer any liability on the sureties on the first appeal. Such sureties became on the giving of the second undertaking to pay the judgments, sureties for the second sureties; and when the second sureties paid or discharged their obligation to the owner of such judgments, and took an assignment of them, they could not enforce them against the first sureties. Under these circumstances, there is no reason on this ground for releasing the purchaser from his bid. The respondent here does not insist upon an objection that these questions were doubtful, and a purchaser ought not to be required to take such a title; but as we understand, if the questions above discussed should be decided in favor of the title, he is willing to take it, although those who are not parties here would not be legally barred by our decision from hereafter raising the question. As our decision depends upon the construction of statutes, the rule of *stare decisis* would be effectual as an answer to any further claim, and we think the purchaser entirely justified in his waiver.

Our conclusion is that *the order of the General Term should be reversed*, and that of the Special Term affirmed, with costs in all courts.

All concur.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.*
V. P. WIESENTHAL, *App't.*
v.

D. T. DENNY, *et al.*

(..... Wash.)

1. A proposed amendment to a city charter may be amended at its second consideration by the city council and then submitted to a vote of the people without further consideration by the council after another publication period of ten days under a

NOTE.—For note on the subject of what constitutes a majority sufficient to carry an election, see *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308, 16 L. R. A.

charter which provides that amendments to itself may be proposed in either house and if agreed to they shall be entered on the journals and published for ten consecutive days and shall then be resubmitted to each house and pursue the same course as is pursued by any ordinance, and if then agreed to and not vetoed, or if passed over a veto, shall be submitted to the voters for ratification.

2. The existence of confusion on the part of the voters and inability to decide which way to vote upon proposed amendments to a city charter, which are caused by the submission of so many at once, will not invalidate the election although it is increased by splitting up the original propositions as adopted by the council and published into

more than twice as many for submission to the voters if the notice of election accurately numbered and described the final subdivisions and the ballots referred to the numbers so given.

3. Needless separation in submitting them to the voters of two proposed amendments to a city charter which are indispensable to each other will not cause the rejection of either or both if each has received a majority of the vote and such separation is justified by the law.

4. A city charter cannot require for its amendment a majority of all the voters voting at the election at which a proposed amendment is submitted, if the state Constitution provides for the ratification of such a proposed amendment by a majority of the qualified voters voting thereon.

(April 8, 1892.)

A PPEAL by relator from a judgment of the Superior Court for King County in favor of respondents in a proceeding by mandamus to compel them to declare him elected as one of the delegates from the third ward of the City of Seattle. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edgar Lemman and Junius Rochester for appellant.

Messrs. George Donworth and Battle & Shipley, for respondents:

The tendency of the courts seems to be to give a liberal construction to laws doubtful as to the majority required so as to sustain the same when a majority of the voters voting have voted in favor thereof.

Metcalf v. Seattle, 1 Wash. 297; *Armour Bros. Bkg. Co. v. Finney County Comrs.* 41 Fed. Rep. 321; *Holcomb v. Davis*, 56 Ill. 413.

The rule that when an election is held at which the subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves and those being present and abstaining from voting, are considered as acquiescing in the result declared by those actually voting, applies equally where at a general election the measure so receiving a majority of the votes cast on the subject failed to receive a majority of the votes cast upon some other subject.

Walker v. Oswald, 11 Cent. Rep. 123, 68 Md. 146.

Even though the proper meaning to be attached to the word "thereat" should be as contended for by appellant the same is wholly nugatory and is not to govern in determining the question of the validity of said proposed amendments, but section 10, art. 11, of the Constitution in the use of the word "thereon" must govern.

A constitutional provision is self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed, or the duty imposed may be enforced.

Cooley, Const. Lim. 4th ed. p. 90.

Section 10, art. 11, of the Constitution of Washington is, with slight modifications, the same as section 8, art. 11, of the Constitution of California, which the Supreme Court of that state in a number of decisions has held is self-executing.

People v. Hoge, 55 Cal. 618.

Where the means for exercise of the granted

power are prescribed no other or different means can be impliedly authorized as being more effectual.

Field v. People, 3 Ill. 83.

This section 10, art. 11, of the Constitution not only furnishes a sufficient guide and procedure to adopt amendments to charters, but it is mandatory, and is a limitation upon the power of cities to enact any other rule or procedure to govern in adopting amendments to their charters.

Cooley, Const. Lim. 6th ed. 93. See also Sutherland, Stat. Const. § 66; *People v. Gunn*, 85 Cal. 238; *State v. Rogers*, 10 Nev. 253, 21 Am. Rep. 738; *Varney v. Justice*, 86 Ky. 596; *Westport v. Kansas City*, 103 Mo. 141; *McDonald v. Patterson*, 54 Cal. 245.

The purpose of the first introduction into the council is to obtain the consent of the council that the same should be proposed as an amendment, and the power of the council to take any action thereon in the particular of amending the same in any wise, is suspended until the resubmission. Anything evidencing the intention of the city council to approve the proposed amendments is sufficient.

Brooks v. Fischer, 4 L. R. A. 429, 79 Cal. 178.

Independent of these provisions of the charter and the rules of the city council, the power to make these amendments existed.

People v. Wallace, 70 Ill. 680. See also Sutherland, Stat. Const. § 49.

Statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal to the validity of the election or will change or make doubtful the result.

Sutherland, Stat. Const. § 452.

Stiles, J., delivered the opinion of the court:

The Constitution, art. 11, § 10, provides that the freeholders' charter of any city of the first class may be amended "by proposals therefor submitted by the legislative authority of such city to the electors thereof that any general election, after notice of said submission published as above specified [*Wade v. Tacoma* (Wash.) 29 Pac. Rep. 983,] and ratified by a majority of the qualified electors voting thereon." Subdivision 88, § 520, Gen. Stat., contains the only legislative reference to such amendment, by enumerating as among the express powers of such cities the power "to provide in their respective charters for a method to propose and adopt amendments thereto." Section 1, of article 20 of the charter of the city of Seattle is as follows: "Section 1. Any amendment or amendments to this charter may be proposed in either house of the city council, and, if the same shall be agreed to by not less than three fifths of the members of each house, such proposed amendment or amendments shall be entered upon the journal of each house, with the yeas and nays of each house thereon, and shall for ten consecutive days, excluding Sundays, beginning with five days next after the passage thereof, be published in the city official newspapers and shall, not less than sixty nor more than ninety days after the first publication, be again submitted to each

house of the city council for passage, and pursue the same course before the council and mayor as is pursued by any ordinance; and if upon such resubmission the same be agreed to again in each house by not less than three fifths of the members thereof, and not returned by the mayor with his objections, or be passed notwithstanding his objections, by not less than two thirds of such members, such proposed amendment or amendments shall be submitted to the qualified voters of the city for their ratification at the next general election, or at a special election to be called for the purpose by the city council before such general election; and if at said election a majority of the lawful voters, voting thereat, shall by their votes ratify any amendment so submitted the same shall become a part of the city charter, and shall, five days after such election, be by the mayor, in proclamation published in the city official newspapers, proclaimed a part thereof: provided, that if more than one amendment be submitted the same shall be submitted to the voters at said election in such manner that they may vote for or against each amendment separately, and that the city council shall cause every amendment that is to be submitted to be published for at least thirty days (excluding Sundays) next preceding such election in the city official newspapers." Section 1, art. 4, of the charter provides: "That the legislative power of the city of Seattle shall be vested in a mayor and a city council, which shall consist of two houses, namely, the board of aldermen and a house of delegates."* Section 18 of said article 4 provides among other things: "Every legislative Act of said city shall be by ordinance. . . . Any ordinance may originate in either house, and, when it shall have passed one house, it may be passed, amended, or rejected in the other."

In August, 1891, the said city council appointed a commission, composed of citizens and business men of said city, to frame and submit to it propositions for amending the

city charter in such particulars as they might suggest; and, in accordance with such request, said propositions were framed and submitted to the council. On October 30, 1891, the said proposed amendments, numbered 1 to 19, were first proposed in the house of delegates, and proceedings were thereupon had, resulting in the passage of the same by said house of delegates. Thereafter the board of aldermen duly passed the same. Proposed amendment No. 2 is the principal subject-matter of this suit, and the same, as proposed to the city council, and as passed and published, is as follows: "Proposed amendment No. 2. A proposition to amendment sections three (3), five (5), and seven (7) of article 4 of the freeholders' charter, adopted October 1, 1890: Resolved, that section 3 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 3. At the general election in 1892, there shall be elected in each ward in the city one of the board of aldermen and one member of the house of delegates. At the general election of 1892 the five members of the board of aldermen receiving the greatest number of votes shall hold office for four years, and the other four for two years, and in the case of a tie vote the length of the terms shall, at the first session, and before transacting any other business, be determined by lot. At each subsequent general municipal election, enough aldermen shall be elected from the respective wards to succeed those whose terms are about to expire, and the aldermen so elected shall hold office for four years. The members elected to the house of delegates shall each hold office two years. Each member of either house shall further hold office until his successor is elected and qualified. Each member of the city council shall have an annual salary of three hundred dollars, to be paid monthly: provided, that after the population of the city shall have reached the number of seventy-five thousand, as determined by any official census, such salary shall be the sum of six hundred dollars per

*The remaining material portions of the charter before its amendment are as follows:

Sec. 2. The board of aldermen shall consist of nine members elected from the city at large, and the house of delegates shall be composed of two members elected from each ward.

Sec. 3. At the first election under this charter nine members of the board of aldermen shall be elected. At the general election of eighteen hundred and ninety-two, nine members shall be elected, and the five then receiving the greatest number of votes shall hold office for four years, and the other four for two years, and in case of a tie vote the length of the term shall, at the first session, and before transacting any other business, be determined by lot. At each subsequent general municipal election enough aldermen shall be elected to succeed those whose terms are about to expire, and the aldermen so elected shall each hold office for four years. At said first election, and at each general municipal election thereafter, two members of the house of delegates shall be elected in each ward, and the delegates so elected shall each hold office two years. Each member of either house shall further hold office until his successor is elected and qualified.

Sec. 4. No person shall be eligible for alderman unless he be a freeholder, a citizen of the United States and have been a resident and elector of the city for at least two years next prior to his election; and no person shall be eligible for delegate unless he be a citizen of the United States and have been an elector of the city and a resident of the

ward for which he is selected for at least one year next prior to his election. No person not a resident or not a citizen or who holds any other place in the city government shall be a member of either house.

Sec. 5. No member of either house shall hold any other office, federal, state, county or municipal, except in the National Guard or as a notary public, or be an employé of the city or either of said houses, or be directly or indirectly interested in any contract with the city, or with or for any department, institution, board, officer, agent or employé thereof, or advance money or furnish material or supplies, or become surety for the performance of any such contract, or directly or indirectly recommend, solicit, advise, request or in any manner use his influence to obtain the appointment of any person to any office, position, place or employment under the city government or under any department, board, officer, agent or employé thereof: Provided, that nothing contained in this section shall impair the right of a member to nominate and recommend any person for any position or office to be filled by the city council or by the house of which he is a member. Each member, upon taking office, shall make and file in the office of the city clerk an affidavit that he will faithfully comply with and abide by all the requirements of this section, and the violation of any of the provisions of this section shall work a forfeiture of his membership and warrant his expulsion from the house to which he belongs.

annum, payable annually. A deduction of five dollars shall be made from each member's salary, who shall be absent from any meeting of his respective house, unless said member shall certify on his honor that said absence was caused by illness or unavoidable absence from the city at the time of the meeting.' Resolved, that section 5 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 5. No member of either house shall hold any other municipal office, or be an employé of the city or either of said houses, or be interested in any contract with the city, or with or for any department, institution, board, officer, agent, or employé thereof. Each member, upon taking office, shall make and file in the office of the city clerk an oath that he will faithfully comply with and abide by all the requirements of this section; and the violation of any of the provisions of this section shall work a forfeiture of his membership, and warrant his expulsion from the house to which he belongs.' Resolved, that section 7 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 7. The house shall meet in separate chamber. A majority of either house shall constitute a quorum, but a less number may adjourn from day to day, or till the time of the next regular meeting, and may compel the attendance of absent members in such manner and under such penalties as each house shall prescribe for itself. A quorum of each of the two houses of the city council, assembled in joint convention, shall be a quorum of a joint convention of the city council.'" There were nineteen of these proposed amendments, of which Nos. 4 and 17 failed to pass the second consideration of the council, and were not submitted in any form. A part of the others, without any amendment or alteration thereof being made, passed each house upon such reconsideration, while several of them, including No. 2, upon such reconsideration were amended by the council, and as amended they passed each house, and all the requirements of section 1, art. 20, were complied with in passing the same, as amended.

The fact that amendment No. 2 was amended upon such reconsideration without again having been published as is required upon the original introduction or proposal of the same in the city council, constitutes the first objection to the validity thereof, raised by the relator. Proposed amendment No. 2, as passed as amended upon such reconsideration, is as follows: "Proposed amendment No. 2. A proposition to amend sections 2, 3, 5, and 7 of article 4 of the freeholders' charter, adopted October 1, A. D. 1890. Resolved, that section 2 of article 4 be amended so as to read as follows: 'Sec. 2. The board of aldermen and the house of delegates shall each consist of as many members as there are wards in the city; one member of each house to be elected from each ward.' Resolved, that section 3 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 3. At the general election in 1892, there shall be elected nine members of the board of aldermen and

there shall be elected in each ward one member of the house of delegates: provided, that in case of the adoption of this proposed amendment the person receiving the highest number of votes for delegate at said general election in March, 1892, shall be entitled to qualify as said delegate. At the general election in 1892 the five members of the board of aldermen receiving the greatest number of votes shall hold office for four years, and the others for two years, and in case of a tie vote the length of the terms shall at the first session, and before transacting any other business, be determined by lot. At each subsequent general municipal election, one delegate shall be elected from each ward, and enough aldermen shall be elected from the respective wards to succeed those whose terms are about to expire, and the aldermen so elected shall each hold office for four years. The members elected to the house of delegates shall each hold office two years. Each member of either house shall further hold office until his successor is elected and qualified. Each member of the city council shall have an annual salary of three hundred dollars, to be paid monthly: provided, that after the population of the city shall have reached the number of seventy-five thousand, as determined by any official census, such salary shall be the sum of six hundred dollars per annum, payable monthly. A deduction of five dollars shall be made from each member's salary who shall be absent from any meeting of his respective house, unless said member shall certify on his honor that said absence was caused by illness or unavoidable absence from the city at the time of the meeting.' Resolved, that section 5 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 5. No member of either house shall hold any federal, state, or other municipal office, or be an employé of the city or either of said houses, or be interested in any contract with the city or with or for any department, institution, board, officer, agent, or employé thereof. Each member on taking office shall make and file in the office of the city clerk an oath that he will faithfully comply with and abide by all the requirements of this section; and the violation of any of the provisions of this section shall work a forfeiture of his membership, and warrant his expulsion from the house to which he belongs.' Resolved, that section 7 of article 4 of the freeholders' charter be amended so as to read as follows: 'Sec. 7. The house shall meet in separate chamber. A majority of either house shall constitute a quorum, but a less number may adjourn from day to day, or till the time of the next regular meeting, and may compel the attendance of absent members in such manner and under such penalties as each house shall prescribe for itself. A quorum of each of the two houses of the city council, assembled in joint convention, shall be a quorum of a joint convention of the city council.'"

The relator was a candidate in the third ward for the office of delegate to the house of delegates, at the annual election held March 8, 1892; and under sec-

tion 3, art. 4, of the existing charter, he would have been entitled to be declared elected, as he received the second highest number of votes cast for that office in his ward. But he has been refused the declaration of his election, because it has been ascertained and declared that the proposed amendments of sections 2 and 3 of article 4 were carried at the same election, whereby, the number of delegates being reduced to one only from each ward, only the candidate receiving the highest number of votes was to be declared elected. Of this action he complains, and sought by mandamus in the superior court to compel the declaration of his election at the hands of the canvassing officers, for the reason, as he alleged, that the said amendments were not lawfully adopted. The mandamus was refused, and he appeals.

The first objection taken by relator is that after the first passage of the proposed amendment as "Proposed Amendment No. 2" by the council, and its publication for ten days, upon its reconsideration it was amended, and then submitted to the popular vote without a second ten days' publication and reconsideration, and adoption without amendment. In short, the contention is that to comply with section 1, art. 20, the same identical proposition must pass both houses, once before and once after ten days' publication, without change or amendment, in order to give it a valid existence as subject for the vote of the electors. We take it, however, that the first vote in council is intended by the charter to be one rather of acquiescence than of anything final in its character, and that the ten days publication is merely one of warning to the public that the subject-matter is to be considered with a view to its amendment. Reading closely, we should say that amendments were barred upon the first consideration, rather than at the second since it is only in connection with the second that it is provided that the proposition shall "pursue the same course before the council and mayor as is pursued by any ordinance," and it is only after the second passage that the mayor is called upon to consider it. It would certainly be a great taking of chances for a proposition to go through three such ordeals, with the possibility of meeting the mayors' disapproval at the end, and die beyond resuscitation, when some slight change might overcome the mayor's objection. We conclude, rather, that the proposition is after its first publication, to all intents and purposes, an ordinance, as the charter says it shall be, and comes up for passage, amendment, or other parliamentary treatment, as the case may be.

The next point made against these amendments is that whereas the final thirty days publication of the proposed amendments was made in the form of seventy consolidated propositions, as they passed the council, the notice of election and the ballots purported to split up the proposition so as to require thirty-seven expressions by the voter to reach them all. The notice was to the effect that whereas proper action had been taken by the legislative authority of the city, providing therefor, certain propositions to amend the

charter were then in course of publication in the city official newspapers, and whereas, by ordinance No. 1974, each of the amendments intended to be submitted was briefly described and numbered for the purpose of reference thereto in the ballots to be cast for and against the ratification of the same, "as follows, to wit." etc. That the notice followed the exact language of the ordinance, and among the thirty-seven proposed amendments we find, in its proper order, this one: "(7) Proposed amendment to section 2 of article 4 of said charter, fixing the number of members of the board of aldermen and house of delegates of said city, respectively; being the first proposed amendment in course of publication, as aforesaid, under the heading, 'Proposed Amendment No. 2.'" The others followed in regular sequence. Upon the ballot, under the head of "Charter Amendments." We find, "For amendment No. 7 to the city charter," and "Against amendment No. 7 to the city charter," and the others are provided for in like manner.

Recurring to ordinance 1974, we find it prescribing in this manner: "Sec. 6. Said several proposed amendments, specified and numbered in section 2 of this ordinance, shall be voted upon by the qualified voters of said city at said general election mentioned in said section 2, for the purpose of ratification or rejection, by a majority of all lawful voters voting thereon at said election, of each of said amendments, in the manner following, to wit. Every voter electing to vote in favor of the ratification of said proposed amendment in said section 2, numbered 7, shall vote a ballot containing the words, 'For amendment No. 7 to the city charter,'" and the contrary; and so on clear through the whole number of amendments. The relator claims that the effect of breaking up the original seventeen propositions into thirty-seven had the effect to confuse the voter, and deprive him of a fair chance to express his wishes; but here again, we cannot agree with him. We do not doubt that there was confusion and inability to decide which way to vote upon the amendments, but it grew out of the necessities of the case, through there being so many subjects to be voted upon, rather than through the method of presenting them. Indeed, it is difficult to see how so many different propositions could have been submitted in any other way than the one adopted, which has the additional merit of having closely followed the general election statutes, (and especially Gen. Stat. § 518,) and the last clause of section 1, art. 20, of the charter. The amendments to sections 2 and 3, art. 4, were indispensable to each other, and might properly have been submitted together as one proposition; but, each having received majority of the vote, their separate submission, in strict accordance with the law, is no ground for defeating either or both.

Lastly, there were 8,294 ballots cast at the election in question. Of these, 1,461 were cast in favor and 1,107 against amendment No. 7, and 1,807 were cast in favor and 693 against No. 8. Thus 5,726 persons failed to vote upon No. 7, and 5,794 failed to vote

upon No. 8. Nos. 7 and 8 were the amendments to sections 2 and 3 of article 4, the adoption of which, as declared deprived the relator of his office. He claims that inasmuch as the language of the charter (sec. 1, art. 20) is, "If at said election a majority of the lawful voters voting thereat shall, by their votes, ratify any amendment so submitted, the same shall become a part of the city charter," these amendments were not adopted, since not less than 4,148 was "a majority of the lawful voters voting thereat." Section 10, art. 11, of the Constitution, quoted above says that such a charter may be amended by proposals therefor submitted by the legislative authority of a city "at a general election, and ratified by a majority of the qualified electors voting thereon." The position of the relator is that this constitutional provision is a limitation upon the powers of the municipality in amending its charter; that the framers of the Constitution intended to surround freeholders, charters of cities of the first class with safeguards; and that, as one of these safeguards, this provision was placed in the Constitution as a limitation upon the power of the city in relation to the amendment of its charter. He maintains that it was not intended to prohibit the people constituting the municipality from requiring and placing upon themselves further limitations and restrictions in the matter of amendments. Therefore, while the Constitution adopts a liberal method of procuring amendments, it is entirely within the power of the city itself, by its original charter, to adopt a strict method, such as is supposed to be involved in the word "thereat." Just how far this proposition could be carried without crossing over the line where amendments would become practically impossible at once occurs for reflection. We have already seen how, before a proposition is submitted, it must pass by a three-fifths vote of the council, be published, passed again by three fifths, face the mayors' objections, be published again, and then be voted upon at an election where two thirds of the voters treat it with indifference: and, looking upon this as a precedent, it will be safe to say that the freeholders' charter of Seattle bids fair to take rank among the famed oriental laws, that never could be changed. But we differ with the relator in this matter. The framers of the Constitution went out of the usual way of making such instruments to insert a provision therein, looking to the possible solution of a perplexing modern problem,—the government of large cities. It granted to certain cities the right to govern themselves, subject only to general laws of the state. The grant was made in the shape of power to enact a charter law, and to amend it afterwards. Just how far this grant was independent of

legislation, we are not called upon to say; but it may be safely said that wherever in this grant it is declared that a thing may be done in a certain way, when it comes to be done, the doing it in that way will be sufficient. "Wherever the language contains a grant of power, it was intended as a mandate. Wherever the language gives a direction as to the manner of exercising power, it was intended that the power should be exercised in the manner directed and in no other manner." *Varney v. Justice*, 86 Ky. 596. "When the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases." *Cooley, Const. Lim.* 5th ed. p. 78. The power to amend is in this instance as important as the power to enact. The system is new and untried. The labor of the freeholders is likely to be accepted somewhat in trust. Trial alone can develop to the general view the imperfections of their work. The Constitution sought to provide for this. No previous city council can propose a charter. Fifteen freeholders must be elected for that sole purpose. But when the charter has been adopted, put into service, and tried, it is left to those whose experience is most intimate with it to point out, in propositions, to the people, wherein they think it needs change. The Constitution requires and contemplates but little of pomps or forms; a recommendation by the legislative authority, a publication so that all may have knowledge of the proposition, and a vote, is all. General elections were selected as the time for submission, because there ought to be a certain stability about such instruments and the vice of nonattention to special elections is well known. We presume it would not be contended that if, following Gen. Stat. §§ 518, 519, a charter election, were held on the same day as a general election, the language of section 519 should be construed as controlling the Constitution, and requiring a majority of all votes cast on that day to adopt the proposed charter, because the Constitution plainly declares that, if a majority of the qualified electors voting thereon ratify the proposed charter, it shall become the charter of the city. To our minds the language concerning amendments is no less vigorous and controlling, and must receive like construction. It is the right of the people to have their charter amended by the majority vote of those who vote thereon, and, having so amended it, the relator is without cause of action.

Judgment affirmed.

Anders, Ch. J., and Hoyt and Scott, JJ., concur.

MISSOURI SUPREME COURT.

Herman A. HAEUSSLER, *Appt.*,
v.
MISSOURI IRON CO. *et al.*, *Respts.*

(.....Mo.....)

1. Possession of land under a mining lease is not adverse to the interests of the owners of the fee so as to prevent a partition between them.
2. A stipulation against the institution of partition proceedings made by co-tenants who undertake to bind themselves, their heirs and assigns forever not to institute such proceedings without the written consent of all the parties, is void because it is an unreasonable restraint upon the enjoyment and use of the property.

(March 2, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dent County in favor of

NOTE.—*Validity of agreement against right to partition.*

The right of co-tenants to bind themselves not to exercise the right of partition, contrary to the doctrine of the main case, has been upheld in several cases.

Thus a condition in a deed of premises to members of a hotel association that the premises shall be held in common without partition or division, is not invalid as repugnant to the estate granted or as against public policy. *Hunt v. Wright*, 47 N. H. 368, 63 Am. Dec. 451.

So an agreement to exempt certain ore banks or mine hills from a partition made by co-tenants because such property could not be divided without injustice to some of the parties is valid. *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641.

In *Conant v. Smith*, 1 Aiken, 67, 15 Am. Dec. 668, both partition and sale of an ore bed were denied because neither could be made without injury to the rights of the parties, and it was said that chancery could regulate the enjoyment between the owners.

In *Eberts v. Fisher*, 54 Mich. 294, the court says that a party may enter into such an agreement with his co-tenants as to estop him from enforcing the right of partition, and cites *Avery v. Payne*, 12 Mich. 540, in support of the doctrine.

In the latter case it held that a statute providing that all co-tenants "may have partition" in the manner therein provided does not give a right to partition as against an agreement of the parties inconsistent with such right. *Avery v. Payne*, *supra*.

But in *Eberts v. Fisher*, *supra*, the question of a perpetual bar to partition was not actually involved. The point decided in the case was that the lease of property held in common to part of the co-tenants for a certain number of years will prevent a partition of the property while the lease remains in force without mutual consent.

So the right of partition is defeated by an agreement of the parties to hold the premises together for the purpose of selling. *Peck v. Cardwell*, 2 Beav. 187.

And very similar to the above English case is a New York decision that a valid power to sell vested by an agreement of the parties which is made irrevocable, will defeat the right to partition. *Selden v. Vermilya*, 2 Sandf. 568.

The doctrine that the right of partition may be

defendants in an action brought for the partition of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Broadhead & Hazel, with *Messrs. J. Morchard & E. A. Seay*, for appellant:

The lease forbidding sale and trade of land is against public policy, and plaintiff under the finding would be powerless to enjoy his property.

Reichard v. Manhattan L. Ins. Co. 81 Mo. 518; *Alger v. Thacher*, 19 Pick. 51; *Parsons*, Cont. 5th ed. pp. 502, 503; *Taylor, Land. & T.* 2d ed. §§ 283, 284, and references; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355.

If the respondent ever intended to use the land for mining they had to do so in a reasonable time, and not having done so for twenty years, the contract is at end, at least as to that parcel. To forever prevent the law of this state in relation to partitions from being enforced is like a covenant not to sue on a policy in this state void and against the public good.

waived is recognized also in a case which decides that the clause, "to remain in common and undivided," between the description and habendum of a deed, does not amount to a condition or covenant against partition. *Spaulding v. Woodward*, 53 N. H. 573, 16 Am. Rep. 302.

Also in a decision that partition is not barred by a condition in a deed of an undivided half interest that the grantees shall not alienate without the grantor's permission as the condition would be as effective after partition as before. *Whitney v. Kendall*, 63 N. H. 200.

An agreement which is not sealed in consideration of a deed of an undivided portion of land that the grantee will hold it in common with a co-tenant during the latter's life, was held not a bar to partition because it was not under seal. The right of the parties to bind themselves against partition was not decided. *Black v. Tyler*, 1 Pick. 180.

Neither was this passed upon in a decision that a conveyance for occupation, "in common as a yard" forever does not defeat a partition in favor of one who has purchased the share of one of the co-tenants in legal proceedings as such occupation in common would not be defeated by a partition. *Fisher v. Dewerson*, 3 Met. 544.

In *Mitchell v. Starbuck*, 10 Mass. 11, the court said: "It is essential to an estate in common to be subject to partition." This was said in respect to an objection against the right of partition on the ground that the land was held by a peculiar tenure unknown to the common law, but the court held it to be in fact a tenancy in common.

No question of any express agreement against partition was involved in the case.

So in *Moore v. Darby* (Del.) Nov. 13, 1889, it was said that partition is a necessary incident of an estate held in common, but the validity of an agreement against partition was not involved in this case.

In *Kean v. Tilford*, 81 Ky. 600, it was held that a tenant in common cannot defeat the right of his co-tenants to a sale of the property by a provision in a deed or will disposing of his share that the property shall not be sold; but this clearly does not decide that the co-tenants could not bind themselves by an agreement to which all were parties, so as to defeat the right of partition.

The main case is the only decision which we have found that directly denies the power of co-tenants thus to bind themselves.

B. A. R.

Reichard v. Manhattan L. Ins. Co. supra; Sawyer v. Hammatt, 15 Me. 40.

The covenant in lease and deed must of course be taken as one contract.

Adams v. Hill, 16 Me. 215; *Whitehurst v. Boyd*, 8 Ala. 375.

The condition is unreasonable and against public policy, the restriction goes far beyond what is necessary for the protection of the lessees and their assigns.

Long v. Toul, *supra*.

Mr. L. B. Woodside for respondents.

Thomas, J., delivered the opinion of the court:

This is a proceeding for the partition of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 24, township 34, range 6 W., situated in Dent county, containing 280 acres. This record discloses the following facts: On the 4th day of June, 1870, C. C. Simmons and W. P. Billings, being seised of said lands in fee, by separate conveyances conveyed two undivided fourths thereof in fee to Alexander L. Crawford and William L. Scott, each of which conveyances contained this stipulation: "And it is also further mutually covenanted and agreed by and between the parties to this conveyance that neither they nor their heirs or assigns, nor any or either of them, shall or will ever institute or commence, or cause to be instituted or commenced, any proceedings, in partition or otherwise, in law or equity, to obtain or procure a partition, allotment, or division, or sale of so much or of such parts or portion of said lands as have been leased for mining purposes to said parties of the second part by deed of lease bearing even date herewith, and made and executed by said Walter P. Billings and Cyrenius C. Simmons, and duly recorded in the office of the recorder of deeds of said Dent county, without the written consent of all parties interested in said property at the time of the commencement of such proceedings, and made a part of the record thereof." The "deed of lease" mentioned in the foregoing stipulation was an indenture which witnessed that the said Simmons and Billings, as parties of the first part, granted, bargained, sold, and conveyed perpetually and forever to said Crawford and Scott, as parties of the second part, their heirs, assigns, and legal representatives, "the sole and exclusive right and privilege to enter upon and into said lands for the purpose of searching for, digging, mining, quarrying, and taking away all the iron ore which may be upon or in said lands; and also for the purpose of smelting and manufacturing of iron on said lands, to any extent that the parties of the second part, their heirs, assigns, and legal representatives, may deem advisable," with the proviso that "such parts or portions of said pieces or parcels of land as do not contain iron ore, and such as shall not be needed or used by said parties of the second part for mining storing waste material, railroad tracks and switches, manufacturing purposes, or for the erection of buildings, machinery, and fixtures required or needful for the use of said parties of the

second part in carrying on their business aforesaid, shall be and remain in the joint possession, and for the mutual use, benefit, and enjoyment, of all the aforesaid parties hereto, according to their respective interests and shares therein." It was provided by this deed of lease that said Crawford and Scott, their heirs, assigns, or legal representatives, should pay to said Simmons and Billings, their heirs, assigns, or legal representatives, the sum of 12 $\frac{1}{2}$ cents per ton gross of 2,240 pounds for the one half of all the iron ore that should be mined, dug, or quarried and taken way, used or sold from said lands; the payments to be made quarterly, on the 15th day of January, April, July, and October in each year. Crawford and Scott agreed to organize a corporation under the laws of Missouri for the purpose of carrying on mining operations on said lands, which was done, the name of the corporation being "Missouri Iron Company," to which said Crawford and Scott in due time conveyed the interests in said lands acquired by them by virtue of the said conveyances and deed of lease. This corporation took from these lands from 1873 to the time of the trial of this cause in October, 1889, 200,000 tons of iron ore. The record shows the interests of the parties other than the Missouri Iron Company in said lands to be as follows: Plaintiff, one fourth; defendant Cook or his representative, one eighth; and Walter and Maud Billings, one sixteenth each; all subject to the terms and conditions of the conveyances and deed of lease executed by Simmons and Billings to Crawford and Scott, as above set forth. Defendant the Missouri Iron Company resisted the partition of the lands on two grounds: (1) It claimed to be in the adverse possession of them; (2) It had not consented in writing to such partition as provided by the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870. Defendants Maud and Walter Billings were minors, and appeared by guardian *ad litem*, and Cook's representative made default. Upon these facts the court refused partition of the lands, and the plaintiff appealed. No instructions were asked or given.

1. One tenant in common cannot maintain an action for partition against his co-tenant where he has been disseised. *Wommack v. Whitmore*, 58 Mo. 448. While it is conceded that the Missouri Iron Company is in the actual possession of the lands partition of which is sought in this case, we do not think such possession is adverse to plaintiff's interest in them; nor does it amount to an ouster of plaintiff. Three distinct interests in the lands are created by the conveyances and deed of lease: (1) All the parties are seised of the lands in fee as tenants in common, subject to the mining right of the Missouri Iron Company; (2) the Missouri Iron Company owns in severalty the right to mine the iron ore on and in said lands, and this right is sole and perpetual; (3) plaintiff Cook's representatives and Maud and Walter Billings are owners in common in perpetuity of the royalties to be paid under the provisions of the deed of lease.

The possession of this property held by

the Missouri Iron Company is under the deed of lease and is not, therefore, antagonistic or adverse to but consistent with the interests of the other parties therein.

2. The real controversy here turns upon the construction and effect to be given the stipulation against the institution of partition proceedings without the written consent of all the parties, contained in the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870. The iron company insists that it is valid and binding, while plaintiff, on the other hand, claims that it is an unreasonable restraint upon the alienation of the property, and upon the right of each party to have partition, and the use and enjoyment of his interest in severalty, and therefore void. Plaintiff concedes in his argument in this court that the mining right is not joint property, but is held in severalty by said company, and hence is not the subject of partition; and this seems to be the theory of his petition. We will therefore take it for granted that plaintiff seeks partition or sale of the lands, subject to such mining right. This brings us to the discussion of the question, Does the stipulation against the institution of proceedings for the partition of these lands without the written consent of all the parties preclude plaintiff from maintaining this action? It must be noted at the threshold of this inquiry that the stipulation in question is not a restraint upon the alienation of lands. The several owners are left free to dispose of their interests in any manner they see proper. The only restraint is upon the right of severing the interest of one owner from the others by a proceeding *in invitum*. Is this restraint unreasonable, and void because unreasonable? This stipulation is a perpetual inhibition of partition, the language being that neither the parties nor their heirs or assigns shall ever institute proceedings for partition without the written consent of all the parties. The civil law refused to enforce agreement perpetually waiving the right of partition. Domat says: "It is always free for every one of those who have anything in common among them to divide it, and, although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition; for it would be contrary to good manners that the proprietors should be forced to have always an occasion of falling out by reason of the undivided possession of a common thing." Domat's Civil Law by Strahan, pt. 1, bk. 2, title, 5, § 2, art. 11. And Mr. Freeman, in his work on Co-Tenancy & Partition, (§ 442,) maintains that this is the rule in England and the United States. Restraints and fetters upon the alienation and enjoyment of property are opposed to the common law, 16 L. R. A.

and especially to the jurisprudence of to-day, which, in the United States, at least, has almost wholly lost the spirit and genius of the feudal system and feudal tenures. 9Am. L. Reg. N. S. 393, 457. Primogeniture and estates tail, with all their incidents, find but little favor in the laws of this century. The right of partition is an absolute right, which yields to no consideration of hardship or inconvenience. Freeman, Co-Ten. § 443. Anything that militates against this right is repugnant to the essential characteristics of co-tenancy. *Mitchell v. Starbuck*, 10 Mass. 11. And the tendency of our times is to greater freedom of sale and transfer of property, unfettered by conditions or limitation of the right of alienation. In the case at bar, if the right of involuntary partition of these lands does not exist now, it will not exist 500 or 1,000 years hence. In time, by the sale and descent of undivided interests, the owners would become so numerous, and the interests so small, that the estate would be almost, if not wholly, valueless. Here is a tract of land containing 280 acres, which may be suited to agricultural and various other purposes, and the joint owners may want to have their interest set off, so that they can utilize them for such purposes. The partition in kind or sale under partition proceedings of these lands subject to the mining right, instead of being detrimental, would be beneficial, to the owner of that right, for it is more difficult and unsatisfactory to deal with many than one. The many can exercise control over the lands subject to the mining right, and that is all one owner could do. Hence there is no reason why the title to the property subject to this right should not be vested in one person, but many reasons why it should be so vested, and we hold that the stipulation in question, as applied to the title to these lands, subject to said mining right, is an unreasonable restraint of their enjoyment and use, and therefore void.

The judgment is reversed, and the cause remanded, with directions to the circuit court to decree that partition of the lands be made subject to said mining right, and, if this interest in the lands cannot be divided in kind without great prejudice to the owners, that it be sold as provided by statute. The decree of partition must also specifically reserve the right to the royalties on the iron ore to be paid under the provisions of the deed of lease to plaintiff Cook's representatives and Maud and Walter Billings, their heirs and assigns, forever. This right is also subject of partition, but said company having no interest in it, it cannot be disposed of in this proceeding except by consent of all parties, and then only by a separate sale.

Rehearing denied. All concur.

KENTUCKY COURT OF APPEALS.

J. B. NICHOLSON *et al.*, *Appl.*,
v.
NATIONAL BANK OF NEW CASTLE.

(.....Ky.....)

1. **Absence of an assignment or an assignment without recourse and the nonaccountability of the assignor for the value of the note are necessary to make a transfer of a note to a bank for value, before maturity, in the usual course of discounting and without notice of any infirmity, a barter and sale as distinguished from a discount.**
2. **The purchase by a bank of a note by a lumping trade which results in a greater discount than would be produced by an exact calculation at the usual rate does not deprive the paper of its standing as a bill of exchange if the circumstances attending the transaction show a discount and not a bargain and sale.**
3. **A usurious discount of a note by a national bank affects neither the negotiability of the note nor the bank's title to it.**

(November 14, 1891.)

NOTE.—*Purchase of notes and bills by bank as distinguished from discounting; What is discounting?*

There is a lack of harmony in the cases as to the exact meaning of the word "discounting" as applied to bank transactions.

In several cases it has been said that the discounting of paper is only a mode of loaning money. *Wagars County Bank v. Baker*, 15 Ohio St. 87; *Smith v. Exchange Bank of Pittsburgh*, 26 Ohio St. 141; *Tracy v. Talmadge*, 18 Barb. 456; *New York Firemen's Ins. Co. v. Ely*, 2 Cow. 678.

So it has been held that an attempted distinction between loans and discounts is unsubstantial as regards the charter restrictions upon the right of a bank to reserve interest. *State v. Boatmen's Sav. Inst.* 48 Mo. 129.

The power to "discount upon banking principles and usages" means to take interest in advance. *McLean v. Lafayette Bank*, 3 McLean, 597.

Deducting interest in advance from the face of a loan is authorized by a charter provision for discounting at a specified rate. *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 552.

The ordinary meaning of the term "to discount" is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due until some future period less the interest which would be due thereon when payable. *Weckler v. Hagerstown First Nat. Bank*, 42 Md. 502; *Philadelphia Loan Co. v. Townner*, 18 Conn. 248.

A discount by a bank means a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt payable at a future day which are transferred to the bank. *Fleckner v. Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

The prohibition in the charter of a corporation against discounting notes applies to the taking and renewal of a note on which the interest is paid or secured in advance. *Philadelphia Loan Co. v. Townner*, 18 Conn. 248.

The right of a bank to "discount bills, notes and other evidences of debt" includes the taking of concurrent bills of other banks at less than their face value. *People v. Metropolitan Bank*, 7 How. Fr. 144.

16 L. R. A.

See also 17 L. R. A. 622.

A PPEAL by defendants from a judgment of the Circuit Court for Henry County in favor of plaintiff in an action upon a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Croan, Farleigh & Straus and John T. Bashaw, for appellants.

Mr. William Carroll for appellee.

Bennett, J., delivered the opinion of the court:

The appellee, as its name indicates, is a bank doing business in the state under and by authority of the Banking Act of the Congress of the United States, and, as such bank, it purchased the following note before it was due:

\$260. March 30th, 1887.

Nine months after date we promise to pay to the order of B. F. Smith two hundred and sixty dollars at German Insurance Bank, Louisville, Ky., value received. *J. W. Ridgway. J. B. Nicholson.*"

This note, on the 26th of December, 1887, four days before its maturity, was, as is alleged,

The word "discount" in a statute providing for an allowance against the assignee of an instrument of "all payments, discounts, and set-offs" means every equity against the claim. *Ferguson v. Hill*, 3 Stew. (Ala.) 455, 21 Am. Dec. 641.

Whether discounting includes buying and selling.

On this question the cases are much divided, especially those concerning national banks.

Discounting in most cases is but another name for buying at a discount. *Tracy v. Talmadge*, 18 Barb. 456.

To discount a bill is to buy it for a less sum than that which upon its face is payable. *Saltmarsh v. Planters & M. Bank*, 14 Ala. 668.

So a plea that a note acquired by a bank after forfeiture of its charter while it still had power to take the note in payment, was acquired by discounting is good in an action by the representatives of the bank upon the note. *Ibid.*

A national bank has no authority to engage in the business of selling railroad bonds on commission under its power to carry on the business of banking "by discounting and negotiating promissory notes," etc. *Weckler v. Hagerstown First Nat. Bank*, 42 Md. 502.

The purchase of state or other stocks for the purpose of profit, except in payment for a debt, is beyond the authority of a bank under its power to carry on banking by discounting bills, notes, and other evidences of debt. *Talmadge v. Pell*, 7 N. Y. 328.

This case decided by the Court of Appeals in 1832, but reported in 1854, is not referred to in the subsequent case of *Tracy v. Talmadge*, 18 Barb. 456, which was decided September 25, 1854, and which is in conflict with the decision of the Court of Appeals.

The purchaser of a promissory note from one bank by another which has power to discount notes is not in excess of its powers, although it is forbidden to "deal or trade in anything except bills of exchange, gold, or silver bullion or in the sale of goods" pledged for loans. *Fleckner v. Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

The term "discounting" includes a purchase as

"assigned, transferred, and discounted for value to the appellee by B. F. Smith and at the time the note was discounted, B. F. Smith and J. J. Smith indorsed the same, etc. Only the makers of the note made defense. It is insisted by them that the note was not purchased by discounting it in the regular course of banking business, but by mere barter and sale, which purchase was, under the National Banking Law, *ultra vires*. Consequently the appellee acquired no title to the note by the purchase; or, if the purchase was not void in consequence of its being *ultra vires*, the purchase was not of that character that gave the note in the hands of the appellee, as an innocent holder for value, the immunity of a foreign bill of exchange, but was of that character, to wit, a mere purchase by barter and sale, that entitled the appellants, as makers, to rely on any defenses to the note in hands of the appellee that they could have relied on against the payee. The lower court instructed the jury that if they believed that the appellee discounted the note before its maturity, etc., in the usual course of business, and without notice of any infirmity in the note, they should find for the appellee. The court refused to submit the question as to whether or not the purchase of the note was by mere

barter and sale. Therefore it must be construed that the court was of the opinion that there was not sufficient evidence of that fact to entitle the question to go to the jury; or that, if the purchase was by barter and sale, it was not, in consequence of it, *ultra vires*, or that it did not reduce the note from the footing of a foreign bill of exchange to the level of an ordinary promissory note. If the court was in error as to these propositions, the case must be reversed; if not, it must be affirmed. The Act of Congress relating to the powers of appellee, among other things, provides: "To exercise by its board of directors, or duly authorized officers, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes," etc. Section 31, chap. 22, Gen. Stat., provides, in substance, that promissory notes payable to any persons or corporation, and payable and negotiable at any bank incorporated under any law of this state, or organized in this state under any law of the United States, which notes shall be indorsed to and discounted by the bank at which they are made payable, or by any of the banks specified, shall be placed upon the same footing as foreign bills of exchange. There is no dispute about

well as a loan. *Pape v. Capitol Bank of Topeka*, 20 Kan. 450, 27 Am. Rep. 183.

A savings bank with the power of "discounting" as distinguished from a commercial bank with the power of "carrying on banking business by discounting," has power to purchase a promissory note. *Ibid.*

A national bank may purchase from the holder notes of third parties under its power to discount and negotiate such notes. *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141.

The purchase by a bank from the holder of a note of a third person, although not indorsed by the holder is a discount of the note, within the meaning of a statute allowing loans or discounts by a bank and the title of the bank is not defeated by taking an excessive discount although a penalty may be thereby incurred. *Atlantic State Bank of Brooklyn v. Savery*, 82 N. Y. 251.

The purchase of the note of a third person from an indorser by way of loan to him, is within the power of a national bank. *First Nat. Bank of Greenville v. Sherburne*, 14 Ill. App. 568.

If the party dealing with the bank assumes a responsibility in connection with the transaction, it is a loan. *Ibid.*

On the contrary it has been decided that the purchase of a note for speculation is not included within the power given to a national bank to "carry on the business of banking by discounting and negotiating promissory notes," etc. Also that the fact of indorsement by the seller does not necessarily show that the transaction was a loan or discount, instead of the purchase of the note. *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 141. See Federal cases, *infra*.

An earlier decision in the same state held that the purchase of a note from the holder who does not indorse or expressly assume any obligations in connection with the transfer is not within the power "to carry on the business of banking by discounting bills, notes, and other evidences of debt." *Farmers & M. Bank v. Baldwin*, 23 Minn. 126, 23 Am. Rep. 683.

And again in Maryland it was decided that a national bank has no authority to use such surplus funds as remain on hand from day to day for the

purpose of buying notes, even if it may invest its surplus capital in notes. *Lazar v. National Union Bank*, 52 Md. 124, 36 Am. Rep. 355.

Application of usury laws.

This question whether or not purchasing is included in discounting arises also in respect to the rates of discount that may be taken, and here again the question is not yet entirely settled.

The Supreme Court of the United States has decided that the purchase by a national bank of business paper transferred to it by indorsement, imposing the ordinary liability upon the indorser, is a discounting of the paper, within U. S. Rev. Stat. §§ 5197, 5198, limiting the rate of interest which may be taken. *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. ed. 742.

The court in this case says it may perhaps be distinguished from cases where the title to the paper is transferred by an indorsement without recourse or by mere delivery.

But a recent decision of the Federal court of appeals holds that those sections apply also to a purchase of drafts by a national bank before their maturity although they are transferred by mere delivery without indorsement. *Danforth v. National State Bank*, 48 Fed. Rep. 271.

In harmony with this is an Ohio decision the power "to carry on the business of banking by discounting bills, notes, and other evidences of debt" where a rate of discount is fixed, is not a power to buy promissory notes at unrestricted rates. The power to buy, if included in the power to loan, must be subject to the restriction. *Niagara County Bank v. Baker*, 15 Ohio St. 87.

On the contrary in the Missouri it is held that the purchase of bills of exchange by a bank is not within a statute restricting the rate of interest, unless the purchase was only a loan in disguise. *State v. Boatmen's Sav. Inst.* 48 Mo. 120.

So where express power is given to a bank to buy bills and notes it is not subject to the restriction as to rates of discount but authorizes the bank to take the note of a third person from the holder in payment of a precedent debt at any price agreed upon. *Dunkle v. Renick*, 6 Ohio St. 537.

R. A. R.

the fact that the note was made payable and negotiable at a bank organized in this state under the law of the United States, and that it was purchased before its maturity, and without notice of any infirmity in it, and that the appellee was organized in this state under the law of the United States; but the contention is, as said, that the purchase was not by discounting the note in the usual course of banking business, but by barter and sale; hence the purchase was either *ultra vires* and void, or that the note, by reason of such purchase, was not placed upon the footing of a foreign bill of exchange, but it was subject to any defenses that the appellants were entitled to as against the payee. If the purchase of the note was by discounting it in the usual course of business,—the business of discounting,—and not by barter and sale, all controversy as to the right of the appellee to recover its value as upon a foreign bill of exchange is at an end. What, then, is a purchase by discount and a purchase by barter and sale? The first named is defined as follows: "By language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or draw-back made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank." See 5 Am. & Eng. Encyclop. Law, p. 678. The discounting indicated is a purchase by discounting, as distinguished from a purchase by barter and sale. The latter is defined by Bouvier and this court to mean that the seller does not indorse the note at all, except, perhaps, without recourse, and is not accountable upon the contract for the value of it. He is only responsible, in such sale, for fraud, and upon his implied warranty that the note is genuine. In all else the purchaser takes the note for better or worse; hence he gives as a general thing, less for it. See 1 Bouvier, Law Dict. title, *Discount*; *Triplett v. Holly*, 4 Litt. (Ky.) 181. Which category is the purchase in? Let us see. The substance of the uncontradicted evidence of the appellee's cashier is that the appellee's usual discount is 8 per cent, that four days before the maturity of the note he purchased it in the usual course of trade, the time being short, at a lumping discount of one dollar. The appellant contends that this lumping discount, or "lumping trade," as the witness calls it, was not discounting in the usual course of trade. Therefore the purchase of the note was either *ultra vires* and void, or it was deprived of its footing as a foreign bill of exchange, and stood in the attitude of having been purchased by barter and sale, which let in the antecedent equities between the makers and payee as against the note in the hands of the

appellee. But the purchase of the note was not, in effect, by barter and sale; for, as seen, the elements of a sale, without an assignment, or an assignment without recourse, and the non-accountability for the value of the note, are wanting to make such sale in a case like this. Here the seller of the note and another did indorse it, and thereby bound themselves to be accountable for its value, and the note was purchased before its maturity for value, and in the usual course of discounting, and without notice of any infirmity in it. All the elements requisite to put the paper in the hands of the appellee, upon the footing of a foreign bill of exchange were complied with, save, as is contended, it was discounted by a lumping trade, and not according to the rule of 8 per cent, ascertained by exact calculation. But it seems to us that the taking a greater sum as discount than 8 per cent, and by a lumping trade, does not deprive the paper of its footing as a bill of exchange. The law of Congress does not prescribe the per cent that shall be charged as discount in order to make the purchase by discount not *ultra vires*, or to make it have the character of negotiable paper. The per centum of discount is left optional with the bank, except, if such per centum amounts to usury, the bank forfeits its entire interest etc.; but the purchase, so far as the title of the note and its negotiability is concerned, is not affected by the usurious discount. Nor does the Act of Congress require the bank to adopt any uniform per centum of discount; that matter is left optional with the bank. It may adopt a general rule upon the subject, which it may disregard and change as often as it pleases; or it may not adopt any general rule at all on the subject, but make the per centum of discount a subject of bargain upon the occasion of each purchase, controlled by the ability and punctuality of the parties, etc. The pivotal question is not whether the bank purchased the note by discounting at a regularly established per centum, or by a lumping trade, but whether the note was purchased by discounting it in the usual course of trade, that of bank discounting, at any price the parties might agree on, before the maturity of the note, and without notice of any infirmity in it. These conditions being answered in the affirmative, the paper is entitled to the immunities of negotiable paper. It is true the discount might be so great as to be strong evidence, in connection with other circumstances tending to prove notice of the infirmity of the paper, that the bank had notice at the time it bought the paper of its infirmity. But such is not the case here. There is no error in the instructions prejudicial to the appellants.

The judgment is affirmed.

INDIANA SUPREME COURT.

John L. SHIDELER, *Appt.*,

v.

STATE of Indiana.

(.....Ind.)

That an acquittal was procured by

NORM.—The above case is without precedent for or against so far as we have discovered.

16 L. R. A.

See also 45 L. R. A. 216.

bribery of the prosecuting attorney will not destroy the effect of a plea of former jeopardy where the state was a party to the former prosecution and was represented throughout by its proper officer while the proceedings up to and including the submission, were regular.

(October 6, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Madison County, convicting him of bigamy after his setting up a plea of former acquittal. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank P. Foster, William A. Kittinger and L. M. Schwinn, for appellant:

No person shall be put in jeopardy twice for the same offense.

Ind. Rev. Stat. 1881, § 59.

The doctrine is also laid down in Gillette, Crim. Law, § 519; *Smith v. State*, 85 Ind. 566, 557; *State v. Elder*, 65 Ind. 262, 82 Am. Rep. 69.

It is true as claimed by the state in this case that if one fraudulently procures his own trial and acquittal without a representation of the state, such will be held void. But we do not believe that such, in legal contemplation at least, was the fact in this case and that therefore *Watkins v. State*, 68 Ind. 427, 84 Am. Rep. 273; *Halloran v. State*, 80 Ind. 586, and other cases cited by the prosecution do not go far enough to uphold the judgment of the lower court in the case at bar.

We think there is a distinction between the facts in those cases and the one at bar which must not be overlooked. In those cases it seems that the state was not represented. There was such fraud that she was not held to be a party, but here the state of Indiana was a party because it was represented regularly, through all the steps in the trial, by its duly elected and acting prosecuting attorney.

Messrs. A. C. Carver and A. G. Smith for the State.

McBride, J., delivered the opinion of the court:

On the 18th day of April, 1890, an affidavit was made before the clerk of Madison county charging the appellant with the crime of bigamy. The prosecuting attorney for that judicial circuit on the same day filed the affidavit in the clerk's office of that county, together with an information based thereon. The records of the Madison circuit court show that on the 19th day of May, 1890, the appellant was arraigned and entered a plea of not guilty, was tried by the court and acquitted, and that throughout the state was represented by the prosecuting attorney. September 22, 1890, he was indicted by the grand jury of that county for the same offense, and on being arraigned he filed a plea of former acquittal. A reply was filed alleging that the former acquittal was procured by fraud. A demurrer to the reply was overruled. There was a plea of not guilty, and a trial, which resulted in the conviction of the appellant, and he was sentenced to two years' imprisonment in the state prison.

The judgment of conviction can only be sustained by treating the judgment of acquittal in the first proceeding as absolutely void, and ignoring it. Can this be done? Waiving any question as to the technical sufficiency of the reply, the facts, as the state claims to have established them by evidence on the trial, and which are relied upon as sufficient to justify the collateral attack on the judgment of acquittal, are sub-

stantially as follows: That, after the commencement of the first prosecution, persons acting in the interest of the appellant corrupted the prosecuting attorney by paying him a bribe of \$500 to connive at appellant's escape from punishment; that although the fact of appellant's guilt was beyond controversy, and the evidence ample to secure a conviction, the witnesses for the state, who had arranged with the prosecutor to come, and who would have come at any time on notice, were not subpoenaed or in any other way notified of the time of the trial, and were none of them present; that the prosecutor and the appellant went into court together without witness, a plea of not guilty was entered, and the case submitted to the court for trial without a jury; that the only evidence adduced was the statement of the accused, and two *ex parte* affidavits produced by him; that this was all in accordance with said corrupt arrangement to secure the appellant's escape from punishment; and that it was upon such presentation of the case alone that the finding and judgment of acquittal were based. It has many times decided, and may be regarded as settled law, that if one procures himself to be prosecuted for an offense which he has committed, thinking to get off with slight punishment or none, and to thus bar a prosecution in good faith by the state for the same offense, if the proceeding is really managed by himself, either directly or through the agency of another, and the state, while a party in name, is not so in fact, and has no actual agency in the matter, the judgment thus procured is void, and affords no protection. 1 Bishop, Crim. Law, § 1010; Archb. Crim. Proc. 852, note by the American editor; *Watkins v. State*, 68 Ind. 427, 84 Am. Rep. 273; *Halloran v. State*, 80 Ind. 586; *Ice v. State*, 128 Ind. 590; *Greeley v. State*, 128 Ind. 72; *State v. Lowry*, 1 Swan, 84; *State v. Clenny*, 1 Head, 270; *State v. Colvin*, 11 Humph. 599, 54 Am. Dec. 58; *State v. Yarbrough*, 8 N. C. 78; *Com. v. Dascom*, 111 Mass. 404; *Com. v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *State v. Wakefield*, 60 Vt. 618; *Com. v. Jackson*, 2 Va. Cas. 501; *State v. Epps*, 4 Sneed, 552; *State v. Green*, 16 Iowa, 289; *State v. Atkinson*, 9 Humph. 877; *State v. Brown*, 16 Conn. 54; *State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 269; *McFarland v. State*, 68 Wis. 400, 60 Am. Rep. 867; *State v. Cole*, 48 Mo. 70.

While the judgments in such cases as these above cited are fraudulently procured, and are frequently said to be void because of the fraud practiced, it is apparent that a better reason for holding them void and not binding upon the state is that the state is not a party to them. The state can no more be bound by a judgment to which it is not a party to than a citizen of a state can. If A and B engage in litigation, and during its pendency B corrupts A's attorney, and through him procures the rendition of a judgment unjust to A, and inuring to B's advantage, although the judgment is thus tainted by fraud, if the court had jurisdiction of the subject-matter, and the proceedings are apparently fair and regular on their face, the judgment

is not void, and cannot be attacked collaterally. A judgment rendered under such circumstances is voidable, and the court rendering it will promptly set it aside on the fraud being shown. *Freem. Judgm. 99.*

A court of equity will also give relief from a judgment thus procured. *Black, Judgm. 919; Freem. Judgm. 486, et seq.; Pom. Eq. Jur. 919.* The attack, however, must be direct, and not collateral. *Black, Judgm. 290 et seq.,* and cases cited. If, however, B, without the knowledge or consent of A, and wholly without authority, personates him, or procures another to personate him, and prosecutes a suit in A's name, but actually in the interest of B, whereby a judgment is rendered to the disadvantage of A and advantage of B, it would be contrary to all principles of justice to hold that A was in any manner or to any extent bound by such judgment. Never having been a party to it, or having any notice or knowledge of the proceeding, he may treat it as a nullity, and may attack it collaterally, as the state was allowed to do in each of the several cases cited. In speaking of such cases, Bishop well says: "He [the defendant] is, while thus holding his fate in his own hands in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge is imposed upon, indeed, yet in point of law adjudicates nothing. All is a mere puppet show, and every wire moved by the defendant himself." 1 Bishop. *Crim. Law, § 1010.*

The Supreme Court of New Hampshire in *State v. Little, supra*, suggests a query whether a judgment can ever be regarded as fraudulent and void when the state has been actually represented by its proper prosecuting officer. We have been unable to find any case in the books, presenting the peculiar features of the case at bar, where the courts have considered the sufficiency of a judgment thus procured as a defense to another prosecution for crime. Here the first prosecution was commenced regularly and in good faith, and the state was represented throughout by its regularly authorized officer and agent, the prosecuting attorney. The charge is that pending the prosecution the prosecuting attorney was corrupted, and paid to secure an acquittal instead of a conviction. So far as disclosed by the record, the prosecution proceeds with regularity throughout. The arraignment, plea, and submission are regular, but the trial is a farce. The distinction between such a case and those cited is at once apparent, and is very broad. While the baseness of an officer who will thus prostitute his office cannot be too severely condemned, and while he should receive prompt and severe punishment, our indignation should not be allowed to blind us to the principle involved. Our anxiety to rectify the wrong done, and punish the wrong-doer, should not lead us to violate established principles of law in our efforts to do so. In the first prosecution the court had jurisdiction both of the subject-matter and of the parties. As above stated, the proceedings were regular up to and including the submission, and are 16 L. R. A.

not void. The steps taken were the usual, proper, and necessary steps in such a case, except that the defendant has a right to a jury trial, instead of a trial by the court. It is not pretended, however, that the judge was corrupt, or that his action was not characterized throughout by the highest and purest motives, and most sincere devotion to duty. When the cause was submitted for trial, jeopardy attached; so that, even if the extreme position were taken, and the trial regarded as a nullity, and the judgment absolutely void, we could expunge both from the record, and there would still remain a valid prosecution pending, awaiting trial. Upon the other hand, if the former judgment, while voidable because of the fraud, is not void, (which is our opinion,) it is not open to collateral attack. In either view of the case, it follows that the court erred in ignoring the first prosecution, and in allowing a new and independent prosecution to be maintained. Whatever rights the state has, must be marked out in the original proceeding. The views we have expressed necessarily lead to a reversal. It is unnecessary, and would be premature, for us to decide at this time and in this case what will be proper procedure for the state in the future conduct of this matter. We will only say that the question is not free from difficulty. It has, however, received consideration from those learned in the law, and some interesting and valuable suggestions will be found in 1 Bishop, on Criminal Law, §§ 1008, 1009. See also *Rea v. Bear*, 2 Salk. 646; *State v. Tylghman*, 88 N. C. 518; *State v. Sweeney*, 79 N. C. 632.

Judgment reversed.

A petition for rehearing was subsequently filed in response to which, on November 21, 1891, *McBride, J.*, on behalf of the court delivered the following opinion:

A petition for a rehearing by the state is based on an evident misapprehension of the scope and effect of the original opinion. While it is true that a prosecution which is in fact instituted and carried on to final judgment by or in the interest of a guilty person to enable him to defeat justice and escape merited punishment (he in person or by his instruments managing both sides) may be treated as void by the state and ignored, on the ground that the state is not in fact in any sense a party to it, and therefore not bound by it, this is not true where the state is in fact a party to the proceeding. Where a prosecution is in fact regularly commenced by the prosecuting attorney, and is thereafter carried to final judgment, the state being represented throughout by its sworn officer, the prosecuting attorney, such judgment is not void because the prosecutor was corrupted during the pendency of the proceeding. The state is a party to such judgment. The conduct of its unworthy representative, conspiring with the guilty party, may render it voidable, but it cannot be ignored.

Petition for rehearing overruled.

COMMISSIONERS OF VERMILLION
COUNTY, *App't.*

James CHIPPS, Admr., etc., of Robert
Baker, Deceased.

(.....Ind.....)

1. County officers are not negligent in accepting a bridge containing defective timbers which an expert, employed by them to determine that question, honestly believes sufficient.
2. A mistake in respect to the safety of a bridge made by a competent person employed by the proper county officers to examine it and put it in good repair, will not make the county liable if it remains unsafe.
3. One who subjects a bridge to an unusual and extraordinary load or strain cannot recover damages for an injury which he receives in consequence.
4. On the question whether or not the running of traction engines over a bridge which had been built for many years was usual and ordinary where there is proof of the passage of only one engine over it, evidence as to the passage of such engines over other bridges is inadmissible.

(January 15, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Fountain County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Davidson, Baker & Yount and
M. G. Rhoads for appellant.

Messrs. Conley & Sawyer for appellee.

Coffey, J., delivered the opinion of the court:

The complaint in this case alleges that the appellee is the duly appointed and qualified administrator of the estate of Robert Baker, deceased; that on the 20th day of July, 1887, there was a bridge in Vermillion county which had prior thereto been constructed by said county and which it was bound to maintain; that it had negligently constructed said bridge by placing therein weak, knotty, and defective timbers, leaving it in an unsafe condition, and that it had negligently accepted said bridge from the contractor who built the same, in an unsafe condition for passengers, by reason of the weak, knotty, and defective pine timbers placed therein, while the contract and specifications for said bridge provided that the same should be constructed in a good, substantial, workmanlike manner, of poplar timber; that it had negligently suffered said bridge to remain in such unsafe condition and to become out of repair, so that on the 20th day of July, 1887, the joists and other timbers upon which the floor of said bridge was laid were

defective, weak, brittle, knotty, old, decayed and rotten, so that it was dangerous for persons to pass over the same in the ordinary use of said highway, of which the county had notice that on that day the deceased, Robert Baker not knowing the defective, decayed, and dangerous condition of the bridge, but having reason to believe it was in good repair and in safe condition, attempted to pass over the same with portable traction engine used for threshing grain, and by reason of the defective, decayed, and dangerous condition of the bridge caused by the failure and neglect of the board of commissioners of the county to properly construct and keep the same in repair, and without any fault on the part of the deceased, the bridge gave way and precipitated the deceased and said engine into the stream below, a distance of sixteen feet, whereby he was, without any fault on his part, stunned, bruised and scalded, from the effects of which he died; that he left a widow and two children, who were dependent upon him for support.

To this complaint the appellant filed an answer in two paragraphs, first, the general denial; second, alleging contributory negligence. The court sustained a demurrer to the second paragraph of the answer, to which appellant excepted. A trial by jury resulted in a general verdict for the appellee. The jury also returned answers to interrogatories with their general verdict. Over a motion for new trial the court rendered judgment on the general verdict for the appellee. Several reasons for a reversal of the judgment of the circuit court are urged here, which will be considered in the order in which they are presented by counsel for appellant.

First. It is contended that the complaint above referred to does not state facts sufficient to constitute a cause of action. The sufficiency of the complaint is questioned for the first time in this court by an assignment of error. It is settled that where the sufficiency of a complaint is questioned for the first time in this court by assignment of error it will withstand such attack if it be sufficient to bar another action for the same cause and would be good after verdict. *De Souchet v. Dutcher*, 118 Ind. 249, 13 West. Rep. 892; *Orton v. Tilden*, 110 Ind. 181, 8 West. Rep. 905; *Hornady v. Shields*, 119 Ind. 201.

In the case of *Knox County Comrs. v. Montgomery*, 109 Ind. 69, 6 West. Rep. 917, it was said by this court: "The liability of counties for negligence in constructing or maintaining bridges is no longer an open question in this state, for there are many cases declaring that they are liable."

The complaint before us sufficiently alleges the negligence of the county, both in constructing and maintaining the bridge therein described, and contains the necessary allegation that the deceased was without fault.

It is contended by the appellant's counsel that ordinarily this would be sufficient; but it is insisted that it is not sufficient under the rule announced in the case of *Carver v. Wabash* (Ind.) 13 L. R. A. 851. In that case

NOTE.—For negligence in construction and care of highway bridges including the matter of extraordinary use of such bridges, see note to *Wabash v. Carver* (Ind.) 13 L. R. A. 851.

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See also 26 L. R. A. 254; 48 L. R. A. 455.

a rehearing was granted and upon a reconsideration of the question it was held that the complaint in that case stated a cause of action. We think the complaint in this case is also sufficient.

The court committed no available error in sustaining a demurrer to the second paragraph of the appellant's answer, as all the matters therein averred were admissible in evidence under the general denial which was pleaded. *Howard County Comrs. v. Legg*, 110 Ind. 479, 9 West. Rep. 212; *Haywood v. Hedrick*, 94 Ind. 340; *Becknell v. Becknell*, 110 Ind. 43, 7 West. Rep. 922.

The facts in this case as they are disclosed by the evidence are, that the bridge mentioned in the complaint is a covered bridge, about thirty feet in length, and was constructed in the year 1869. For at least ten years after its construction traction engines were not used in Vermillion county, where the bridge is situated, but for the period of four or five years prior to July, 1887, they had been in general use. On the 20th day of July, 1887, the appellees' intestate attempted to cross the bridge with a traction engine weighing eight thousand six hundred pounds, when the bridge gave way and he was thereby killed.

The evidence tends to show that six thousand pounds was the heaviest load to which bridges in that neighborhood were subject at the time this one was constructed. The bridge in question was constructed by one Daniels, an expert bridge builder, under plans and specifications furnished by the county. The evidence tended to prove that some of the timbers which gave way were knotty and brittle, and had begun to decay. One Britton, an expert called as a witness by the appellee, testified that the defects in these timbers were original defects, the timbers being unfit for use as bridge timber by reason of its knotty and brash condition, while Daniels, an expert called by the appellant and the person who constructed the bridge, testified that the timber was good and was suitable for the construction of a good and safe bridge, and were such as were put in all bridges at the time this was constructed, and that he inspected and accepted the timber believing it to be suitable for the purpose intended.

Two or three weeks before the accident above mentioned, the trustees of the township in which the bridge is situated employed a carpenter of twenty-four years' experience, to examine the bridge and make a careful inspection of its timbers and put the same in good repair which he, in connection with the supervisor, proceeded to do. He put in some new timbers and, after inspection, pronounced the others sound and safe and supplied the bridge with a new floor.

On the trial of the cause the court, over the objection and exception of the appellant, permitted the appellee to prove that in other parts of the county, and on other highways than the one in controversy, traction engines were common, and that it was customary for them to cross the bridges on such highways.

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The decided weight of authority is, that in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair. *Elliott, Roads and Streets*, p. 42.

The reason given in most of the adjudicated cases for holding that counties are not liable in such cases is, that as the state would not be liable, it is unreasonable to hold that a public corporation, such as a county, which is a mere governmental instrumentality, should be held liable. But whether this reason is valid or otherwise we need not stop to inquire, for it is now firmly settled in this state that a county is liable for a failure to exercise reasonable care in the construction of its bridges, or to exercise reasonable care in keeping such bridges in repair.

Counties are not insurers, however, of the safety of their bridges; nor are they bound, when constructing them, to anticipate uses not then known, and necessities which are not within ordinary experience. So in repairing they have performed their whole legal duty when they have put them in as good a condition of strength and soundness as will make them as secure as new bridges of the same kind and plan. *Fulton Iron & Engine Works v. Kimball Twp.* 52 Mich. 146; *Medina Twp. v. Perkins*, 48 Mich. 67; *McCormick v. Washington Twp.* 112 Pa. 185, 2 Cent. Rep. 584; *Wabash County Comrs. v. Pearson*, 120 Ind. 428.

In the case of *Wabash County Comrs. v. Pearson*, *supra*, it was said by this court: "A corporation charged with the duty of keeping a bridge in repair must select the proper means and persons to do the work, if by the exercise of ordinary care such selection can be made. If, however, after ordinary care is used in selecting suitable persons, and requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability."

The first question presented for our consideration under the facts above stated is this, Was the board of commissioners guilty of negligence in accepting the bridge, mentioned in the complaint, at the time of its construction?

If the question as to whether some of the timbers used in the bridge were defective was the only question involved, we could not disturb the verdict on the evidence, for we will not weigh conflicting testimony; but the question in the case is not alone as to whether the timber was defective, but the further question exists as to whether the defect was of such a character as to charge the county with negligence in accepting a bridge containing such timber. In the construction of bridges the county is not liable for latent defects which could not have been discovered by the use of reasonable diligence, in the material used, and is only bound to use ordinary or reasonable care to make the structure safe for the uses for which it was intended. *McCormick v. Washington Twp. supra*.

The case cited was a case where a bridge gave way by reason of defective timber,

under the weight of a traction engine, and the court instructed the jury as follows: "If the jury believe that the supervisors, or those in their employment, when building the bridge in July or August of 1883, tested the alleged defective chords or stringers by cutting into it with an axe, or in any other manner, as an ordinarily prudent man would do under the circumstances, they performed their duty and negligence cannot be inferred because of a mistake made in the performance of such duty."

The Supreme Court of Pennsylvania held this instruction to be a correct exposition of the law.

In the case of *Medina Twp. v. Perkins*, *supra*, where a bridge gave way by reason of defective timber, under the weight of a portable engine, the Supreme Court of Michigan, in discussing the question as to the duty of township officers in relation to bridges said: "The law will not impose an impracticable rule of duty. Township officers are not expected to be experts, nor learned engineers, nor persons liberally instructed in mechanics, nor individuals equipped with the resources of experienced specialists, and nothing more can be demanded of them than reasonable intelligence and ordinary care and prudence. And no duty is enjoined on the township to keep informed of the condition of its bridges that they may be taken as being above the capacity of its own officers."

In this case no complaint is made of the plan of the bridge. The county employed a skilled and competent person to construct it according to the plans and specifications. Such skilled person inspected, and received the timber which entered into its construction, and testifies that in his opinion they were suitable for the purpose for which they were used. He further testified that such timbers were used at the time the bridge was built by all persons of competent skill. It is not denied or disputed that the expert employed by the county to construct this bridge honestly believed the timber used by him, after inspection to be suitable bridge timbers. Is it to be said that the officers of the county, who are not presumed to be experts, are guilty of negligence in accepting a bridge containing timbers which an expert did honestly believe sufficient?

The timbers of which complaint is now made did in fact prove to be sufficient to bear up all ordinary loads to which they were subjected for a period of eighteen years. In view of these facts we are of the opinion that the evidence in the cause does not make a case of negligence against the county in accepting the bridge in question from the contractor. To hold otherwise would require of the board of commissioners something more than ordinary diligence, and would in fact make it the insurers of the safety of the county bridges.

Where the facts are undisputed and can lead to but one conclusion, the question of negligence is a question of law for the court. *Mann v. Bolt R. & S. Y. Co.* 128 Ind. 138.

Nor do we think the evidence sustains the charge that the county was guilty of

negligence in failing to keep the bridge in repair.

About two or three weeks prior to the accident we are now considering, the proper legal authority employed a competent person to examine the bridge and put the same in good repair. He proceeded to do so and gave the timbers such examination as he deemed necessary to test their soundness, and did such other things as he thought necessary to make the bridge safe. If he made a mistake the county cannot be charged with negligence by reason of such mistake. The duty of the county was to exercise reasonable care in selecting a proper person to examine and repair the bridge, and to require of him the exercise of his skill, and if it did so and the bridge still remained unsafe, the county was not liable. *Wabash County Commrs. v. Pearson*, *supra*.

As the legislative department of the state has determined that the removal of traction engines upon the public highways is a subject calling for the exercise of the police power, it may fairly be considered as a question as to whether we are not bound to know that the use of the highways for that purpose is not usual and ordinary. *Elliott's Supp.* § 847.

But without stopping to inquire whether we are or are not bound to take such notice, we think the court erred in permitting the appellee to prove, on the trial of the cause, that it was usual and ordinary for traction engines to pass over other highways and bridges than the one in controversy. It did not tend to prove that the deceased in using the bridge mentioned in the complaint was using it in the usual and ordinary way.

In the case of *McCormick v. Washington Twp.* *supra*, it was held that in order to recover, the plaintiff must show that at the time of the accident he was using the highway in the ordinary and usual manner in which that highway was, had been, and was intended to be used, and if he was not traveling in the usual and ordinary way in that vicinity he was not entitled to recover. As we have seen, this bridge was constructed at least ten years before traction engine's came into use. In the case of *Fulton Iron & Engine Works v. Kimball Twp.* *supra*, in speaking of the subject of repairs the Supreme Court of Michigan said: "When it [the statute] requires repairs it may fairly be construed as requiring bridges to be put in as good a condition of strength and soundness as would make them as secure as new bridges of the same kind and plan. But it does not require different structure." The rule that one who uses a bridge in a manner not usual or ordinary, or subjects it to an unusual or extraordinary load or strain, and is thereby injured, cannot recover damages for such injury, is well settled.

That the proof that traction engines had passed over other highways and bridges in the county was considered by the jury in this case as proof that the deceased was using the bridge in controversy in the ordinary and usual way is made to appear by their answers to interrogatories for they so find, whereas there is no proof in the record that more

than one engine had, prior to the injury complained of, passed over this bridge. The fact that one engine passed over the bridge shortly before this accident does not make that the usual and ordinary mode of travel over it. The admission, therefore, of evidence that traction engines had passed over other highways and bridges in the county was not only error, but it was an error which resulted in an injury to the

appellant. For the errors above indicated the circuit court should have granted a new trial.

Judgment reversed, with directions to sustain the appellant's motion for a new trial in this cause.

McBride, J., dissents.

Petition for rehearing overruled April 1, 1893.

INDIANA APPELLATE COURT.

Monroe MOYER, Guardian of Dennis Moyer,
Appl.,
v.
Amanda M. BUCKS.

(.....Ind.:.....)

Service by publication alone which is shown by the record to be the only service does

not give jurisdiction to render a personal judgment against the defendant in a bastardy proceeding in the absence of a statute providing for such service.

(October 29, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Tippecanoe County

NOTE.—*Validity of personal judgments rendered upon constructive service of process.*

Against nonresidents.

1. In other states than where rendered.

The authorities all concur in denying jurisdiction in actions *in personam* over nonresident foreigners, upon anything short of actual notice given within the territorial limits of the forum, or voluntary appearance there. *Latimer v. Union Pac. R. Co.* 43 Mo. 105, 97 Am. Dec. 373.

In *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225, Thompson, Ch. J., says: "It must then be taken, I think, as the settled law of this state, that a judgment obtained in a sister state against a person not being within the jurisdiction of the court, nor having been served with process to appear, nor having appeared to defend the suit, will be absolutely void."

A court has no extraterritorial jurisdiction, and a person not domiciled in the state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice of process within it or voluntarily submits himself to the jurisdiction of its court. *DeMell v. DeMell*, 120 N. Y. 485.

A nonresident of the state is not concluded by a decree *in personam* based upon constructive service of process upon him. *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300. In this case it is said: "We believe that there is no law of force in this state authorizing the making of a citizen of a foreign state a party to a suit in our courts, so as to conclude such citizen, by a judgment or decree *in personam*, unless he voluntarily appears and defends. And that, by the general law, and by the comity of states, the citizen of a foreign state cannot be made a party to a suit in Georgia, so as to be estopped by a judgment against him, without his consent."

Emmett, Ch. J., in *Stone v. Myers*, 9 Minn. 303, 36 Am. Dec. 104, says of a judgment against a nonresident based on service by publication and attachment of defendant's property within the state: "But such a judgment, though in form *in personam*, is in effect only a judgment *in rem*. It is a judgment for no other purpose than to reach the property which a nonresident may have in the state, but who is not personally served with process therein. It is confined exclusively to such property, and is of no further force when that is exhausted."

16 L. R. A.

Beyond this it is evidence of nothing nor does it bind or conclude the defendant in anything. An action could not be maintained on it in any other court here or elsewhere, nor, in my opinion, would the party in whose favor it was rendered be precluded thereby from still bringing another action on the original consideration for any balance that might be due to him after exhausting the property which was in the state at the time jurisdiction attached." See too, language of Miller, J., in *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931.

A court cannot acquire jurisdiction to render a valid personal judgment against a nonresident by actual service of its process upon him outside the state. *York v. State*, 73 Tex. 651; *Kimmarle v. Houston & T. C. R. Co.* 76 Tex. 686; *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587; *Kelly v. Norwloh Union F. Ins. Co. (Iowa)* Feb. 4, 1891; *Ford v. Adams (Ark.)* Jan. 17, 1891; *Cross v. Armstrong*, 7 West. Rep. 771, 44 Ohio St. 613.

A personal judgment rendered against a nonresident upon constructive service is void. *Miller v. Miller*, 1 Bail. L. 242; *Aldrich v. Kinney*, 4 Conn. 280, 10 Am. Dec. 151; *Scott v. Streepy*, 73 Tex. 547; *Denny v. Ashley*, 12 Colo. 165; *Anderson v. Goff*, 72 Cal. 65; *Fowler v. Lewis (W. Va.)* Feb. 12, 1892; *Quari v. Abbott*, 102 Ind. 233; *Renier v. Hurlburt (Wis.)* 14 L. R. A. 532; *Abbott v. Sheppard*, 44 Mo. 273; *Martin v. Cobb*, 77 Tex. 644; *Kimball v. Merrick*, 20 Ark. 12; *Silver v. Luck*, 42 Ark. 263; *Holt v. Alloway*, 2 Blackf. 108.

A judgment rendered in one state against a nonresident upon a service of process other than personal service therein will not support an action in another state. *Downer v. Shaw*, 22 N. H. 277; *Arndt v. Arndt*, 15 Ohio. 33; *Scott v. Noble*, 72 Pa. 115, 18 Am. Rep. 663; *Price v. Hickok*, 39 Vt. 232; *Steel v. Smith*, 7 Watts & S. 447; *Jones v. Spencer*, 15 Wis. 683; *Earlman v. Jones*, 2 Yerg. 484; *Chamberlain v. Faris*, 1 Mo. 517, 14 Am. Dec. 304; *Hogers v. Coleman*, *Hardin (Ky.)* 418; *Lincoln v. Towser*, 2 McLean, 473; *McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666.

The only modes in which a court can acquire authority to render a personal judgment against one residing without the state are either by service of process upon him while temporarily within the state or by a voluntary submission of his person to the jurisdiction of the court. *Welch v. Sykes*, 3 Ill. 197, 44 Am. Dec. 699; *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179; *Shumway v. Stillman*, 6 Wend. 447.

in favor of plaintiff in an action brought to enforce a judgment against Dennis Moyer out of property in the hands of his guardian. *Reversed.*

The facts are stated in the opinion.

Messrs. John D. Gougar and R. P. Davidson, for appellant:

The judgment against Dennis Moyer, in the circuit court, was a personal one, upon constructive notice only. Such a judgment is absolutely void.

Section 390, Rev. Stat. 1881, expressly declares that no personal judgment shall be rendered against a defendant upon constructive notice, who has not appeared to the action. This section, however, was wholly unnecessary. The principle is fundamental, and is thoroughly settled in reason and by countless adjudications that a personal judgment against a nonresident defendant upon constructive notice merely, is an utter nullity.

Fennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 80 L. ed. 372; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *McEwan v. Zimmer*, 38

Mich. 765, 31 Am. Rep. 332; *Barber v. Morris*, 37 Minn. 194; *National Bank v. Peabody*, 55 Vt. 492, 45 Am. Rep. 632, note; *Gilchrist v. West Virginia Oil & O. L. Co.* 21 W. Va. 115, 45 Am. Rep. 555; *Elliott v. McCormick*, 3 New Eng. Rep. 871, 144 Mass. 10; *Smith v. Grady*, 68 Wis. 215; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 6 Cent. Rep. 679, 66 Md. 511; *Paxton v. Daniell*, 1 Wash. 19; *Freeman, Judgm.* § 567, note; *Cooley, Const. Lim.* p. 449, et seq.; *Wade, Notice*, § 1084; 4 *Wait, Act. & Def.* 188, 189, 196; *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440, note; *Mitchell v. Gray*, 18 Ind. 124; *Beard v. Beard*, 21 Ind. 321; *Nicholson v. Stephens*, 47 Ind. 186; *Middleworth v. McDowell*, 49 Ind. 387; *Hood v. State*, 56 Ind. 270, 26 Am. Rep. 21; *State v. Engis*, 74 Ind. 20; *Sowers v. Edmunds*, 76 Ind. 123; *Cavanaugh v. Smith*, 84 Ind. 382; *Cicero v. Williamson*, 91 Ind. 541; *Paulus v. Lattn*, 93 Ind. 41; *Quarl v. Abbott*, 102 Ind. 233; *Dobbins v. McNamara*, 12 West. Rep. 680, 113 Ind. 54.

It is a universally acknowledged principle that jurisdiction cannot be acquired or exercised over persons or property without the

Under a Missouri statute providing for establishing the personal liability of stockholders on a judgment against their corporation to the amount of unpaid balances on stock "after sufficient notice in writing to the persons sought to be charged," a judgment of a court in that state adjudging such personal liability against a nonresident who was not personally served with notice within that state is void, where he has not agreed in advance to accept, or does not in fact accept, some other form of service as sufficient. *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338; *Wilson v. St. Louis & S. F. R. Co.* (Mo.) Dec. 22, 1891.

A judgment rendered without personal service in a state court against a nonresident on a warrant of attorney to confess judgment contained in a bond as authorized by the statute of the state where it was rendered will not be enforced in the courts of another state. *Grover & B. Sewing Machine Co. v. Radcliffe*, 137 U. S. 297, 34 L. ed. 670; *Iglehart v. Moore*, 16 Ark. 44.

Such statutes can bind only citizens of the state where they exist. *Sim v. Frank*, 26 Ill. 125.

A personal judgment rendered in a Canadian court against a resident of Wisconsin upon service of process in the latter state as authorized by the laws of Canada has no validity in Wisconsin. *Smith v. Grady*, 68 Wis. 213. To the same effect are *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332, and *Shepard v. Wright*, 118 N. Y. 582.

A judgment against a nonresident rendered without personal service of process within the state or appearance is no bar to an action in another state on the original cause of action. *Whittier v. Wendell*, 7 N. H. 267; *Rangely v. Webster*, 11 N. H. 299.

A decree of a state court for the removal of a cloud upon the title of land within the state, rendered against a nonresident cited by publication only, in accordance with the local statutes, being a decree *in personam* merely, is no bar to an action by such nonresident in a Federal court to recover such land. *Hart v. Sansom*, 110 U. S. 151, 23 L. ed. 101.

2. In state where rendered.

In some states personal judgments upon constructive service are prohibited by statute.

Where the defendants are served without the state, no personal judgment can be properly entered. *Hakes v. Shupe*, 27 Iowa, 465; *Weil v. Lowenthal*, 10 Iowa, 576; *Johnson v. Dodge*, 19 Iowa, 16 L. R. A.

106; *Maddox v. Craig*, 80 Tex. 600; *Paxton v. Daniell*, 1 Wash. 19; *Stewart v. Anderson*, 70 Tex. 568; *Cloyd v. Trotter*, 7 West. Rep. 425, 118 Ill. 391.

An action is not maintainable on a judgment rendered against a nonresident who was only constructively summoned either in the courts of the state where the judgment was rendered or of any other state. *Needham v. Thayer*, 147 Mass. 536, overruling *Graves v. Cushman*, 181 Mass. 359; *McCormick v. Flake*, 138 Mass. 379; *Cook v. Darling*, 18 Pick. 398.

A judgment against a nonresident rendered without personal service within the state will not support an action of debt in the state where rendered. *Eastman v. Dearborn*, 1 New Eng. Rep. 166, 63 N. H. 384; *Sowers v. Edmunds*, 76 Ind. 123; *Mitchell v. Gray*, 18 Ind. 123; *Lutz v. Kelly*, 47 Iowa, 307. *Contra*, *Granger v. Clark*, 22 Me. 123.

It was held in *Kendrick v. Kimball*, 33 N. H. 452, that an action of debt could be maintained in the New Hampshire courts on a judgment rendered there upon constructive service of process upon one who left the state after the attachment of his property but before personal service could be had. This decision rendered in 1856 is held unsustainable by *Eastman v. Dearborn*, *supra*, since the 14th Amendment to the Federal Constitution and under the latter decisions.

A purely personal judgment rendered upon citation by publication, is good against a collateral attack unless it affirmatively appears from the record that the defendant was a nonresident. *Martin v. Burns*, 80 Tex. 676.

A personal judgment against a nonresident based upon service by publication will not support garnishment proceedings. *Smith v. McCutchen*, 38 Mo. 415.

A judgment for a tort against a nonresident based upon publication of the summons, gives the judgment creditor no right to proceed *in personam* against the defendant, or for the purpose of compelling him to submit to an examination in respect to his property. *Bartlett v. McNeill*, 60 N. Y. 53.

Against residents.

In *Knowles v. Logansport Gas Light & C. Co.* 86 U. S. 19 Wall. 53, 22 L. ed. 70, it is said: "We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at

territorial limits of the government where the court sits, and that the Legislature possesses no power to grant it.

Jarvis v. Barrett, 14 Wis. 591. See also *Clark v. Hammett*, 27 Fed. Rep. 339.

Bastardy proceedings are unknown at common law, and are purely statutory.

Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257.

The remedy can go no further than the terms of the statute.

Marlett v. Wilson, 80 Ind. 240; *Baker v. State*, 56 Wis. 568; *Baker v. State*, 65 Wis. 50.

The proceeding is governed by the rules of civil practice, but the only process provided for is a warrant.

Morris v. State, 115 Ind. 282.

The defendant in a bastardy case can only be brought in, in the mode provided by statute. It will certainly not be controverted that a process unauthorized by statute is a nullity. So also a publication unless authorized by statute is void.

Brenner v. Quick, 88 Ind. 546; *Dowell v. Lahr*, 97 Ind. 151; *Brown v. Goble*, Id. 86;

his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of nonresidents . . . personal service cannot be dispensed with unless the defendant voluntarily appears." To the same effect is *Beard v. Beard*, 21 Ind. 321.

A statute providing for process of process in actions *in personam* of a strictly judicial character and proceeding according to the course of the common law, by publication, upon residents who can be found within the state is unconstitutional, because such service is not "due process of law." *Bardwell v. Collins*, 9 L. R. A. 152, 44 Minn. 97.

A judgment rendered against a resident of the state where rendered upon constructive service of process authorized by its laws will be held as valid by its courts as though rendered upon personal service. *Thouvenin v. Rodriguez*, 24 Tex. 468, 477.

A personal judgment against a resident of the state where it is rendered upon constructive service of process in accordance with local statutes will be enforced in the courts of another state. *Budford v. Kirkpatrick*, 13 Ark. 38; *Nunn v. Sturges*, 22 Ark. 389; *Mitchell v. Ferris*, 5 Houst. (Del.) 84; *Cassidy v. Seitch*, 2 Abb. N. C. 315.

A personal judgment rendered against a resident of the state upon service of process upon him in accordance with the statute by leaving the same at his usual place of abode is valid until set aside by some direct proceeding taken for that purpose. *Huribut v. Thomas*, 55 Conn. 181; *Biesenthal v. Williams*, 1 Duv. 329, 85 Am. Dec. 629.

In *Huntley v. Baker*, 38 Hun. 573, a personal judgment was held valid when sued upon in New York, although rendered in Wisconsin upon service of the summons by leaving it at the defendant's domicile, in accordance with the laws of the latter state, he having left the state without intending to return but not having yet acquired another domicile. The court said, page 550: "Without stating the principle more at length, it may be assumed that by reason of the relation between the state and its citizen, which affords protection to him and his property and imposes upon him duties as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the state, prescribing a method of service which is not personal and which in fact may not become actual notice to him."

In *Fernandes v. Casey*, (Tex.) May 27, 1890, a judgment 16 L. R. A.

Vizzard v. Taylor, Id. 93; *Fontaine v. Houston*, 58 Ind. 316; *Freeman*, Judgm. § 127.

Notice by publication can only be given in proceedings *in rem*. In proceedings *in rem*, the *res* is under control of the court and it alone is subject to its judgment. If there be neither jurisdiction of person nor *rem* the whole proceeding is a nullity.

Stone v. Myers, 9 Minn. 308, 86 Am. Dec. 104. See also *note to Molyneux v. Seymour*, 76 Am. Dec. 662-670.

Where the record shows one kind of notice there can be no presumption that there was any other.

Ely v. Tallman, 14 Wis. 32, cited in *note to Rape v. Heaton*, 76 Am. Dec. 280; *Barber v. Morris*, 37 Minn. 194.

Mr. J. B. Milner for appellee.

Reinhard, J., delivered the opinion of the court:

The appellant is the guardian of his son, Dennis, a minor, who, until the fall of 1887, was a resident of Tippecanoe county, when it is claimed he left the state and became a non-resident. It appears that after Dennis left the

ment against one who had left the state intending to seek a home elsewhere, but who afterward returned to the state to live without acquiring a domicile elsewhere, was rendered upon service by publication during his absence and execution thereon levied upon his lands after his return. An injunction against the sale thereunder was refused on the ground that the judgment was valid. It does not appear whether the lands were acquired after his return or not. This is an extreme extension of the doctrine of the right of a state to bind her citizens by any mode of serving process and while it may be distinguished from the *decisions* in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and analogous cases by the citizenship of the defendant, it is in conflict with the *language* used in the opinions in those cases.

See *Wilson v. Seligman*, 144 U. S. 41, 38 L. ed. 338.

If process be served upon a defendant according to the laws of the state of which he is at the time a resident, the judgment rendered there is valid as a bar to an action in another state on the same cause of action. *Harryman v. Roberts*, 52 Md. 64.

A judgment against a resident of the state rendered upon attachment of his land and service of process by leaving it at his place of abode, will support an action in another state for the balance remaining unsatisfied after a sale of the attached land. *Fullerton v. Horton*, 11 Vt. 425.

A personal judgment against one who had left the state intending not to return, rendered upon service of process by leaving it with his wife at his recent place of abode, will not sustain an action in another state. *Amsbaugh v. Exchange Bank of Maquoketa*, 33 Kan. 100.

An action is not maintainable in New York on a judgment rendered in Massachusetts where jurisdiction was obtained by attaching defendant's property and by substituted service of process, he having at the time removed into and become a resident of New York, notwithstanding the judgment was valid under the laws of Massachusetts. *Kilburn v. Woodworth*, 5 Johns. 37, 4 Am. Dec. 321. To the same effect is *Johnson v. Ward*, 8 Johns. 88, 5 Am. Dec. 327.

In *Elliot v. McCormick*, 8 New Eng. Rep. 371, 144 Mass. 10, it is said that *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, "modify the application and effect of our statutes, and overrule the adjudications of this court, so far as they hold that a judg-

state, on January 10, 1888, the appellee instituted bastardy proceedings against him before a justice of the peace. The warrant that was issued for his arrest was returned "Not found," and the justice proceeded with the trial under the statute. He found that Dennis was the father of the appellee's bastard child, and certified the record to the circuit court, where, on the 18th of May following, an affidavit was filed that the defendant was a resident of the state, but had departed therefrom with the intention of avoiding the service of the process, and that his whereabouts was unknown. Notice by publication having been made, the defendant was defaulted, and a personal judgment rendered against him for \$500 on the 5th day of October, 1888. This action is a suit

upon that judgment, and was brought against the appellant, as guardian of said Dennis, to obtain satisfaction of the judgment out of the assets in his hands for said ward. The complaint is in one paragraph. The appellant demurred to the complaint. The demurrer was overruled, and the appellant answered in four paragraphs, the third and fourth of which set up the facts above stated at length, and with the additional averments that the ward owned no property in the state of Indiana other than that in the hands of the guardian, which consisted of money, and that no attachment or other proceedings had been instituted against said ward except the bastardy proceedings referred to. A demurrer was sustained to each of these paragraphs. The cause was sub-

ment *in personam* can be rendered against a nonresident defendant without any other service than attaching his property, or leaving a summons at his last and usual place of abode within the state, followed by such publication of notice as is ordered by the court."

What property subject to.

A strictly personal judgment rendered in a state court in an action upon a money demand against a nonresident of the state, without personal service of process upon him within the state or appearance in the action in response to substituted or constructive service is void and cannot be enforced against property of such nonresident located within such state. *Pennoyer v. Neff*, 96 U. S. 714, 24 L. ed. 555; *McKinney v. Collins*, 88 N. Y. 216; *Becher v. Chambers*, 58 Cal. 635; *Cudabac v. Strong*, 67 Miss. 705.

In *Pelton v. Platner*, 18 Ohio, 209, 42 Am. Dec. 197, the court says: "In Ohio we are of the opinion that a judgment before a justice of the peace against property, and no service on the person, appropriates the property only. That execution cannot issue on such judgment against the other property or person of the defendant for any implied balance, nor could an action be sustained upon it as being *prima facie* evidence of debt. When it has converted the property it is *functus officio*, and vitality remains to it no longer for any purpose."

A judgment against a nonresident, based upon service by publication and attachment of his property, is effectual only against the particular property attached and will not support an action of debt. *Eastman v. Wadleigh*, 65 Me. 251, 20 Am. Rep. 695; *Gilman v. Gilman*, 126 Mass. 26; *Bissell v. Briggs*, 9 Mass. 482, 6 Am. Dec. 88.

Such judgment cannot bind property not proceeded against *in rem* in satisfaction of this claim. *Bartlett v. Spicer*, 75 N. Y. 523; *Fiecke v. Anderson*, 88 Barb. 71.

A judgment in a "foreign attachment" action against a nonresident without personal service on the defendant is not a lien upon lands not attached in such action. *Stanley v. Stanley* (S. C.) Nov. 30, 1891.

No valid title is acquired by a purchaser at a sale on a general execution under a personal judgment in the same form that would have been proper if defendant had been personally served, where no appearance was made and service was by publication only, although the land had been attached in the suit. *Cassidy v. Woodward*, 77 Iowa, 354.

"While a personal judgment against a nonresident debtor who is only served with process by publication is void and of no effect, yet in a case where the debtor has property within the state, which is seized under a writ of attachment issued in the cause at the time the suit is brought, a judgment

therein, which, though general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to the payment of a debt due from the nonresident, is so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and considered for that purpose, and to that extent, is not void." *State v. Eddy*, 10 Mont. 311.

A personal judgment for deficiency in an action for the foreclosure of a mortgage against a nonresident upon whom process was served by publication is unauthorized and void and will not uphold a sale on execution of other land of the defendant within the state than the mortgaged premises. *Schwinger v. Hickok*, 53 N. Y. 280. In this case *Andrews, J.*, said: "The Legislature could, perhaps, have declared that judgment obtained against a nonresident, upon service by publication, might be enforced against all property of the defendant within the state. *Thomas v. Emmert*, 4 McLean, 97; *Bissell v. Briggs*, 9 Mass. 482, 6 Am. Dec. 88; *Boswell v. Otis*, 50 U. S. 9 How. 338, 13 L. ed. 184. Such a judgment would be *in rem*, and would impose no personal liability upon the defendant."

Since the decision in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. ed. 555, this *dictum* could not be adhered to unless limited to property taken by mesne process.

For alimony or costs.

A judgment for alimony and costs is not binding on a nonresident defendant who was not served with process within the state or did not appear in the divorce proceedings. *Rigney v. Rigney*, 40 N. Y. S. R. 210, citing *Beard v. Beard*, 21 Ind. 321; *Lytle v. Lytle*, 48 Ind. 300; *Middleworth v. McDowell*, 49 Ind. 386; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Garner v. Garner*, 56 Md. 127; *Van Storch v. Griffin*, 71 Pa. 240; *People v. Baker*, 76 N. Y. 73, 37; *Van Voorhis v. Brintnall*, 86 N. Y. 13, 40 Am. Rep. 505; *De Meli v. De Meli*, 120 N. Y. 435.

No extensive examination of the topic as connected with divorce decrees has been here attempted.

Jurisdiction in partition suits may be acquired over nonresidents by publication merely of process, but not so as to authorize the rendition of personal judgments against them for the costs. *Tallaferro v. Butler*, 77 Tex. 573; *Foot v. Sewall*, 81 Tex. 659.

A judgment for costs in a partition suit rendered against a nonresident joint-tenant, summoned by publication only, cannot be enforced as a personal judgment by sale on execution of the land partitioned to him, and such a sale confers no title on the purchaser. *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372. J. G. G.

mitted for trial to the court, and there was a finding in favor of the appellee, upon which, over appellant's motion for a new trial, judgment was rendered. Errors are assigned (1) for overruling the demurrers to the complaint; (2) for sustaining the demurrer to the third paragraph of the answer; (3) for sustaining the demurrer to the fourth paragraph of the answer; (4) for overruling the motion for a new trial. The motion for a new trial challenges the sufficiency of the evidence to sustain the finding.

The principal question thus presented by the record is whether a personal judgment in a bastardy proceeding is or is not void where the record shows on its face that the only service had upon the defendant was notice by publication. The appellee's counsel in their brief says: "As we conceive it, the question is, Can a personal judgment be rendered against a citizen of this state who has left the state to avoid the service of process? The affidavit for publication states that Dennis Moyer, the ward, is a resident of the state. The notice treats him as a nonresident; so does the order of court. We submit that the affidavit characterizes the proceeding and is the basis of it, and under the statute, though the subsequent proceedings are irregular, some notice was given, and it is sufficient." Looking at the case, then, from the view most favorable to the appellee, the question still remains, May a personal judgment be rendered in a bastardy proceeding against a defendant who has not been arrested or in custody, and upon whom no process has been served, except notice by publication, even though he be a resident of the state, but temporarily absent therefrom? This question, we do not hesitate to say, must be decided adversely to the claims of the appellee. We are not unaware of the rule that, where notice is given by publication, the judgment of the court that the publication and affidavit upon which it is based are sufficient to give it jurisdiction is conclusive upon all the parties as against a collateral attack. *Eisig v. Lower*, 120 Ind. 239; *Goodell v. Starr*, 127 Ind. 198. But it must be evident that this rule by no means keeps a personal judgment from being void which has been rendered upon no other notice than by publication. In *Jackson v. State*, 104 Ind. 516, 1 West. Rep. 840, the rule was expressed as follows: "If there be a notice of publication, or whatever of this nature the law requires in reference to persons or other matters, its sufficiency cannot be questioned collaterally;" and further on the court says: "It has long been the rule in this state that, where a court is required to determine whether facts essential to jurisdiction exist, a judgment that they do exist will be conclusive as against collateral attack."

But what was it the law required the court to determine in those cases with reference to the notice? By an examination of those cases, it will be found that the proceedings there were *in rem*, and no other kind of judgments were sought or obtained. The only fact essential for the court to determine in reference to its jurisdiction was whether the notice and affidavit were sufficient in order to make valid a judgment *in rem*. There was no occasion to decide whether such notice and affidavit would

have been sufficient to warrant a personal judgment. The point was decided, however, in *Quarl v. Abbott*, 102 Ind. 238. Where there is no statute authorizing notice by publication, it is doubtful whether it is good, even for a basis of a judgment *in rem*; and certainly it could not be claimed successfully that it will authorize a personal judgment, in the absence of a special statute to that effect. Where a personal judgment is sought it devolves upon the court, as preliminary to the hearing, to determine whether personal service has been had. If it determines this question in the affirmative, and it appears that some personal service was in fact had, the judgment may be ever so irregular or voidable, but it is not void, and will be sufficient to withstand any collateral attack. As a general rule, a personal judgment is absolutely void where it appears upon its face that the court had no jurisdiction either of the person or the subject-matter. *Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 198; *Kingman v. Paulson*, 126 Ind. 607; *Quarl v. Abbott*, 102 Ind. 238. Ordinarily, in civil actions, where there is no appearance for the defendant, a summons and service thereof is necessary in order to give the court jurisdiction of the person of the defendant, so that it may render a personal judgment. While a bastardy proceeding is in some sense a civil action, the process required there is a *capias* or warrant. *Morris v. State*, 115 Ind. 252, 14 West. Rep. 87. Where a defendant in such a proceeding has been once arrested on a warrant and escapes, and then the cause is certified to the circuit court under the statute, it seems that the trial may proceed in his absence, and he may thereafter be arrested again, and be compelled to comply with the court's orders. *Patterson v. State*, 91 Ind. 364; *Lucas v. Hawkins*, 102 Ind. 64, overruling *Patterson v. Pressley*, 70 Ind. 94. But we know no law authorizing any kind of legal proceedings against anyone without some process, and, upon every principle underlying our system of jurisprudence, such a proceeding would be a nullity. In this state the process required is usually prescribed by the statute. The pertinent inquiry for us to make, therefore, is, What sort of process has the statute provided in such cases, and has the statutory provision been complied with? We have already seen that the kind of process which the statute requires is a warrant or *capias*. *Morris v. State*, *supra*. The statute nowhere provides for notice by publication in bastardy cases. Freeman says that "a publication, in the absence of any law authorizing it, is the same in effect as no publication. A judgment based upon it is void." Freeman, Judgm. 127. But even if this is not so, and even if there were a statute expressly authorizing notice by publication in bastardy cases, as was once the case, we apprehend such statute would be applicable only to such portion of the proceedings as might be considered strictly *in rem*. Such notice might be sufficient to authorize the court, in the absence of the defendant, to fix the status of the parties, determine the paternity of the child, etc.; but as to that we of course decide nothing. The action of the court goes no further than that. No personal judgment could be rendered on such notice,

even if the defendant were a resident of the state and temporarily absent. The statute itself forbids it. Rev. Stat. 1881, § 890; *Mitchell v. Gray*, 18 Ind. 123; *Sowers v. Edmunds*, 76 Ind. 123; *Middleworth v. McDowell*, 49 Ind. 386; *Lytle v. Lytle*, 48 Ind. 200. And it has been repeatedly decided that a judgment *in rem* cannot become the foundation of another action. *Henrie v. Sweasey*, 5 Blackf. 335; *Roose v. McDonald*, 23 Ind. 157; *Lippard v. Edwards*, 39 Ind. 165.

We are referred to the case of *Davidson v. State*, 62 Ind. 276, as relied upon by the court below to support its decision. In that case, however, the question of the validity of a personal judgment rendered upon constructive service was not before the court. There the proceeding had been instituted before a justice of the peace. A warrant had been issued for the defendant and returned "Not found." The justice proceeded to hear the case in the absence of the defendant, and found that he was the father of the bastard child. He certified the case to the circuit court. At the next term of the court an affidavit of nonresidence was filed, and notice by publication had. At a succeeding term of the court the cause was tried on default of the defendant, and a finding was made that he was the father of the child, and the cause was continued without fixing the amount the defendant was to pay, or rendering any judgment against said defendant whatever. Shortly afterwards a warrant was issued upon which the defendant was arrested, and gave bail for his appearance at the next term of court, when he appeared and moved to set aside the default, which motion the court overruled. After a motion in arrest had been made and overruled, the court rendered final judgment on the default and finding previously entered. The only question was whether the default was legal, for up to that time no judgment had been rendered. The court held that it was, but it was not called upon to decide, and did not decide, that a personal judgment upon such finding alone was valid, because no judgment had been ren-

dered prior to the appearance of the defendant. Possibly the notice of publication might have been sufficient under the statute to authorize the court to proceed in the defendant's absence, and determine the status of the parties, but it did not authorize the rendition of any personal judgment, nor did the court so decide. The case is therefore no authority by which we feel bound. A few other cases of an earlier date would seem to intimate that a defendant in a bastardy proceeding might be properly served with notice by publication. *Milton v. State*, 9 Ind. 452; *Hunter v. State*, 6 Blackf. 882. However, what validity should be given to a personal judgment which has been rendered upon such notice only is not determined by any of those cases, as they turned upon other questions not here involved. The appellee cites *Beard v. Beard*, 21 Ind. 321, as an authority that a personal judgment on a notice by publication may be rendered against a resident of the state who is temporarily absent. But we do not regard that case as determinative of the question before us, and, if counsel will examine it carefully, they will find that the court even there declare that, in the absence of a statute, a constructive service upon a resident of the state while absent is void, and that he should be served by copy of the summons at his last usual place of residence. Whatever the court intimates there as to the power of the Legislature to make a law which would make notice by publication effective is without controlling force here, as it has not been attempted to make such a law for such cases as the one we are now considering. From what has been said it will be apparent that we regard the rulings of the court as erroneous. There was no legal evidence to sustain its finding and judgment, and the motion for a new trial should have been sustained. The court erred also, we think, in sustaining the demurrer to the third and fourth paragraphs of the answer.

Judgment reversed, with instructions to the court below to proceed in accordance with this decision.

NEW YORK COURT OF APPEALS. (2d Div.)

Maria L. DALY, *Respt.*,
c.

John S. WISE, *Appt.*

(.....N. Y.....)

1. A covenant that a dwelling is fit for residence is not implied on the lease of the whole of an unfurnished dwelling for a definite term under a single contract which contains no covenant that the premises are in good repair or that the lessor will put or keep them so.
2. A representation that the plumbing is in good order, made on the lease of

NOTE.—The authorities on the question of an implied covenant that premises leased for a dwelling are fit for habitation are well presented in the report of the above case.

For an exception in case of a lease of furnished rooms at a summer resort, see *Ingalls v. Hobbs* (Mass.) *ante*, 51.

14 L. R. A.

a dwelling, although false, does not affect the liability of the lessee for rent if the statement was made in the belief that it was true.

(April 19, 1892.)

APPEAL by defendant from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to recover the balance of rent due under the terms of a written lease. *Affirmed*.

Statement by **Follett, Ch. J.**:

September 27, 1888, the litigants entered into a written lease by which the plaintiff let to the defendant an unfurnished dwelling, known as "334 West Fifty-eighth Street," in the city of New York, for one year from October 15, 1888, for \$1,800, pay-

able \$150 October 15, 1888, and a like sum on the 15th day of each succeeding month. The lease contained no covenant in respect to the then condition of the house, nor that the lessor should put or keep it in repair. November 15, 1888, the defendant began to occupy the premises, paid the rent for four months, until January 15, 1889, and continued in occupation until February 2, 1889, when he abandoned them because of their unsanitary condition, arising from defective plumbing. February 1, 1890, this action was begun to recover the sums due by the terms of the lease on the 15th day of February, March, April and May, 1889, \$600 in all, with interest. The defendant answered that he was induced to enter into the lease by the oral representation of the plaintiff's agent; that the building on said premises was properly constructed and in thorough repair, the more especially in the matter of plumbing and sanitary arrangements; and that this defendant signed said lease, relying upon the faith of said representation so made as aforesaid." It was also alleged: "That, when defendant entered into possession of said premises, it was discovered that said representations were untrue, and that said premises were unfit for the purposes of a residence, in that there existed hidden defects in the plumbing and construction of the sewer and other pipes, and the sanitarian arrangements in the buildings thereon. That such defects were concealed from view, and were not discovered until the effect thereof became apparent in the health of the defendant's family. That by reason of said defects the said building became charged with sewer gas and other foul and poisonous odors, thereby causing the defendant, his wife, children, and servants, to become sick, and in great danger of death; and they so continued sick and in danger until the defendant was evicted from said premises, as hereinafter set out." At the close of the evidence, neither party asked to have any question of fact submitted to the jury, but each moved that a verdict be directed in his or her favor. The defendant's motion was refused, and he excepted; but the plaintiff's motion was granted, and the defendant again excepted. No other exceptions are contained in the record, and the only questions reviewable in this court are those presented by the two exceptions mentioned. A judgment was entered on the verdict for the plaintiff, which was affirmed at general term. No opinion was written, but the case was decided upon the opinion of the same court in another action, arising over the same lease. 7 N. Y. Supp. 902.

Mr. Robert L. Harrison, for appellant: The false representation by the plaintiff's agent that the plumbing was in good repair was fraudulent.

The defect was a latent one to which the rule of *caveat emptor* does not apply, for the lessee from the necessity of the case must rely upon the representation of the lessor.

Smith v. Marable, 11 Mees. & W. 5; *Cesar v. Karuts*, 60 N. Y. 229; *Rhinclander v. Sea-* 16 L. R. A.

man, cited in note to *Chadwick v. Woodward*, 13 Abb. N. C. 455; *Wallace v. Lent*, 1 Daly, 481. See also *McAdam, Land. & T.* p. 125, and cases there cited.

The agent must have stated what he knew to be false, or represented as a fact what he did not know to be true; either of which would constitute fraud. The rule that there must be an intent to deceive does not permit one to state as a fact what he does not know to be true.

Havokins v. Palmer, 57 N. Y. 664; *Hammond v. Pennock*, 61 N. Y. 145; *Jolliffe v. Hitte*, 1 Call, 807.

The false representation, being upon a material point, vitiated the lease.

McAdam, Land. & T. p. 120.

Even if the representation of the agent be held not to be fraudulent, and even in the absence of a covenant to repair in the lease, there was a constructive eviction of the defendant.

Tallman v. Murphy, 120 N. Y. 345; *Thomas v. Nelson*, 69 N. Y. 118; *Bradley v. DeGocouria*, 12 Daly, 393; *Lawrence v. Burrell*, 17 Abb. N. C. 812.

Mr. Robert Sturgis, with *Messrs. Daly, Hoyt & Mason*, for respondent:

Under the common law, the landlord was not bound, in the absence of an express covenant in the lease, to make repairs.

No covenant can be implied in the absence of such express agreement.

McGlashan v. Tallmadge, 37 Barb. 313; *Franklin v. Brown*, 6 L. R. A. 770, 118 N. Y. 110; *Witty v. Matthews*, 52 N. Y. 512; *Edwards v. New York & H. R. Co.* 98 N. Y. 249; *Edwards v. McLean*, 122 N. Y. 302; *Moffatt v. Smith*, 4 N. Y. 126; *Howard v. Doolittle*, 3 Duer, 464; *O'Brien v. Capwell*, 59 Barb. 504.

In the absence of such an express warranty or covenant to repair there is no implied covenant that the demised premises are suitable or fit for occupation.

McGlashan v. Tallmadge, Edwards v. New York & H. R. Co., Franklin v. Brown, O'Brien v. Capwell, Howard v. Doolittle, and Edwards v. McLean, supra; Lynch v. Speed, 15 Daly, 207; *Mayer v. Moller*, 1 Hilt. 491.

It is no defense to an action for the rent, that the premises were and continued to be unhealthy, noisome, and offensive, and unsuitable for a dwelling.

McGlashan v. Tallmadge, and Moffatt v. Smith, Franklin v. Brown, Edwards v. McLean, and Howard v. Doolittle, supra; Chadwick v. Woodward 13 Abb. N. C. 441; *Coulson v. Whiting*, 12 Daly, 413; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438.

Under such circumstances, even a statement that the plumbing is in good condition is to be regarded merely as an expression of opinion and not as an assertion of the fact.

1892 Sup. *McAdam, Land. & T.* pp. 150, 155; *Fowler v. Stevens*, 17 Jones & S. 479, and cases cited.

The defendant cannot claim to be relieved from payment of rent under the covenant of quiet enjoyment. The only cases where this can be urged being where the landlord intentionally and under claim of right does some act inconsistent with the title and rights and quiet enjoyment of his tenant.

McAdam, Land. & T. 2d ed. 481 *et seq.*

Edgerton v. Page, 20 N. Y. 281; *Howard v. Doolittle*, 3 Duer, 464.

This case must be distinguished from those where the tenant hires an apartment in a building where the landlord has control of the general system of pipes, etc., which supply the tenant's rooms.

Bradley v. DeGoicouria, 12 Daly, 393; *Vann v. Rouse*, 94 N. Y. 401; *Tallman v. Murphy*, 120 N. Y. 345.

Follett, Ch. J., delivered the opinion of the court:

In case neither party requests to have any question of fact submitted to the jury, but each asks that a verdict be directed in his favor, the court is authorized to determine the fact in issue; and upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed. *Kirtz v. Peck*, 118 N. Y. 222; *Dillon v. Cockcroft*, 90 N. Y. 649; *Provost v. McEnroe*, 102 N. Y. 650, 2 Cent. Rep. 898. This case must be determined upon the theory that all the disputed facts have been found in favor of the plaintiff.

In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract, which contains no covenant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant on the part of the lessor that the dwelling is without inherent defects, rendering it unfit for a residence. *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770. In *Smith v. Marrable*, 11 Mees. & W. 5, a contrary rule was laid down by *Baron Parke*. That case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week left, paying the rent for that week. In an action brought, it was held, in the opinion delivered by *Baron Parke*, concurred in by *Barons Alderson and Gurney*, "that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance. It rather rests in an implied condition of law, that he undertakes to let them in a habitable state." *Chief Baron Abinger* concurred upon the ground that "a man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited." The opinion of *Baron Parke* was rested on the authority of *Edwards v. Etherington*, *Ryan & M.* 268, 7 Dowl. & R. 117, and *Collins v. Barrow*, 1 Mood. & R. 112, both of which cases, together with *Salisbury v. Marshall*, 4 Car. & P. 65, are expressly overruled by *Hart v. Windsor*, 12 Mees. & W. 68, in which *Parke, B.* said: "We are under no necessity of deciding in the present case whether that of *Smith v. Marrable* be law or not. It is distinguishable from the present case on the ground on which it was

put by *Lord Abinger*, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*, 13 Mees. & W. 52, for it was the case of a demise of a ready-furnished house for a temporary residence at a watering place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment." *Smith v. Marrable*, as decided at Hilary Term, 1843, and *Hart v. Windsor*, and *Sutton v. Temple*, at Michaelmas Term of the same year. The rule laid down in *Smith v. Marrable*, by *Abinger, C. B.*, as applicable to furnished houses, has been followed in *Campbell v. Wenlock*, 4 Fost. & F. 716, and *Wilson v. Hatton*, 2 Exch. Div. 386; but the rule as stated by *Parke, B.*, has not been followed in England or in this state. *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770. The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition? In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. *Wallace v. Lent*, 1 Daly, 481; *Jackson v. Odell*, 12 Daly, 345; *Rhineland v. Seaman*, cited in note to *Chadwick v. Woodward*, 13 Abb. N. C. 455; *Cesar v. Karuts*, 60 N. Y. 229. In the case at bar the defendant testified, and in this he was not contradicted, that, when he first went to the house with the plaintiff's agent, he said: "I complained to him [the agent] at the time that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff,—determined not to put in any new; that it was all in good condition; that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or the agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to, in respect to the owner's liability in case he fraudulently misrepresents the condition of the dwelling, or, knowing that it is in bad condition, fraudulently conceals the fact from the person who becomes the lessee. Is the plaintiff liable for having stated that a material fact existed which did not exist, i. e., that the plumbing was in good order, upon the theory that she was bound to know whether or not the statement was true. In case a party, for the purpose of inducing another to contract with him,

states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud if the statement is relied on, and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 N. Y. 562; *Oberlander v. Spiess*, 45 N. Y. 175; *Wakeman v. Dolley*, 51 N. Y. 27, 10 Am. Rep. 551; 2 Pom. Eq. Jur. §§ 887, 888; *Story*, Eq. Jur. § 193. It does not ap-

pear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition" was made without actual or supposed knowledge of its condition, nor that it was made in bad faith; and we think the case does not fall within the principle of the authorities last cited. The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty, because it is not so pleaded in the answer.

The judgment should be affirmed, with costs.

All concur.

ILLINOIS SUPREME COURT.

George W. HOYT, *Plff. in Err.*,
v.

PEOPLE of the State of Illinois.

(.....Ill.....)

1. An indictment charging an agreement to burn a building and that in pursuance of such agreement the building was burned is not bad for duplicity as charging both conspiracy to commit arson and arson, since the conspiracy was merged in the consummated act of burning.

2. Denying a continuance on an admission by the prosecuting attorney

that an absent witness would testify as alleged in the defendant's affidavit for continuance without requiring an admission of the facts which such testimony would prove if true does not violate a constitutional right of the accused to "meet the witnesses face to face" and to have "process to compel their attendance" if a reasonable time for that purpose has already elapsed.

3. Discretion may be vested in the court to deny a continuance to the accused because of the absence of a witness upon admission by the prosecution that he will testify to the facts set out in the affidavit for continuance, without requiring an admission of their truth in the absence of a constitutional provision prohibiting it.

NOTE.—Denial of continuance upon admissions by the prosecution as affected by right of accused to meet witnesses.

An admission by the prosecution that witnesses for whom a continuance is desired would testify as alleged if they were present has been held sufficient in the following cases without any discussion of constitutional questions: *Comerford v. State*, 23 Ohio St. 599; *State v. Hatfield*, 72 Mo. 518 (see later Missouri cases, *infra*); *Hamilton v. State*, 8 Ind. 552; *Lea v. State*, 64 Miss. 294.

So in *State v. Mooney*, 10 Iowa. 506, a refusal of continuance was held proper on an admission that if the witnesses were present defendant could "prove by them his previous good character."

In Montana an admission by the state that the witnesses if present would testify to the facts stated in an affidavit for a continuance, is sufficient to justify a denial of the continuance. *State v. Gibbs*, 10 L. R. A. 749, 10 Mont. 213; *Territory v. Harding*, 6 Mont. 323; *Territory v. Perkins*, 2 Mont. 457.

This is true even if the admission expressly reserves the right to impeach the testimony. *State v. Gibbs*, *supra*.

In Illinois a statute providing that the prosecuting attorney shall not be required to admit the absolute truth of the matter set up in an affidavit for a continuance in order to prevent the continuance for a material witness, but only that such witness if present would testify as alleged in the affidavit, was in question in *Hickam v. People* (Ill.) March 31, 1891, and it was held that the denial of a continuance under this statute on an application made at the second term was in the discretion of the court. The constitutionality of the statute was not discussed.

But in *People v. Vermilyea*, 7 Cow. 390, *Chief Justice Savage* said: "The practice of requiring concessions in such cases is novel and I apprehend not 16 L. R. A.

well calculated to advance justice. But if to be encouraged it seems to me that the prosecutor should admit all that the defendant can possibly obtain by the witness which is the truth of the facts proposed to be proved."

This decision was not based on the right of the accused to meet witnesses but on the insufficiency of the admission as a substitute for the testimony.

The latter Indiana cases overruled the decision in *Hamilton v. State*, 22 Ind. 552, and required an unconditional admission of the truth of the facts which the witness is desired to prove as a condition of denying a continuance basing this decision on the constitutional right of the accused to "meet the witnesses face to face and to have compulsory process for obtaining witnesses in his favor." *McLaughlin v. State*, 8 Ind. 231; *Miller v. State*, 9 Ind. 340; *Wassels v. State*, 25 Ind. 35.

In Missouri also a series of decisions have established the doctrine that an admission by the prosecuting attorney that an absent witness, if present, would testify as set forth in an affidavit for a continuance cannot be made by statute a sufficient ground for refusing the continuance under a constitutional provision that the accused shall have the right "to have process to compel the attendance of witnesses in his behalf." *State v. Berkley*, 10 West. Rep. 67, 22 Mo. 41; *State v. Dawson*, 6 West. Rep. 451, 90 Mo. 149; *State v. Neider*, 13 West. Rep. 123, 94 Mo. 79; *State v. Warden*, 14 West. Rep. 426, 94 Mo. 648; *State v. Dyke*, 96 Mo. 298; *State v. Loe*, 98 Mo. 609. Although in the first of these cases the decision was made by a bare majority of the judges against vigorous dissent.

So in Arkansas a statute making an admission by the prosecution that an absent witness would testify as alleged in an affidavit for a continuance a substitute for the witness which shall prevent postponement of the cause for his testimony, is held unconstitutional as against the right of an

4. Where testimony of accomplices is the principal evidence against an accused he is entitled as a matter of right to have an instruction given to the jury as to the legal character of such evidence and a refusal of it will constitute reversible error unless the evidence of his guilt is so conclusive that such an instruction could have no effect on the result reached by the jury.

(March 24, 1892.)

ERROR to the Circuit Court for Iroquois County to review a judgment convicting defendant of arson. *Reversed.*

The facts are stated in the opinion.

Messrs. Free P. Morris, R. W. Hilscher and C. H. Payson, for plaintiff in error:

If the jury believes an accomplice then his testimony may be sufficient to warrant a conviction; but in determining whether they will believe him, the fact that he is a convict or an accomplice—like the interest of a witness in a suit, should be considered.

Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; *Friedberg v. People*, 103 Ill. 160; 1 Greenl. Ev. 808; 2 Starkie, Ev. 12; *People v. Spies*, 5 Am. Crim. L. Rep. 649.

When a witness is undoubtedly an accomplice, it is error for the court not to instruct the jury on the subject of accomplice testimony. *Stone v. State*, 22 Tex. App. 185.

The court erred in refusing to compel the prosecution to admit the absolute truth of the statement in the affidavit for continuance, which it was shown the absent witness would testify to if present.

Ill. Const. art. 13, § 9; *Willis v. People*, 2 Ill. 400; *Vanmeter v. People*, 60 Ill. 169.

In order to avoid a postponement on motion of defendant to procure the testimony of an absent witness, the absolute truth of the affidavit must be admitted, and evidence to rebut or impeach it is incompetent and inadmissible.

Powers v. State, 80 Ind. 77; *Brent v. Heard*, 40 Miss. 370; *Pool v. Devora*, 30 Ala. 672; *Murphy v. Murphy*, 31 Mo. 332.

A defendant could not be compelled to go to trial by even admitting the truth of what the absent witness would swear if present.

Dominges v. State, 7 Smedes & M. 475, 45 Am. Dec. 815; *Goodman v. State*, 1 Meigs (Tenn.) 195; *De Warren v. State*, 29 Tex. 464; *People v. Dodge*, 28 Cal. 445.

The court should have quashed the third count of the indictment.

It charges two separate felonies under the statute: 1st, a conspiracy to commit arson with one penalty (Crim. Code, § 46); 2d, the completed crime of arson, with still another and different penalty (Crim. Code, § 18).

See *People v. Wright*, 9 Wend. 198; *McGahagan v. State*, 17 Fla. 685.

A count in an indictment containing a joinder of two or more distinct offenses, is bad for duplicity.

State v. Ripley, 31 Me. 386; *State v. Fildment*, 35 Iowa, 541; *State v. Palmer*, 32 La. Ann. 565; *State v. Johns*, 32 La. Ann. 812; 1 Bishop, Crim. Proc. 13th ed. § 432; Moore, Crim. Law, 805.

Messrs. George Hunt, Atty. Gen., and A. F. Goodyear, State's Atty., for the People.

Schofield, J., delivered the opinion of the court:

Plaintiff in error was indicted jointly with Asa Sapp and Gustave S. Traub, but he was

accused "to have compulsory process for obtaining witnesses in his favor." *Graham v. State*, 50 Ark. 181.

So in Louisiana, it is held that the admission must be of the facts which it is alleged that the desired witnesses would testify to and that an admission merely that the witnesses would swear as alleged reserving a right to impeach them is insufficient. *State v. Brette*, 6 La. Ann. 653.

So in Texas the admission must be of the facts which the absent witnesses are desired to give evidence upon. *Hyde v. State*, 16 Tex. 457; *De Warren v. State*, 29 Tex. 464.

In Kentucky an admission by the prosecution that the "facts are true" which an affidavit for a continuance alleges that an absent witness would testify to if present, is made necessary by a statute in order to prevent a continuance for a material witness; and a denial of the continuance upon such an admission is held not to be in violation of the constitutional right of the accused to "compulsory process for obtaining witnesses in his favor." *Pace v. Com.* 11 Ky. L. Rep. 407; *O'Brien v. Com.* Id. 634.

Going still beyond any of the above cases, it was held in *Goodman v. State*, 1 Meigs (Tenn.), 195, that an accused has a constitutional right to have his witnesses present even if there is an admission of the facts which they are wanted to prove as well as of the fact that they would testify to such facts. But in this case the offer was in fact only to admit that they would have so testified.

In a California case the refusal to postpone a trial for an absent witness was held not error where the district attorney admitted the fact and the witness was actually produced on the trial and 16 L. R. A.

no exception was taken. *People v. Brown*, 59 Cal. 345.

Also that a defendant is not obliged to take the testimony by commission of a witness who is temporarily ill or go to trial without him, but may have a continuance if the witness is material. *People v. Dodge*, 28 Cal. 445.

Impeaching a contradicting affidavit.

An admission that an absent witness would testify to certain facts if present, does not prevent the state from giving evidence to contradict such alleged facts. *Olds v. Com.* 3 A. K. Marsh. 465; *State v. Miller*, 67 Mo. 604.

In *Powers v. State*, 80 Ind. 77, it is held that a statute requiring an admission of the fact to be proved by absent witnesses as a condition of denying a continuance for them, prevents the impeachment of their credibility.

On the other hand it has been decided that the credibility of absent witnesses cannot be impeached where there has been an admission that if present they would testify to certain alleged facts. *Dominges v. State*, 7 Smedes & M. 475, 45 Am. Dec. 815.

But in Mississippi this rule was altered by statute so as to give the affidavit only the effect that the witness' testimony would have if he was present. *Brent v. Heard*, 40 Miss. 370.

In Kansas it is also held that an affidavit for a continuance read by consent cannot be impeached for want of diligence in obtaining the testimony, or on the ground that the testimony of the witness would be untrue or that the alleged witnesses are non-existent. *State v. Boark*, 23 Kan. 147.

R. A. R.

tried alone, and the jury found him guilty as charged in the third count of the indictment. The sufficiency of that count was questioned on the alleged ground of duplicity by a motion to quash, which was overruled by the court, and it is now insisted that the court erred in thus ruling. The substance of the allegations of the count, which are in apt technical language, is that the parties indicted agreed to burn an elevator of one Peter Hoyt, and in pursuance of that agreement did burn it. The conspiracy to burn is merged in the consummated act of burning, and so the offense charged is that of arson only, and not the independent offenses of a conspiracy to commit arson and arson. 2 Whart. Prec. Ind. pp. 94-97; 1 Bishop, Crim. Law, 786, 790, 804-815; 3 Greenl. Ev. § 90; 4 Am. & Eng. Encyclop. Law, 648. There was, therefore, no error in refusing to quash the count.

Another contention in the court below, and renewed here, is that the Act in relation to conspiracy, approved June 16, 1887, is repealed by an Act entitled to that effect, approved May 28, 1891, and that there can, therefore, now be no conviction under the first-named Act for conspiracy. But since the third count is for arson, and cannot, therefore, be for an offense created only by the first-named Act, it is impossible that the case can be affected by the last-named Act.

Before entering upon the trial, plaintiff in error made and presented to the court his motion, supported by his affidavit, for a continuance of the case, on account of the absence of a witness on his behalf,—one Oppy,—stating what he expected to prove by Oppy. The state's attorney thereupon admitted, for the purposes of the trial of the case at that term, that Oppy would, if present, testify to the facts recited in the affidavit, and that on the trial of the case those facts might be read to the jury as the testimony of Oppy; and the court thereupon overruled the motion for continuance. The facts which it was stated in the affidavit could be proved by Oppy were read to the jury upon the trial of the case, and the court refused to instruct the jury that they must accept these facts as true, but on the contrary instructed the jury that such facts should be subjected to "the same rules of consideration, the same scrutiny, and the same rules of criticism as is any other evidence in the case, and the jury should give such evidence only such weight as, from all the evidence in the case, they may think it deserves." Each of these rulings is assigned for error; but obviously they present but a single question, namely, whether the matters stated in the affidavit as those of which Oppy would, if present at the trial, testify, were to be taken by the jury as absolutely true, or simply as are matters testified to by other witnesses who appear and testify at the trial, subject to like impairment and contradiction by other evidence in the case.

It is enacted by section 1 of "An Act to Regulate the Granting of Continuances in Criminal Cases," approved June 26, 1885 (Laws 1885, p. 73), "that, when affidavit is made for a continuance in behalf of the people or any defendant in a criminal case on the ground of the absence of a material witness, the state's attorney or the defendant, as the case may be, 16 L. R. A.

shall not be required to admit the absolute truth of the matter set up in the affidavit for continuance, but only that such absent witness, if present, would testify as alleged in the affidavit; and, if it is so admitted, no continuance shall be granted, but the case shall go to trial, and the party admitting the same shall be permitted to controvert the statements contained in such affidavit by other evidence, or to impeach such absent witness, the same as if he had testified in person; *provided*, that the court may, in its discretion, require the opposite party to admit the truth, absolutely, of any such affidavit, when from the nature of the case he may be of the opinion that the ends of justice require it: *provided*, further, that this Act shall not apply to applications for continuances at the same term of court at which the indictment was found or information filed." Rev. Stat. 1891, chap. 38, § 428a. The indictment here was found at the March Term, and the application for continuance was made at the following October Term, of the court, and the ruling of the court below is thus within the letter of the statute. This is not denied by counsel for plaintiff in error, but they contend that this statute is within the inhibition of so much of section 9, art. 2, of our Constitution, as guarantees that "in all criminal prosecutions the accused shall have the right to . . . meet the witnesses face to face, and to have process to compel the attendance of witnesses." Surely, this statute does not deny to the accused the right to meet the witnesses testifying against him face to face. He is not compelled to admit the facts stated in the affidavit on behalf of the people; and if he shall not do so the state's attorney cannot read them in evidence to the jury, but must produce the witness, so that the accused can meet him face to face. If, however, the accused shall prefer to have the facts read in evidence to the jury, rather than that the trial shall be postponed, he may do so; for he may by a plea of guilty, or by a confession in open court, waive the production of all evidence of his guilt. He is entitled to process to compel the attendance of witnesses on his behalf, but this statute denies him nothing in that regard. He is, of course, entitled to reasonable time for the execution of process to compel the attendance of witnesses, but neither is that done away with or abridged by this statute. The Constitution makes no provision for the continuance of causes for trial; and at common law, and until the passage of our statute allowing exceptions to be taken to decisions of courts in overruling motions for continuance in criminal cases, approved February 18, 1857 (Pub. Laws 1857, p. 103), applications for continuances in criminal cases were addressed purely to the discretion of the court, and its decision thereon could not be assigned for error. *Baxter v. People*, 8 Ill. 388; *Holmes v. People*, 10 Ill. 478.

The ruling in *Willis v. People*, 2 Ill. 899, that the admission in evidence of an affidavit for a continuance in a criminal case on the ground of the absence of a material witness is an admission of the truth of the facts which the affidavit states can be proved by such witness, which cannot be controverted, was based upon no constitutional provision nor common-law principle, but purely upon the language of the

agreement of the state's attorney and the defendant, in analogy to like ruling upon affidavits for continuance in civil cases; and the statute then in force in regard to applications for continuances in civil cases required the party who wished to avoid a continuance to admit, not that the absent witnesses would testify to the facts stated in the affidavit, but to admit the facts stated in the affidavit, thus leaving no room for controversy. Rev. Stat. 1883, p. 489, § 11.

The decision in *Van Meter v. People*, 60 Ill. 168, is only that the Act of 1867 (Sess. Laws 1867, p. 157) is merely an amendment of the Practice Act, and does not apply to criminal cases. Since there is no constitutional provision giving the accused the absolute right, unaffected by any discretion in the court, to a continuance of his case for any definite time beyond what may be reasonable within which to execute the process of the court for obtaining the attendance of witnesses, it is impossible that this Act can be unconstitutional; for if the statute may vest the power of granting continuances entirely in the discretion of the court, without any right of review, the statute surely cannot be unconstitutional which restricts the exercise of that discretion, as this statute does, in favor of the accused. Ample time is given by this statute within which to procure the attendance of witnesses by means of process of the courts, and there is no pretense that there is any constitutional guaranty that their attendance shall be obtained through other means, when they are beyond the jurisdiction of process of our courts.

The principal evidence tending to prove the guilt of plaintiff in error is found in the testimony of his co-defendants,—accomplices,—who admit that they committed the arson, but say that plaintiff in error hired them to do it. It has often been questioned in England and in this country, by courts of the highest respectability, whether convictions on such testimony alone should be allowed to stand; but it is held by this court, in conformity with the prevailing ruling elsewhere, that convictions may be sustained on such testimony alone, although the court may in its discretion, in such cases, advise the jury not to convict. *Gray v. People*, 26 Ill. 847; *Cross v. People*, 47 Ill. 158; *Collins v. People*, 98 Ill. 584, 88 Am. Rep. 103; and *Friedberg v. People*, 102 Ill. 160. But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution; for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice. And thus it is said in 1 Phil. Ev. (Cow. & H. & Edw. notes,) p. 111: "Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor by their evidence to fix upon other persons. They are sometimes entitled to earn a reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive. . . ." And it is said in Best on Evidence, p. 266, § 170, in speaking of approv-

ers and accomplices: No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to many objections; and though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders; it being so strong a temptation to a man to commit perjury if by accusing another he can escape himself. Let us see what has come in lieu of the practice of approvement: A kind of hope that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment. This is in the nature of a recommendation to mercy. The accomplice is not assured of his pardon, but gives his evidence *in vinculis*,—in custody; and it depends on the title he has from his behavior whether he shall be pardoned. . . ." See, also, to like effect, 1 Greenl. Ev. § 879; 1 Wharton, Crim. Law, 7th ed. 785.

The plaintiff in error asked the court, but the court refused, to instruct the jury as follows: "The jury are instructed that the witnesses Asa Sapp and George Traub are what is known in law as accomplices, and that, while it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice still a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied beyond a reasonable doubt of its truth, and that they can safely rely upon it." No other instruction was given, calling the attention of the jury to the character of the evidence of accomplices, and cautioning them in acting upon it or otherwise embodying the idea expressed in this instruction. It cannot be said that this is an instruction on the facts only; for although the jury are the sole judges of the credibility of the evidence, and may convict on the evidence of accomplices alone, still the law is they shall not do so arbitrarily, and they must act on the testimony of accomplices with great caution, and only when they are satisfied from it, and all the circumstances in evidence in the case, that it is true. Such evidence is not, in legal estimation, as satisfactory in its nature as is the testimony of unimpeached and disinterested witnesses. Nor can it be said that the evidence of the guilt of the plaintiff in error is so conclusive that we can say this instruction could have had no effect upon the result reached by the jury. There were sufficient reasons why it should be given, and we think its refusal was the denial of a substantial right to appellant, and we therefore hold that it is reversible error.

Numerous other questions are discussed in the arguments before us, but they are such as are not likely to arise on another trial of the case, and therefore demand no discussion now. For the error in refusing to give the instruction *supra*, the judgment is reversed, and the cause remanded for another trial.

MISSOURI SUPREME COURT (1st. Div.).

Samuel E. FLINT *et al.*, Appts.,
v.
HUTCHINSON SMOKE BURNER CO.,
Resp't.

(.....Mo.....)

An injunction against the slander of title of letters-patent by falsely and maliciously charging infringement and notifying plaintiff's prospective customers that they will be held responsible for using plaintiff's device thereby injuring plaintiff's business by unfair competition, will not be granted until the question of slander has been determined in an action at law.

(June 6, 1892.)

APPEAL by plaintiffs from a judgment of the Circuit Court for the City of St. Louis in favor of defendant in a suit brought to enjoin the publication of alleged false notices the tendency of which was to injure plaintiffs' business. *Affirmed.*

The facts are stated in the opinion.

Mr. Paul Bakewell, with Mr. R. A. Bakewell, for appellants:

False statements made by an individual in regard to articles manufactured by another for the purpose of preventing sales by him of such articles, and which do in fact prevent such sales, or injure the manufacturer in his business, constitute a cause of action.

NORM.—Injunction against false statements as to plaintiff's property or business.

The power to grant an injunction against false statements injurious to business is denied in *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. App. 148. But see later English cases *infra*.

And in several cases the power to grant an injunction against threats to prosecute infringement of a patent has been denied in general terms without reference to the question of malice. *Baltimore Car Wheel Co. v. Bemis*, 20 Fed. Rep. 95; *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 310; *Whitehead v. Kitson*, 119 Mass. 484.

The same decision has been made in trade-mark cases. *Mauger v. Dick*, 55 How. Pr. 122; *Wolfe v. Burke*, 66 N. Y. 115.

And one case held expressly that even if malice existed an injunction could not be granted against such threats. *Kidd v. Horry*, 23 Fed. Rep. 773.

But the weight of authority as shown by the later cases is to the effect that such an injunction may be granted, if the threats to prosecute for infringement are not made in good faith, and only in such cases. *Emack v. Kane*, 24 Fed. Rep. 46; *Croft v. Richardson*, 50 How. Pr. 356; *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386; *Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.* 13 Blatchf. 375; *Hovey v. Rubber Typ Pencil Co.* 57 N. Y. 119; *Kelley v. Ypallanti Dress Stay Mfg. Co.* 10 L. R. A. 686, 44 Fed. Rep. 19; *Andrews v. Deshler*, 45 N. J. L. 107; *Chase v. Tuttle*, 27 Fed. Rep. 110; *Tuttle v. Matthews*, 23 Fed. Rep. 96; *Burnett v. Tak*, 45 L. T. N. S. 743.

The commencement of proceedings to assert the validity of a patent has also been required in some cases as a condition of denying an injunction to restrain circulars threatening infringers. *Azmunn v. Lund*, L. R. 18 Eq. Cas. 330; *Rollins v. Hinks*, L. R. 13 Eq. Cas. 355.

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Snow v. Judson, 88 Barb. 216; *Benton v. Pratt*, 2 Wend. 895, 20 Am. Dec. 623; *White v. Merritt*, 7 N. Y. 552, 57 Am. Dec. 527; *Galagher v. Brunel*, 6 Cow. 846.

A patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of the patent, if he has no bona fide intention to follow up his threats by taking such proceedings; and the court will, in such case, restrain him from making such publication.

Azmunn v. Lund, L. R. 18 Eq. 330; *Rollins v. Hinks*, L. R. 13 Eq. 355; *Emack v. Kane*, 24 Fed. Rep. 46.

It is no defense to an action for such false representations to allege that defendant holds a patent giving him the exclusive right to use the particular article which he claims the plaintiffs' article resembles, and that the federal courts have exclusive jurisdiction of all causes of action for any violation of that exclusive right. No question of patent or no patent, or in respect to any right the defendant may have under his patent, or to any violation of such right, can arise in such an action, so as to deprive the state court of jurisdiction.

Benton v. Pratt; *Snow v. Judson* and *White v. Merritt*, *supra*; *Hovey v. Rubber Typ Pencil Co.* 57 N. Y. 124; *Townshend, Slander & Libel*, § 206, and cases cited.

Language concerning a thing, published without lawful excuse, is actionable if pecu-

In the recent English case of *Colley v. Hart*, L. R. 44 Ch. Div. 179, which was an action under the English Statute of 1883, the court recognized the rule as above stated to be the law in the absence of any statute, and said that there being no evidence that the circular in question, which threatened infringement, was published maliciously, there was no right of action unless it was given by the statute, and as there was no malice shown and the defendant had followed up his circular by commencing an infringement action with due diligence, there was no right of action under the statute.

The English Patents, Designs, and Trade-marks Act of 1883, § 32, expressly provides for an injunction as well as damages where threats are made by circulars or otherwise to bring legal proceedings in respect of the manufacture, use, or sale of an invention. Among the various decisions under this Act it has been held that a notice saying that information had been received of extensive violations of plaintiff's rights as a patentee, and that "all parties are warned not to infringe," was a threat. *Johnson v. Edge* (1892) 2 Ch. 1.

When we turn from libelous charges of infringement of patents or trade-marks to other libelous charges injurious to business there is less preponderance of authority in favor of either side.

In the case of secret unpatented formulas, circulars, etc., falsely stating that plaintiffs were offering to the public a spurious imitation of defendant's goods may be restrained by injunction. In such cases it may be presumed that defendants knew the statements were untrue. *James v. James*, L. R. 13 Eq. 421; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763.

So in other cases on false representations that plaintiff's goods are imitations. *Thomas v. Williams*, L. R. 14 Ch. Div. 864.

In *Thomas v. Williams*, *supra*, and in several

niary damage is a natural and proximate consequence of the publication. No special damage need be proved. And an action will lie for a false and malicious statement disparaging the article that another sells.

Townshend, *Slander & Libel*, 4th ed. §§ 146-150, pp. 157-789; 8d ed. p. 386; Odgers, *Libel & Slander*, 2d ed. pp. 114, 223; *Thomas v. Williams*, L. R. 14 Ch. Div. 504; Newell, *Defamation*, p. 181.

A court of equity will in some cases interpose by injunction to prevent the perpetuation of a wrong, where the wrong consists in the publication of a statement injurious to the business of another, the false and fraudulent statement being an attack on the business of a rival in business.

20 Cent. L. J. 13, note and review of cases; Townshend, *Slander & Libel*, 3d ed. pp. 95, 336; 4th ed. 278, 280, 295; Odgers, *Libel & Slander*, 2d ed. p. 2, 274; High, *Inj.* § 1015; *Emack v. Kane*, 34 Fed. Rep. 46; *Palmer v. Train*, 18 Reporter, 99; *Riding v. Smith*, L. R. 1 Exch. Div. 91; *Routh v. Webster*, 10 Beav. 561; *Clark v. Freeman*, 11 Beav. 112; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551; *James v. James*, L. R. 18 Eq. 421; *Maxwell v. Hogg*, L. R. 2 Ch. 307, 810; *Quarts Hill C. G. Min. Co. v. Beall*, L. R. 20 Ch. Div. 501; *Hills v. Hart-Davies*, L. R. 21 Ch. Div. 798; *Gaskin v. Ball*, L. R. 18 Ch. Div. 324; *Beddou v. Beddou*, L. R. 9 Ch. Div. 89; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763; *Thomas v. Williams*, L. R. 14 Ch. Div. 864; *Dixon v. Holden*, L. R. 7 Eq. 488;

other English cases the power to grant an injunction against a libel injurious to trade is declared in general terms without any express limitation as to cases where malice is shown; but in these cases the libelous publications were false and perhaps it was fairly assumed in most if not all of them that the defendant was not acting in good faith.

The doctrine is extended in *Loog v. Bean*, L. R. 26 Ch. Div. 306, to a case of oral slander which was calculated to injure the business of another, so a libel likely to injure a friendly society by false statements as to its credit and financial condition after the publisher knows that it is false, may be restrained by injunction. *Hill v. Hart-Davies*, L. R. 21 Ch. Div. 798.

The publication of placards and advertisements for the purpose of intimidating workmen from entering the service of a certain employer, although amounting to a crime, may be prevented by injunction on the ground that such acts destroy property. *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551.

In *Dixon v. Holden*, L. R. 7 Eq. 488, an injunction was granted against the publication of a notice falsely stating that the plaintiff was a partner in a bankrupt firm, although it did not appear that the publisher did not believe it to be true. The vice-chancellor who decided the case put it on the broad ground of jurisdiction to stop the publication of a libel which would have the effect to destroy property whether tangible or intangible, whether money or reputation.

In *Clark v. Freeman*, 11 Beav. 112, an injunction in favor of a physician to prevent the sale of a quack medicine as his was refused by the master of the rolls on the ground that it was a mere libel as to which the court had no jurisdiction.

But in *Maxwell v. Hogg*, L. R. 2 Ch. 307, Lord Cairns said it always appeared to him that *Clark v.* 16 L. R. A.

Loog v. Bean, L. R. 26 Ch. Div. 306; *Hayward v. Hayward*, L. R. 84 Ch. Div. 198.

Messrs. Seddon & Blair, for respondent: The offense charged is a libel, and falls within the generic title of "slander or libel of title."

Meyvoss v. Adams, 12 Mo. App. 329; *Hastings v. Giles Lithographic Co.* 51 Hun, 864; *John W. Lovell Co. v. Houghton*, 22 Jones & S. 60.

Courts of equity will not restrain the publication of either libels or slanders.

American Life Assn. v. Boogher, 3 Mo. App. 177; *Clark v. Freeman*, 11 Beav. 112; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. App. 142; *Singer Mfg. Co. v. Domestic Sewing Mach. Co.* 49 Ga. 73; *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 310; *Whitehead v. Kitson*, 119 Mass. 484; *Raymond v. Russell*, 3 New Eng. Rep. 313, 143 Mass. 295, 58 Am. Rep. 137; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. Rep. 95; *Kidd v. Horry*, 28 Fed. Rep. 774; *Consumers Gas Co. v. Kansas City Gas Light & C. Co.* 100 Mo. 501.

Black, J., delivered the opinion of the court:

This case is now before us on the plaintiffs' appeal from a judgment sustaining a demurrer to the petition. The petition discloses the following facts: The plaintiffs, Samuel E. Flint and William F. Mills, are the owners of letters-patent issued by the United States in 1888 for a smoke-preventing device. The defendant corporation is the owner of three letters-patent issued in 1877 and 1878 for a device for aiding com-

Freeman might have been decided in favor of the plaintiff on the ground that he had a property in his own name.

In *Singer Mfg. Co. v. Domestic Sewing Mach. Co.* 49 Ga. 73, the court stating the general rule to be that to get an injunction, an infringement of a property right must be shown, refused to give an injunction to prevent a defeated competitor from publishing that he and not the successful party had received the premium from a state agricultural society for the best sewing machine.

In *Greene v. United States Dealers Protective Assn. & M. A.* 39 Hun, 300, an injunction against the publication of plaintiff's name as a delinquent debtor was denied where the charge that he could, but would not, pay was not shown to be false. The court did not decide whether or not it could be granted if such proof were made.

In *Raymond v. Russell*, 3 New Eng. Rep. 313, 143 Mass. 295, 58 Am. Rep. 137, the court declared that there could be no injunction against the publication, in the books and records of a mercantile agency, of representation as to plaintiff's character and standing or property even if the representations were false, but in that case they were not shown to be false.

In *Consumers Gas Co. v. Kansas City Gas Light & C. Co.*, 100 Mo. 501, it was decided that no injunction could be granted against the assertion of an exclusive privilege in the manufacture and sale of a commodity without further interference with property of another.

An advertisement merely disparaging a rival publication will not be restrained by injunction. *Seeley v. Fisher*, 11 Sim. 551.

For the kindred subject of slander of title, see *Burkett v. Griffith*, 13 L. R. A. 707, note, 90 Cal. 533. D. A. R.

bustion in steam boiler and other furnaces, and an air-feeding attachment for locomotives, all issued to William S. Hutchinson. It is alleged that the inventions described in the Hutchinson patents are restricted and most narrow in their scope. Plaintiffs state further that they were negotiating with the Mermod & Jaccard Jewelry Company of St. Louis for the erection of a smoke-preventing device, to be constructed in accordance with their patent; that the defendant willfully and maliciously, and with the intent to injure the plaintiffs in the manufacture and sale of their smoke preventer, served upon the jewelry company a written notice, thereby notifying that company that the smoke-consuming device attached to its furnace by Flint, one of the plaintiffs, was an infringement upon the Hutchinson patents, and that the jewelry company would be held responsible for royalty, costs, and damages; that defendant served the notice and made the statements therein set forth, knowing that they were false, with the malicious intent and purpose of injuring the plaintiffs in their business of manufacturing and selling their device; that the jewelry company, fearing suit in consequence of the notice, refused to allow plaintiffs to put up their device until they gave the jewelry company an indemnifying bond which they were obliged to do. It is then averred that defendant gave other like notices to plaintiffs' customers and to other persons about to use their device; that these persons, fearing lawsuits, have refused to deal with the plaintiffs; that before the issuing of these notices the plaintiffs were doing a large and lucrative business in smoke consumers; and that the loss in their trade in consequence of the notices is very great, but difficult to estimate. The plaintiffs allege further that they are peculiarly responsible; that their device is no infringement whatever upon the Hutchinson patents; that they notified the defendant that they would defend any suit or suits brought by defendant for infringement; that they believe defendant does not intend to sue them or their customers, but intends maliciously to continue to serve such false notices, thereby intending to injure their business. They pray for an injunction restraining defendant from making, stating or publishing, by notice, circular, or otherwise, that their device infringes any of the three Hutchinson patents, and for damages in the sum of \$10,000.

There is no doubt but a court of equity has inherent power to restrain the wrongful use of a trade-mark, or the unauthorized use of a man's name, or the use of his letters, against his will; but it is evident that this case does not fall within either of these classes. Here the complaint is that defendant falsely and maliciously notified persons to whom the plaintiffs were about to sell the their device that it infringed the defendant's patents. Though these notices do not defame the reputation of plaintiffs as individuals or as men of business, they do deny the right of plaintiffs to make and sell the particular smoke-preventing device. "Where the plaintiff possesses an estate or interest in any real or personal property, an

action lies against any one who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the plaintiff." *Odgers, Libel Slander*, 2d ed. p. 188. To the same effect is *Townshend, Slander & Libel*, § 206. Such an action is denominated "slander of title," and this, too, whether the slander is published through the medium of words spoken, written, or printed. It was held by the court of appeals, and properly held, that an action at law would lie for slander of title of letters-patent. *Meyrose v. Adams*, 12 Mo. App. 380.

There is no doubt but the petition in this case states a cause of action at law; but the important question is whether a court of equity has power to enjoin the slander before a trial at law. The circuit court held that it had no such power, and hence dismissed the bill, and it is this ruling which is now before us for review. Mr. Odgers, in the first edition of his book, laid it down in clear and emphatic terms that a court of equity possessed no such power. He said: "No injunction can be obtained to prohibit the publication or republication of any libel or to restrain its sale. The matter must go before a jury, who are to decide whether the words complained of are libelous or not. The crown has no authority to restrain the press; and the courts, whether of law or equity, cannot, till after verdict, issue any injunction in respect of any libel save such as are contempt of court." *Odgers, Libel & Slander*, *13. *Vice Chancellor Malins* asserted a contrary doctrine in *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551, and in *Dixon v. Holden*, L. R. 7 Eq. Cas. 488. In the latter case he says: "In the decision I arrive at I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." In the subsequent case of *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. App. 142, the plaintiff was a life assurance company, having a large income. The defendant published a pamphlet, in which he commented on the business of several companies. The pamphlet contained statements to the effect that the affairs of the plaintiff were managed with reckless extravagance, and that it was insolvent. The bill alleged that the statements were false, that they would be injurious to the plaintiff, and diminish its profits. *Vice Chancellor Hall*, refused an injunction, and the plaintiff appealed. *Lord Cairns* considered the bill as based on a libel only, and then proceeded to say, if "these comments do amount to libel, then, as I have always understood, it is clearly settled that the court of chancery has no jurisdiction to restrain the publication merely because it is a libel." He refers to the opinions of *Vice Chancellor Malins* before mentioned, and of them says: "I am unable to accede to these general propositions. They appear to me

to be at variance with the settled practice and principles of this court, and I cannot accept them as authority for the present application." The chancery division in subsequent cases recognized the binding force of *Prudential Assur. Co. v. Knott*, but that division seems to have adhered to the former opinions of *Vice Chancellor Malins*, placing at first stress upon certain provisions of the Judicature Act. It seems to be now conceded that that Act in no way enlarged the principles on which a court of equity would act in granting injunctions. Mr. Odgers makes a full review of the many English cases, and says it must be taken as the present settled practice in the chancery division to restrain libels and slanders on an interlocutory application; but he gives it as his opinion that the practice is an innovation, and violative of the liberty of the press and free speech, and that the rulings will not stand the test in the House of Lords. Odgers, *Libel & Slander*, 2d ed. pp. 351, 364.

It must, we think, be conceded that the law on this subject in that country is, at this time, in a most unsatisfactory state; and it is quite clear that those prior decisions there, which we are in the habit of looking to as the foundation of our law, deny the right of a court of equity to enjoin a libel or slander. There are exceptions in star chamber times, but such exceptions serve to make firm the general rule that a court of equity possessed no such power. The great weight of American authority is to the same effect. The plaintiff in *Brandreth v. Lance*, 8 Paige, 24, 4 L. ed. 880, sought to restrain the publication of a pamphlet which purported to be a literary work, but was an intended libel on the plaintiff. As the publication could not be regarded an evasion of the literary or medical property rights of the plaintiff, an injunction was denied, though the publication was a gross libel upon the plaintiff personally. A court of equity, it was held, had no jurisdiction to restrain a libel. The remedy was an action at law. In *Boston Diastile Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310, Gray, *Ch. J.*, speaking for the court, said: "The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involves no breach of trust or of contract." The court in that case regarded the opinions of *Vice-Chancellor Malins*, before noted, as inconsistent with well-settled principles of law. *Whithead v. Kitson*, 119 Mass. 484, was quite like the present case. There plaintiffs and defendant held letters-patent for inventions. After the plaintiffs had introduced their invention, and spent much time and money in doing so, the defendant falsely represented to persons likely to deal with the plaintiffs that their patent interfered with his patent, and that persons using

the patent of plaintiffs would be infringers, and become liable as such. The court held that the case made by the bill was not within the jurisdiction of a court of equity. *Clark v. Dean*, 143 Mass. 295, 3 New Eng. Rep. 333, asserts the same principle. These Massachusetts cases were cited with approval in *Consumers' Gas Co. v. Kansas City Gas-light & C. Co.* 110 Mo. 501. To the same effect are the following cases: *Singer Mfg. Co. v. Domestic Sewing Mach. Co.* 49 Ga. 79; *Kidd v. Horry*, 28 Fed. Rep. 778; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. Rep. 95; *American Life Assn. v. Boogher*, 3 Mo. App. 173.

We live under a written Constitution which declares that the right of trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various constitutions of this state were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen the law furnishes a remedy. In view of these considerations, a court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are spoken of a person or his title to property. In either case it is for a jury to first determine the question of slander or libel in an action at law. This we conclude is the result of the better cases in this country and in England. But it is argued in behalf of the appellant that this is a case of libel plus something else. If that something else is sufficient to give a court of equity jurisdiction, then the jurisdiction is not defeated because there is libel or slander added. But what is that something else in this case? It is said to be that unfair competition in business which the courts are prompt to prevent in trade-mark cases; that unfair competition which results in loss of business, owing to the dread men have of law-suits. The answer to all this is that slander of a person in his business or profession or of title to his property is often, if not most generally, accompanied with loss of business. Indeed, it is generally laid down that to sustain an action for slander of title special damage must be shown to have arisen from the defendant's word. But such incidents arising from the wrong do not give a court of equity the right to interfere by injunction. All this is clearly stated in *Prudential Assur. Co. v. Knott*, *supra*. We see nothing in this case save slander of title, and the remedy is at law. After verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander. Odgers, *Libel & Slander*, 2d ed. p. 340. As slander of title is all we can see in this case, the judgment will be and it is affirmed.

All concur.

MICHIGAN SUPREME COURT.

James H. SEAGER, Guardian, etc., of James B. Seager *et al.*, *Appt.*,
v.

Gertrude C. McCABE.

(.....Mich.....)

The right of dower extends to a share of the proceeds of mines although not opened until after the husband's death, where they are opened on lands held only for mining purposes and available only for the minerals, and the statutes give to the widow the "use during her natural life of one third of all the lands whereof her husband was seised" during marriage.

(June 10, 1892.)

APPPEAL by petitioner from a decree of the Circuit Court for Ingham County in favor of respondent in a petition filed in a proceeding by the guardian of certain infants seeking power to open mining lands, the purpose of which petition was to determine whether or not the widow of the infants' ancestor had any dower rights in the property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Van Zile & Ostrander for appellant.

Messrs. Cahill & Ostrander, for appellee.

Whatever foundation there is in the decid-

ions of courts for the appellants' contention and theory, seems to begin with the opinion of the judges in *Stoughton v. Leigh*, 1 Taunt. 402.

The judges were of opinion that the widow was dowable of all the mines of lead and coal, as well those which were in decedent's own landed estates as the mines and strata of lead, lead ore and coal in the lands of other persons, which had in fact been opened and wrought during the coverture.

If we concede the rule to be that mines as such are subject to dower, and that if a vein of ore has once been opened and wrought, the dowress may work it to exhaustion, what is the reason for the doctrine in *Stoughton v. Leigh*?

I think it was the common-law doctrine of waste, because, under the facts in that case, as to unopened mines leased, the rent or royalty reserved afforded some basis for admeasurement.

"If the tenant digs for gravel, lime, clay, brick-earth, or stone hid in the ground, or for mines of metal or coal, or the like, not being open at the time of lease, it is waste."

Bacon, *Abr. title Waste*.

The rule which made it waste to open a mine in demised lands where no mine before existed and none were demised, was not founded entirely, or at all, upon the idea that the removal of ore was what constituted the waste. But it was founded upon the ancient

NOTE.—Right to dower in mines.

As is stated in the opinion, the above case seems to be the first one in the United States that directly decides the question of a widow's right to dower in mines which were not opened during her husband's lifetime.

In *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, which involved the question of dower in mines opened after her husband's death, the court although conceding that the general doctrine denied a dower right in mines not opened during the husband's lifetime, was inclined to the contrary opinion but disposed of the case by holding that an agreement of the owner of the fee for a division of the profits of the mines with the dowress was practically an assignment of dower therein and was binding on the parties.

As far back as in 1883, in the case of *Hoby v. Hoby*, 1 Vern. 218, dower was allowed in a coal mine, but the case does not show whether or not it was opened during the life of the husband.

A subsequent English case denied the right of dower in mines, unless opened during the life of the husband. *Stoughton v. Leigh*, 1 Taunt. 402.

And this has been stated as the law in subsequent cases, both English and American, in which the question was not involved and has been the generally accepted doctrine of text-writers.

In the more recent English case of *Dickim v. Hamer*, 1 Drew. & S. 224, a widow was denied dower in mines which were opened by a lessee after her husband's death where as guardian of the heir she joined in the lease under order of the court. The decision was based on the theory that she was precluded from claiming dower by her own action, and the court intimates an uncertainty as to the question if she had done nothing to affect her claim.

16 L. R. A.

The cases are all agreed that a right to dower exists in mines opened during the husband's lifetime. *Moore v. Rollins*, 45 Me. 496; *Hendrix v. McBeth*, 61 Ind. 473, 23 Am. Rep. 680; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Coates v. Cheever*, 1 Cow. 460; *Stoughton v. Leigh*, 1 Taunt. 402; *Crouch v. Puryear*, 1 Rand. (Va.) 258; *Billings v. Taylor*, 10 Pick. 480, 20 Am. Dec. 533.

The same doctrine applies to a widow's share of her husband's estate which is given by statute as a substitute for dower. *Hendrix v. McBeth*, *supra*.

The discontinuance of the working of a mine during the husband's life will not defeat the widow's right to dower and to re-open the mines. *Stoughton v. Leigh* and *Coates v. Cheever*, *supra*.

And a coal mine opened during the husband's life may be worked by sinking new pits and shafts into the same vein or into veins which are so connected as to form one mine. *Crouch v. Puryear*, *supra*.

But in *Coates v. Cheever*, *supra*, it was said that a widow was not entitled to dower in an extension of a mine and the order made was that she should have dower in "all such ore beds . . . as were in fact opened and wrought before the death of her said husband," but not in "any part or portion of said ore bed opened" after his death.

In *Billings v. Taylor*, *supra*, a four-acre tract worked for slate was held to be wholly included in the claim of dower, and not merely the part which had been dug during the husband's life, where it had been worked by taking a small section at a time and going down the usual depth, then beginning again at the surface.

The reasonableness of the decision in the main case will be likely to make it the leading, as it is the earliest, authority on the subject in this country notwithstanding the numerous *dicta* and unauthoritative statements showing a general understanding that the law was otherwise. B. A. R.

doctrine that it changed the character of the estate or holding.

In this idea is to be found the true and logical reason for the rule laid down in *Stoughton v. Leigh*, 1 Taunt. 402, in regard to unopened mines.

See *Park, Dower*, 99; cited in 1 *Scribner, Dower*, 2d ed. p. 202, par. 6; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

This reason for the rule does not exist in this state; nor does any reason for the rule exist in such case as the present one.

To cut and sell timber is not necessarily waste. A widow may have dower in wild and uncultivated lands and may clear and improve such lands as tenant in dower.

Campbell, Appellant, 2 Dougl. (Mich.) 141.

There is no presumption of law that the taking of iron ore from an open mine is waste in a party having rightful possession.

Ward v. Carp River Iron Co. 47 Mich. 65, 50 Mich. 522.

The widow is entitled to dower in land improved by the heir, and thus enhanced in value without allowance to the heir, on account of his expenditures and labor.

2 *Scribner, Dower*, 2d ed. p. 595.

In the following states, at least, the common-law doctrine of waste is modified or held not to obtain:

Ohio:—*Allen v. McCoy*, 8 Ohio, 418; Michigan:—*Campbell, Appellant*, 2 Dougl. (Mich.) 141; Kentucky:—*Lickman v. Irvine*, 3 Dana, 121; Illinois:—*Schnebly v. Schnebly*, 26 Ill. 116; Georgia:—*Chapman v. Schroeder*, 10 Ga. 321; New Jersey:—*Brown v. Richards*, 17 N. J. Eq. 32; *Gaines v. Green Pond Iron Min. Co.* 33 N. J. Eq. 603; Arkansas:—*Pike v. Underhill*, 24 Ark. 124; New York:—*Russell v. Rogers*, 10 Wend. 480, 25 Am. Dec. 574; New York:—*Jackson v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; New York:—*Cumming v. Hackley*, 8 Johns. 202; Rhode Island:—by express statute; Pennsylvania:—*Hastings v. Crunckleton*, 3 Yeates, 261.

The following are cases in which the general subject is mentioned or discussed:

Coates v. Cheever, 1 Cow. 460; *Billings v. Taylor*, 10 Pick. 460, 20 Am. Dec. 533; *Vindlay v. Smith*, 6 Munf. 134; *Carr v. Carr*, 20 N. C. 179; *Crouch v. Puryear*, 1 Rand. (Va.) 258; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Rockwell v. Morgan*, 13 N. J. Eq. 334; *Reed v. Reed*, 16 N. J. Eq. 248. See also 1 Washb. Real Prop. 4th ed. 165; 1 *Scribner, Dower*, 2d ed. chap. 10, par. 4.

McGrath, J., delivered the opinion of the court:

Schuyler F. Seager died intestate in 1883, leaving surviving him his widow, Gertrude B. Seager, now Gertrude B. McCabe, and as his sole heirs James B. Seager, Harry R. Seager, Schuyler F. Seager, and Richard B. Seager. Administration was had upon the estate, and the estate fully administered upon, and the administrators discharged, and dower has never been assigned to the widow. Seager died possessed of an undivided five-twelfths interest in 40 acres of wild land in the Upper Peninsula, which was not improved, and was wholly valueless for agricultural purposes or lumbering. Its

principal value, and practically its sole value, is in the deposits of iron ore contained in it. In his lifetime he had sold an undivided five-twelfths interest in 80 acres adjoining the 40 above mentioned, expressly excepting and reserving in the conveyance "all mines and minerals whatsoever, unopened as well as opened, in and under the hereditaments hereby assured, with full liberty to enter upon said premises to search for, work, mine, and carry away any and all of said minerals: provided, that reasonable compensation be made for all injuries which may be sustained by the owners or occupants for the time being of said premises, by reason of the prosecution of the mining and works aforesaid." At the time of the death of Schuyler F. Seager no mine of iron or other mineral deposit of any kind had ever been discovered opened, or worked on either parcel of said lands. In March, 1888, the minors, through James H. Seager and the widow, their general guardians, upon petition to the circuit court, obtained permission to lease, and did lease, the said lands, premises, and mineral rights for the purpose of mining iron ore; and the general guardian of certain of said infants has in his hands, undistributed, the sum of \$2,300, arising from royalties paid by the lessee under the aforesaid lease, which sum is derived wholly from the developments upon the 80 acres last named. James H. Seager, the general guardian of certain of said minors, files a petition to determine whether the widow is entitled to any portion of said sum by way of dower. Our Statute (How. Stat. § 5733) gives to the widow of every deceased person the use during her natural life of one third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. Other sections of the statute provide that, in case of mortgaged lands, the widow shall be entitled to the interest or income of one third of the surplus; that the widow shall be entitled to dower in aliened lands; that when the estate consists of a mill or other tenement which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided by metes and bounds, dower may be assigned of rent, issue, and profits thereof, to be had and received by the widow as a tenant in common with the other owners of the estate. These are the only permanent provisions made by the statute for the widow in case decedent shall leave issue. The naked question raised is whether, under these statutory provisions, a widow is excluded from all interest in the minerals in lands which, at the time of the death of her husband, were unimproved and unproductive, although such lands may be rich in minerals, and were owned, held, and known as mining lands, and were chiefly and solely valuable for the minerals contained in them. From my examination I have been unable to discover that this precise question has ever been passed upon by any court in this country. Text-writers generally, and in some of the following cases, none of which involve the question of an

unopened deposit, the courts, lay down the rule that a widow is dowerable of mines which had been opened at the death of the husband, but that she may not open new mines, even upon the lands set apart to her as dower; in other words, that a widow is not dowerable of mineral deposits where there is no opened mine. Washb. Real Prop. 166; 2 Kent, Com. 41; 1 Bishop, Married Women, § 264; 1 Scribner, Dower, 189-195; *Freer v. Stotenbur*, 36 Barb. 641; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Gaines v. Green Pond Iron Min. Co.* 33 N. J. Eq. 603; *Coates v. Cheever*, 1 Cow. 460; *Reed v. Reed*, 16 N. J. Eq. 248; *Moore v. Rollins*, 45 Me. 493; *Billings v. Taylor*, 10 Pick. 460, 20 Am. Dec. 533; *Neel v. Neel*, 19 Pa. 323; *Irwin v. Covode*, 24 Pa. 162; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Cent. Rep. 347; *Pindlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear* 1 Rand. (Va.) 258; *Clift v. Clift*, 87 Tenn. 17.

Sayers v. Hoskinson holds that it is the right of a life tenant to work an opened mine to exhaustion. *Moore v. Rollins* is to the same effect. In *Freer v. Stotenbur*, which was a case of a tenant for years under a lease, the court says: "A tenant for life or for years, or for a single year, has the right to work a mine to quarry that has been worked and is open at the commencement of his tenancy, for it has become the mere annual profit of the land." The English rule respecting an unopened mine is recited, but the court expressly refrains from determining the case upon that ground, but instead finds that the right to quarry and take away stone was granted by the lease. In *Irwin v. Covode* it was held that a court might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, but not such mining as is subject to no other objection than its liability to exhaust the mine. The court says: "It is said that on the western slope of the Alleghanies the seams of bituminous coal are so few and thin that tenants for life, if permitted to introduce modern facilities for mining, would exhaust the lands so held, and leave them ruined on the hands of those in succession. Should this happen, it would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature, it is no valid objection that use is consumption." In *Coates v. Cheever* the tract of land in question embraced 430 acres, and the pits had been opened by the husband, but the mining had been abandoned, and the pits had filled in by a caving in of earth and stone, and after the death of the husband a new pit had been sunk, extending the opening and operations; and the court held that the wife was "entitled to one third of the whole estimated value of the property, deducting the value of the improvements made since the sale by her husband. If practicable, they should have given her a proportion of the ore bed, assigning to the tenant his own improvements. If such division was impracticable, then they should have directed an alternate occupancy of the whole or a share of the

profits, also securing to the tenant under our statute his own improvements, and a suitable allowance for the use of them." In *Neel v. Neel* the wife had a life estate under a will, and the only question was whether a tenant for life of land having coal mines open upon it may mine the coal, not only for his own use but for sale. The court says: "It seems in this case that the author of the gift at some time sold coal out of these pits, but I do not conceive this to be material. It is sufficient that he opened them, and derived any profit from them, even if it were only fire bote. The fact of his opening the pits made them an actual part of the profits of the land, and the right of them passed as such by a devise of the life estate. If he meant otherwise, he should have said so; not having said so, this is a legal inference of his intention. . . . The most obvious inference would seem to be that when a man devises land with an open mine upon it, to a person for life, he intended the devisee to derive profits from the mine as well as from the surface of the land. He may not have supposed that the devisee would exhaust the mine, and this might seem unreasonable; but, when a donor did not see proper to restrain the gift, how shall it be done? Surely the courts have no control over the arrangements which people choose to make of their affairs. Usually an enterprising tenant for life may be of advantage to the remainder-man, but, in the case of mines, it may be the reverse. And I cannot see how the enterprise of the citizen is to be restrained by judicial process. If we could get ourselves freer from the notions derived from feudal subordination, we should perhaps think that the privileges of tenants for life should be enlarged, rather than restrained, and that the cultivation of the country would be thereby improved." In *Billings v. Taylor* the husband died seized of a tract of land four acres in extent, consisting of a slate quarry, mostly below the surface of the ground. One quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the surface, and go down to a certain depth, and then begin on the surface again. The court says: "It would be too narrow a construction to say that no part of this quarry was open except that portion which had actually been dug, but it must be considered that the whole, lying together as one tract, belonging to one estate, and wrought in the manner above described, was open, and that the wife was entitled to dower in that as well as in the other estate of her husband." In *Crouch v. Puryear* it was held that it was not waste in tenant in dower of coal lands to take coal to any extent, from a mine already opened, or to sink new shafts into the same veins of coal. In *Gaines v. Green Pond Iron Min. Co.*, held, that a life tenant has a right to use a mine for his own profit, when the owner of the fee in his lifetime had opened it, even though he may have discontinued work upon it for a long period of years. In *Reed v. Reed*, held, that the operating of an opened mine was a mode of enjoyment of the land to which a

tenant for life was entitled. In *Hindlay v. Smith*, held, that a devisee for life was entitled to unlimited use of the salt mineral, and of the wood upon the premises for fuel, used in the production of salt from the brine. It has been held that, if the mode of using the land consisted in cutting the growth upon it as the customary source of profit, the widow may continue to do so. Thus to cut and sell staves and shingles or hoops or poles under the circumstances supposed would not be waste. *Ballentine v. Poyner*, 8 N. C. 110; *Clemens v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

The doctrine that a widow is not dowable of mining lands, unless at the time of the death of her husband mines had been opened, is traceable to *Stoughton v. Leigh*, 1 Taunt. 402. There decedent left a large estate, upon which there was a lead and a coal mine, neither of which had been opened; two other lead and two coal mines, which he had leased to tenants, reserving certain rents, which were to be paid whether the tenant did or did not open the mines. One of each class of mines had been opened at the time of his death,—a lead and a coal mine,—which he had leased reserving royalties payable in ore and coal. The coal mine had been opened at the time of his death, but the lead mine had not. Two other lead mines and two other coal mines had been opened. Deceased was also entitled to minerals lying under lands not his own, and had operated certain mines thereon, and others were unopened. The court held that the wife was dowable of all the open mines, but was not dowable of the mines or strata which had not been opened, whether owned by lease or not. The decision may not be without reason, but certainly no reasons are given in the opinion. Clearly, as to those lands which had been leased, they had been by the decedent devoted to mining purposes, and the mode of enjoyment and source of profit, under all the authorities had been fixed and determined by the decedent; and as to the rents which were to be paid whether the mines were opened or not, under all the authorities on the subject of dower, the widow was entitled to participate in them. The rule laid down in that case undoubtedly had its origin in cases where the relation of landlord and tenant existed. A tenant who rents a farm cannot cut and sell the timber therefrom, convert the farm into a brickyard, open a stone quarry or sand pit, bore for oil or mine for ore thereon, unless authority so to do is expressly given or arises by implication from the situation; but one who rents a piece of ground upon which there is an open quarry or sand pit or brickyard, or open mine may quarry, take out sand, make brick, or operate the mine, unless there is either an express reservation, or some condition or circumstances which would operate as an implied restriction. One who leases a copper mine may mine for copper, but, if he should strike a pocket of silver, the same rule would prohibit him from appropriating the silver. The *Salt Well Case*, where the vein of petroleum was tapped, is an illustration of the principle underlying 16 L. R. A.

this class of cases. *Kier v. Peterson*, 41 Pa. 361. The question in that class of cases is one of interpretation of the contract,—of what was the use granted,—and, as bearing upon that question, the condition of premises, the use to which the premises had been devoted, and the source of profit are important considerations; but there is room for but one construction, where there is but one mode of enjoyment, one source of revenue or profit, one use. Suppose that a lease were given by A. of all his mining lands, or a devise was made for life of a gravel bank, although no mine or pit had been opened, and the lands were available for no other purpose, or were adapted to no other use, from which any considerable revenue could be derived, and suppose such grant was made to a wife or child, could it be contended for a moment that the ordinary methods of use or enjoyment of such land were not to be adopted; that the usual mode of deriving revenue from such lands was not to be resorted to; that such land was not to be used "according to its nature."

In 7 Bacon, Abridgments, 262, it is said that where a man grants all his mines of coal, when none are open, the tenant may open new mines. Mr. Parks in his work on Dower, cited in 1 Scribner on Dower, 191, says: "Mines in a man's own lands are clearly so far from being a distinct inheritance that they are merely a source of enjoyment. The right to soil is a right to the profits of it, subject only to such restrictions as the law has imposed upon the owners of particular estates with respect to the mode of enjoying those profits." Blackstone says, (2 Bl. Com. § 17): "If a man grants all his lands, he grants thereby all his mines of metal and the fossils, his woods, his waters, and his houses as well as his fields and meadows." As is said in *Lenfers v. Henke*, *supra*: "Land comprehends all things of a substantial nature, which includes any ground, soil, or earth whatever, and bath in its legal signification an indefinite extent upwards as well as downwards. Minerals are a part of the land itself, and, if not susceptible of division, the wife is entitled to be endowed of the profits or rents." In *Gaines v. Green Pond Iron Min. Co.*, *supra*, the court says: "In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction. The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years or more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored. When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose has some support in the adjudications in this country, and is certainly not without reason to uphold it." In

Hickman v. Irvine, 3 Dana, 121, the court says: "We cannot say that a widow is entitled to dower in the improved lands only of her deceased husband. She is, by the general provision of the common and statute law, to be endowed of one equal third part of all lands of which he was seised during the coverture; and, to whatever extent the doctrine of forfeiture for waste may apply to the case of a dowress who reduces forest lands to a state of cultivation, we cannot view this doctrine, and the possibility that its application may render a portion of the dower lands useless to the widow, as a limitation either upon the quantity or quality of the land to be assigned as a dower. When a case shall occur in which the lands assigned for dower cannot be made available for the reasonable support of the widow without converting a portion of the woodland to the purpose of cultivation, and in which, upon an attempt being made thus to render it available, the reversioner shall insist upon a forfeiture, it must be decided upon consideration of the object of the law in establishing the right of dower, upon a comparison of its regard for the present comfortable sustenance of the widow with its care for the preservation of the inheritance, and upon a view of the actual condition of the estate and of the surrounding country with regard to improvement and population, whether the change of timbered into arable land is in the particular case such an act of waste as would be just cause of forfeiture."

The strict rules of the common law of England respecting waste and the rights of tenants for life do not obtain here. With us the change in the mode of use is not waste. It is not use, but abuse, that is waste. Waste must be consumption, nor is consumption always waste. The owner of a life estate has some rights in common with the owner of the fee. There is no substantial

reason why, so far as the use of premises is concerned, there should not be a community of right between the owner of the life estate and the owner of the reversion. Our statute respecting "dower" defines it as the use for life of one third of all the lands of which the husband was seised during the marriage relation. "Dower" is defined by the English authorities as the provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children. Co. Litt. 30a; 2 Bl. Com. 180. The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the state, founded in policy, and the provision of the widow is a part of the law of distribution, and the aim of the statute is not subsistence alone, but provision commensurate with the estate. In the present case the grant is by operation of the statute giving the use of all the lands of which the husband was seised. The grant must be held to include the use of these lands, irrespective of whether mines were opened upon them before or after the husband's death. The question here is not the impairment of one mode of enjoyment or source of profit to reach another. There is but one mode of enjoyment of the land in question; but one source of revenue or profit. The land is susceptible of but one use. The widow is therefore entitled to one third of the amount in the hands of the petitioner, and the decree of the court below is affirmed.

The other Justices concurred.

MISSISSIPPI SUPREME COURT.

LOUISVILLE, NEW ORLEANS & TEXAS
R. CO., *Appt.*,

v.

J. A. JORDAN, Guardian, etc., of W. W.
Blythe *et al.*

(.....Miss.....)

1. Authority given to a resident general guardian of an infant to agree with

a railroad company upon the amount of damages for taking lands of the infant or to release the claim or right to damages does not require any condemnation of the property and ascertainment of the value before the guardian is authorized to make such agreement or release.

2. Legislative authority to a general guardian of an infant to agree with a railroad company as to the amount of dam-

NOTE.—Constitutionality of private statutes to authorize disposal of property.

The inherent power of the Legislature to provide by special Act for the disposal of private property seems to have been assumed in many early in-
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stances without question, and was less carefully defined and restricted in the early decisions than in more recent ones.

In *Livingston v. Moore*, 22 U. S. 7 Pet. 400, 8 L. ed. 751, it is said that in the early legislation of

ages for a right of way across the infant's lands or to release the claim or right to such damages, is not unconstitutional as a legislative usurpation of judicial power.

3. A conveyance of a right of way across an infant's lands to a railroad company is not a dedication to public use without compensation because there was no money consideration, where it was made on a condition subsequent that a depot, station-house and tank should be maintained upon the land.

4. No notice to an infant is necessary in order to make valid the act of his general guardian under statutory authority in transferring a right of way across his lands to a railroad company.

(May 23, 1882.)

A PPEAL by defendant from a judgment of the Circuit Court for DeSoto County in favor of plaintiff in an action brought to recover possession of certain real estate over which defendant's tracks were laid. *Reversed.*

The facts are stated in the opinion.

Messrs. Mayes & Harris for appellant.

Messrs. Morgan & Buchanan for appellees.

Johnston, Sp. J., delivered the opinion of the court:

On the 15th day of May, 1884, Mrs. Blythe, as the guardian of her two minor children, conveyed by deed the right of way through the lands of her wards to the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad

Company, the consideration expressed in the deed being for the sum of one dollar, and the further condition that the grantee, the railroad company, should establish and maintain a depot and section house and tank on the land. The minors owned the land in common with Mrs. Blythe, their mother, and three other adult tenants in common, all of whom joined in the conveyance to the railroad company. The second section of the charter of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, after providing that the company could own a right of way acquired by purchase, grant, or devise, and also the mode and manner by which the right of way could be taken by condemnation proceedings, concludes with the following provision: "When any land to be taken for the purposes aforesaid shall belong to any infant, *non compos*, or insane person, having a resident general guardian, such guardian may agree with said company upon the amount of damages to be paid for taking such lands, or release to said company his claim or right to damages in the premises." This charter was granted on March 9, 1882. In 1870, the Memphis & Vicksburg Railroad Company was incorporated. By an Act of March 3, 1883, the Memphis & Vicksburg Railroad Company was authorized to consolidate with the Mississippi Valley & Ship Island Railroad Company, and that these two consolidate with any other companies; the consolidated company to enjoy all the rights and franchises conceded to the different companies entering into the consolidation. This Act was amended by the Act of

South Carolina before the establishment of a court of equity, statutes were frequently passed to authorize administrators or others to sell lands for the payment of debts and for similar purposes, and that it was admitted in argument in that case that similar laws were of frequent occurrence in Pennsylvania.

Chief Justice Gibson said in *Norris v. Clymer*, 3 Pa. 277: "It is not above the mark to say that 10,000 titles depend upon legislation of this stamp."

A private Act may authorize a trustee of a legal estate to convert it into money. *Kerr v. Kitchen*, 17 Pa. 433.

In this case the conveyance was by a trustee of a married woman to whom she had conveyed the property in contemplation of marriage and was made to perfect the title of a person who purchased from her after her marriage without knowledge of the trust deed which was unrecorded.

A private statute giving trustees power to pass complete title to land which was unproductive and unsalable by reason of entailment, and to convert it into personal property, is not unconstitutional. *Carroll v. Olmsted*, 16 Ohio, 251.

A private Act authorizing partition because of controversies among the heirs and devisees of a deceased co-tenant is not unconstitutional. *Biddle v. Starr*, 9 Pa. 432.

Where land was devised in trust for life, with contingent remainders in tail, with power in the tenant for life to sell on irredeemable ground rents, an act authorizing a sale on redeemable ground rents payable to a trustee was held constitutional. *Sergeant v. Kuhn*, 2 Pa. 383.

Limitations of the power.

A private Act declaring that the children of a certain bastard should be capable of inheriting from her, cannot divest the title of her brothers to 16 L. R. A.

whom it has already descended. *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493.

It is plain that many acts might be passed which, like the one above involved, would violate specific constitutional provisions or well-established principles of ownership, as, for instance, an Act attempting to take away one man's property without reason or compensation and bestow it on another. But fortunately such Acts are not passed, and those private Acts which do come in question usually relate to a mere change of the investment of property.

A private Act cannot authorize a woman who has made a deed in trust for herself during life with power of appointment and in default of exercising the power to her heirs to convey a good title as against her children. *Rogers v. Smith*, 4 Pa. 93.

This would seem to be an attempt, like the last one above to destroy a vested right.

So a private Act authorizing husband and wife to sell and convey the fee simple of land, devised to the wife with remainder in fee to her children, does not make such conveyance a good title, such that a purchaser can be compelled to accept it. *Bumberger v. Clippinger*, 5 Watts & S. 311.

Somewhat similar in principle is the recent decision that a statute aimed at a particular case, although general in form providing that the personal estate of which a lunatic or *non compos mentis* diseased should go to the next of kin of the person from whom it was derived, if this person was the husband or wife of the intestate, was held unconstitutional on the ground that it was arbitrary and did not constitute a "law of the land." *Dibrell v. Lanier*, 12 L. R. A. 70, 89 Tenn. 497.

A private Act of the Legislature empowering another person, instead of a guardian, to dispose of an infant's estate, was held unconstitutional in

March 15, 1884, so as to permit the Memphis & Vicksburg Railroad Company to consolidate with any other companies whether the Mississippi Valley & Ship Island Railroad Company became a party to the consolidation or not. In August, 1884, under the authority of these statutes, the Memphis & Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, the New Orleans & Mississippi Railroad Company, and the Tennessee Southern Railroad Company were consolidated under the name of the Louisville, New Orleans & Texas Railway Company, this appellant. The grantee in the deed of May 15, 1884, took possession of the land conveyed as the right of way, fenced the line, constructed its road, and established the depot, section house, and tank, which have since the consolidation been maintained by the appellant. In a word, up to the present time the conditions of the deed have been performed. Some time after the execution of the deed Mrs. Blythe died, and J. A. Jordan, the appellee, was appointed guardian of the two minors, and brought the present ejectment suit against the appellant for the recovery of the two-fifths undivided interests of his wards in the land conveyed by their former guardian. The plaintiffs, as well as the defendant in the suit, claim through G. L. Blythe, deceased, the father of these minors, as the common source of title, and the question of title involved in the controversy depends alone upon the validity of the deed made for the minors, by their former guardian, on May 15, 1884. The circuit court refused to grant a peremp-

tory instruction directing the jury to find a verdict for the defendant, and, upon a verdict in favor of the plaintiffs, the court rendered a judgment for the property and \$250 damages by way of mesne profits, and thereupon this appeal was taken by the railroad company.

It is contended by counsel for the appellees that the appellant did not acquire the privilege or right conferred by the second section of the Act of March 9, 1882, upon the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, for the reason that the statute authorizing the consolidation of the Memphis & Vicksburg Railroad Company with other companies was passed on March 8, 1882, six days prior to the incorporation of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company; and that the consolidating Act, in so far as it gave the consolidated company the charter rights and franchises of the different consolidating companies, applied only to then existing companies. The question whether the special franchise or privilege granted by the Act of March 9, 1882, has been acquired by the appellant by its consolidation with the railroad company incorporated by this statute, and has thus become part of its own charter, is not presented in this case, and is not necessary or proper to be decided, and upon which no opinion is expressed. The appellant does not so claim the property in controversy, but upon an entirely different theory. The New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company during its corporate existence, acquired this right of way, under the deed made by Mrs. Blythe, the former guar-

California on the ground that the guardian had an authority coupled with an interest. *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639.

Distinction between those sui juris and those who are not.

A private Act authorizing executors to sell the real estate of one who is not *sui juris*, such as an infant, and invest the proceeds upon trusts declared by will, is constitutional but it is otherwise as to those who are *sui juris*. *Kneass's App.* 81 Pa. 87.

This is clearly stated also in the later New York cases.

The Legislature may by special Act authorize the sale of the lands of infants including the future contingent interests of those not in being. *Brevort v. Grace*, 53 N. Y. 245; *Leggett v. Hunter*, 19 N. Y. 445.

But this power does not extend to the sale of lands in which adults competent to act for themselves have an interest vested or contingent unless the sale is necessary for the payment of taxes and assessments. *Brevort v. Grace*, 53 N. Y. 245; *Powers v. Bergen*, 6 N. Y. 368.

A private Act authorizing trustees to sell and give absolute title to an estate held in trust for life tenants with remainder to their children according to appointment and in default of appointment with cross remainders, is not unconstitutional. *Norris v. Clymer*, 2 Pa. 277.

This decision is said in *Schoenberger v. School Directors*, 33 Pa. 34, to be founded on the necessities or interests of the parties under disability to convey.

The latter case holds that where premises were devised to a widow for life with the right to dispose of them by will by appointment among children or grandchildren and with remainder over in default of appointment to testator's surviving 16 L. R. A.

children and their issue *per stirpes* that a statute appointing trustees with authority to sell the property was unconstitutional as the trustees were strangers to the will, so that the question is merely one of the power to appoint men to sell property belonging to other persons.

The Legislature cannot without the owner's consent confer on a stranger the power to sell his property and hold the proceeds as trustee for him. *Hegarty's App.* 75 Pa. 505; *Ervine's App.* 16 Pa. 255.

A private statute authorizing an executor to sell all the real estate of his decedent and convey it free from any trust or condition under the will and hold the proceeds in trust to carry out the provisions of the will, is unconstitutional where the estate is vested in parties who are *sui juris*. *Hegarty's App. supra*.

A private Act authorizing a sale of an estate given to a father for life with remainder to his children if the sale is necessary for the support and maintenance of the tenant for life and his infant children and for their education, and for the payment of debts incurred for those purposes, is not unconstitutional. *Clarke v. Van Surlay*, 15 Wend. 436, affirmed *Cochran v. Van Surlay*, 20 Wend. 365; *Towle v. Forney*, 14 N. Y. 423, affirming 4 Duer, 164; *Suydam v. Williamson*, 65 U. S. 24 How. 427, 16 L. ed. 742; *Williamson v. Suydam*, 73 U. S. 6 Wall. 723, 18 L. ed. 997. These two decisions of the United States Supreme Court were based on the decisions of the state court and overruled its own prior decision in *Williamson v. Berry*, 49 U. S. 8 How. 496, 12 L. ed. 1170.

But a private statute authorizing trustees for the use of a life tenant under a will with remainders to her issue living at her decease and for want of such issue to all the grandchildren of the testator then living and out of the proceeds of the

dian, and in which it was the grantee; and the appellant claims this title derivatively, and by reason of its consolidation with that company, and as part of its property and assets. There can be no doubt that the consolidation under the Act of March 8, 1882, and the amendatory Act of March 15, 1884, vested in the new company the property and assets of all the consolidating companies, of which the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company was one, and whatever title vested in the grantee by this deed passed to this appellant.

It is argued in behalf of the appellees that the guardian could convey under the authority of the last clause of the second section of

the Act of March 9, 1883, only after there had been a condemnation of the property and an ascertainment of its value as provided in the preceding clauses of the section. This view is not a correct construction of the statute, which authorized the guardian to agree with the company upon the amount of damages, or release all claim to damages. Evidently this was intended as a distinct mode by which the company could acquire the right of way, and its purpose and effect were to dispense with the necessity for condemnation proceedings in this class of cases. The discretionary power was confided to the guardian, of adjusting the damages with the railroad company, as was also the authority to decide whether it would be

sale to pay the commissions, costs, and expenses of the trustees with all assessments and liens on the land and invest the surplus in securities to be held in lieu of the lands under the trust, is not within the power of the Legislature, in the absence of infancy or other incapacity of the persons interested. *Powers v. Bergen*, 6 N. Y. 383.

The Legislature has power to pass an Act licensing the sale of infants' real estate although the same power exists in the courts. *Rice v. Parkman*, 16 Mass. 336.

Giving power to guardian of infants.

In an early opinion by the justices of the New Hampshire court, given in response to an inquiry, they declared that the Legislature could not by special law authorize the guardian of an infant to make a conveyance of real estate. Opinion of the Justices, 4 N. H. 572.

So in Tennessee a special Act authorizing guardians to sell lands of infant wards to pay their ancestor's debts is held unconstitutional because judicial in its character. *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430.

But the weight of authority is very greatly against these cases. The Legislature may authorize a guardian appointed in another state to sell the property of infant wards within the state. *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159.

So it may authorize a guardian to be appointed for that purpose and to sell an infant's land. *MoComb v. Gilkey*, 29 Miss. 146.

And it may pass a law authorizing a guardian of infants to convey all their interests in the property, real, personal, and mixed, held by a firm in which they are interested, to a corporation to be organized as a successor to the firm and to take stock in such corporation. *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 533.

So a private Act authorizing a guardian having a title to real estate of his wards to convey it in pursuance of a contract made by their ancestor, is valid. *Estep v. Hutchman*, 14 Serg. & R. 436.

But a private Act authorizing the guardian of infants to mortgage their lands to pay for buildings erected by her direction before she was appointed guardian, was held unconstitutional in Rhode Island on that ground that as the buildings became theirs as soon as they were built upon their lands they were under no legal obligation to pay for them. *Burke v. Mechanic Sav. Bank*, 12 R. I. 513.

Non compos mentis.

The Legislature may authorize the guardian of a non compos mentis to sell a part of the latter's real estate and apply the proceeds to discharging incumbrances on another part. *Davison v. Johnston*, 7 Met. 383, 41 Am. Dec. 443.
16 L. R. A.

As to decedent's estates.

A private Act authorizing administrators to sell lands descended to infants to satisfy decedent's debts to which his estate might be subjected by judicial proceedings, is unconstitutional. *Kibby v. Chitwood*, 4 T. B. Mon. 91, 16 Am. Dec. 143.

So is a private Act authorizing commissioners to make a sale under similar conditions. *Sheehan v. Barnett*, 6 T. B. Mon. 552.

So the Legislature of a state may by a special Act authorize an administratrix appointed in another state to sell the real property of a decedent within the state for the payment of his debts and make a valid conveyance thereof. *Holman v. Bank of Norfolk*, 12 Ala. 359; *Watkins v. Holman*, 41 U. S. 16 Pet. 35, 10 L. ed. 373.

In the above Alabama case the court said that there was an implied reservation of the right of the heirs to contest the validity of the sale if there were no debts to authorize it.

So a private Act confirming an administrator's sale under order of the probate court of lands of a decedent for debts, is not unconstitutional as an exercise of judicial power. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542.

A private Act authorizing an administrator to sell lands of his decedent at private sale upon an order of the proper court instead of at public auction, as by the general law, is not unconstitutional. *Florentine v. Barton*, 69 U. S. 2 Wall. 210, 17 L. ed. 733.

And a private statute authorizing commissioners to sell so much of the lands of a decedent as were necessary to satisfy a lien of the state thereon is not unconstitutional. *Livingston v. Moore*, 32 U. S. 7 Pet. 439, 8 L. ed. 751.

The Legislature may authorize an administrator to sell land of his intestate and make an investment of the proceeds. *Williamson v. Williamson*, 3 Smedes & M. 715.

But a private Act authorizing a trustee to sell the real estate of a decedent before the time prescribed in his will, is unconstitutional where the parties interested are of full age and under no disability. *Ervine's App.* 16 Pa. 256.

A private Act authorizing the creditor of a decedent's estate to sell at public sale so much of decedent's lands as will raise a specified sum and apply it upon claims held by himself and another for moneys advanced and liabilities incurred on account of the estate is unconstitutional. *Lane v. Dorman*, 4 Ill. 223.

The court said such power was clearly judicial, and also that there was a sufficient remedy in the courts for the enforcement of the claims. So far as the decision is based on the theory that the power was judicial it is clearly against the weight of authority unless distinguished from the other cases on the ground that the Act assumed to decide the amount of the claims to be enforced against the estate.

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beneficial to the ward's estate to convey the right of way, without any pecuniary or direct compensation or consideration. This, precisely, as in case of a person *sui juris*, obviated the necessity for any condemnation proceedings. The more important question presented in this case is whether it was beyond the limits of legislative power for the Legislature to confer upon guardians the authority to convey the right of way in the lands of their wards, as provided in the section of the Act of March 9, 1882. The objections urged against the validity of this statute are that it is a legislative usurpation of judicial power, full jurisdiction in minors' business having been confided by the Constitution to the courts of chancery; that it provides no notice to the minor, who is the owner of the land, and therefore the method provided by this statute, for taking private property for public use, is not "due process of law;" and, finally, that it dedicates private property to public use without due compensation first being made to the minor. These objections will be examined in the order stated.

The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special Acts of the Legislature, authorizing or confirming the sale of lands by guardians, are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights, in the absence of special or exceptional constitutional limitation, and that such acts are not judicial, but the proper exercise of legislative power.

Such a power necessarily resides in the legislative department of the government, as *pater patrie*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs. This principle was announced by Judge Story, who delivered the opinion of the Supreme Court of the United States in *Wilkinson v. Leland*, 27 U. S. 2 Pet. 860, 7 L. ed. 554, a decision that was followed in the case of *Watkins v. Holman*, 41 U. S. 16 Pet. 25, 10 L. ed. 873, and also in *Hoyt v. Sprague*, 103 U. S. 618, 26 L. ed. 585.

In *Hoyt v. Sprague*, Mr. Justice Bradley delivering the opinion of the court, speaking of this class of statutes, said: "The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But, when it is not confided to the courts, the power exercised is of a legislative character, the Legislature making a law for the particular case." Such has been the uniform course of decisions in this state. *Williamson v. Williamson*, 8 Smedes & M. 715, 747, was followed and affirmed in *McComb v. Gilkey*, 29 Miss. 146, and again in *Boon v. Bowers*, 30 Miss. 246. 64 Am. Dec. 159. The three cases cited by counsel for the appellees do not controvert the correctness of the principle as we have stated it. The statute involved in the Illinois case of *Lane v. Dorman*, 4 Ill. 238, expressly adjudicated a debt in favor of a particular creditor, and directed a sale of the

minor's lands for its payment. The court characterized the statute for this reason as in the nature of a judicial decree. In the Pennsylvania case of *Schoenberger v. School Directors*, 32 Pa. 84, the statute before the court directed the sale, by two strangers, of land that had been devised to the testator's widow for life, with power of appointment by last will and testament to such persons as she might appoint, with remainder over to various specified persons, some of whom were minors. The court said the statute "was simply an authority to strangers to seize and sell an estate under no obligation or necessity to be sold. It was a legislative repeal of a private citizen's will."

Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 80, a Tennessee decision, proceeded on the construction of a special statute which the court interpreted to adjudicate and determine the question of the debts for which the land was directed to be sold, and accordingly held the statute unconstitutional on the ground that it was in this respect the exercise of judicial power. It will be seen that *Jones v. Perry* stands apart from the general constitutional doctrine, and rests alone upon the construction of the particular statute then being considered. An opinion given by the judges of the Supreme Court of New Hampshire to the Legislature of that state, reported in the fourth volume of New Hampshire Reports, page 564, stands alone and unsupported in its broad and unconditional denial of power in the Legislature in this class of cases. The Constitution of Mississippi, it is true, invests the chancery courts with full jurisdiction in minors' business; but, having ascertained that the special power exercised in that class of statutes is legislative and not judicial, it is evident that the Legislature has not usurped in any respect the powers or functions of the judicial department of the government. So the former Constitution of 1832 gave the probate courts jurisdiction in all matters testamentary and of administration and in orphans' business, but by a long line of decisions it was held that the power of these courts over the lands of decedents and infants was derived from legislative grant, and was therefore purely statutory, and not constitutional.

The power of determining controversies, of adjudicating debts, and deciding questions of property and personal rights is purely judicial, but the delegation of the power of selling lands for the payment of debts that are to be ascertained and adjudicated by the courts is not, in any sense, a judicial act, but the exercise of legislative power. The statute now under consideration contains two distinct features. It confers upon the guardian authority to agree upon the compensation for the ward's lands to be taken as the right of way, and also the authority to release all claim to damages and compensation. In this case the deed was made upon an independent and valuable consideration, contained in the condition subsequent in the deed and running with the grant, that the railroad company should erect and maintain a depot and station on the land, a condition which has been performed. The deed is not voluntary and without consideration, but, on the contrary, its consideration may be

of greater value than a money compensation for the strip of land taken as a right of way. The adult co-tenants evidently regarded it as of equal value to the land conveyed to the railroad company, and it can readily be perceived that such a consideration may not only be ample compensation for the right of way granted, but in many instances might far exceed the money value of the land granted to the railroad company as a roadway. A conveyance on such a consideration is in no just or proper sense the dedication of private property to public use without compensation. The railroad company has stipulated to maintain this depot on the land conveyed by these owners, partly for their profit and convenience in receiving their supplies and shipping their crops, a full equivalent for the right of way. This condition is not only a valuable, but a continuing one, and, upon its failure, the land granted will revert to the grantors at their option, according to their original title.

If the Legislature has the power to authorize a guardian to sell lands of his ward for the payment of debts or the reinvestment of the proceeds, the power must exist to authorize a guardian to sell a part of his ward's plantation as a right of way for the consideration of the erection and maintenance of a railroad station on the land, which in actual value is a fair compensation for the land conveyed, and which will be to the benefit, and not to the injury, of the infant owner. There is no deprivation of property in such a case, but the conversion of its value from one form into another. Such an arrangement amounts to direct compensation, not in money, but its equivalent, and the

power wisely exercised, as it seems to have been in this case, would be to the interest of the minor.

The objection that no notice to the minor is provided by the statute cannot be sustained. It is settled in this state that notice to minors is not necessary in proceedings in the chancery court for the sale of the lands of their ancestor. *Burrus v. Burrus*, 56 Miss. 92; *Bailey v. Fitts Gerald*, Id. 578; *Johnson v. Cooper*, Id. 608. And the same was announced by the Supreme Court of the United States in *Florentine v. Barton*, 69 U. S. 2 Wall. 210, 17 L. ed. 783. The question is simply one of the power of the Legislature to authorize the guardian to convey the land, and in none of the numerous cases of the class to which this belongs has notice to the minor been regarded as essential in any respect. We are of the opinion that the deed executed by the guardian in this case is legal and valid; and the statute, in so far as it authorizes a conveyance of the minor's land for a distinct and direct consideration which is a fair and just compensation, whether for money or its equivalent, is within the limits of legislative power. Whether the provision of the statute permitting a guardian to release the damages and convey the right of way for no independent consideration, but solely in expectation of indirect and remote benefits flowing or resulting from the construction of the road as an improvement, is not involved in the case now under consideration, and upon which it is unnecessary to intimate an opinion.

From these views it follows that the judgment of the Circuit Court must be reversed, and the cause remanded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.

Eugene GRAVES, *alias* Maximillian E. A. LAFOSSE.

(.....Mass.....)

A statute designating one who is convicted of a felony after having been convicted of two others, an habitual criminal and subjecting him to long imprisonment as such, is not *ex post facto*, although by its terms it may be enforced against one whose former convictions occurred before its passage.

(January 5, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an indictment charging him with procuring an abortion, and with being an habitual criminal, as defined by Act of June 16, 1887. *Overruled.*

The case sufficiently appears in the opinion. **Mr. P. Henry Hutchinson** for defendant.

Messrs. A. E. Pillsbury, Atty-Gen., and Charles N. Harris, Asst Atty-Gen., for the Commonwealth:

The Statute of 1887, chap. 435, providing for the punishment of habitual criminals, is not unconstitutional and *ex post facto* when applied to a case in which the third offense was committed after the passage of the Act.

Ross's Case, 2 Pick. 165; *Riley's Case*, Id. 172; *Com. v. Phillips*, 11 Pick. 27; *Plumbly v. Com.* 2 Met. 413.

Knowlton, J., delivered the opinion of the court:

Under Stat. 1887, chap. 435, "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this Act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state-prison for twenty-five years," etc. The defendant contends that this statute can only

NOTE.—The above decision has interest as relating to one of the modern statutes about habitual criminals, although the principle of the decision on the objection that the statute is *ex post facto* is 16 L. R. A.

clearly established by the earlier Massachusetts cases cited in the opinion as well as by *Rand v. Com.* 9 Gratt. 738; *People v. Butler*, 8 Cow. 347; *Es parte Gutierrez*, 45 Cal. 430.

See also 23 L. R. A. 830; 24 L. R. A. 387; 29 L. R. A. 834; 35 L. R. A. 238.

be applied to cases in which the former convictions on which sentences were imposed were subsequent to the passage of the Act, and that, if it included cases in which the former convictions were before, it would be unconstitutional. The statute relates to the judgment to be rendered and the sentence to be imposed in cases arising after it goes into effect. It is prospective, and not retrospective. It deals with offenders for offenses committed after its passage, but it provides that, in considering the nature of an offense and the condition into which the offender is brought by it, his previous conduct may be regarded. The meaning of the statute in this particular seems clear, and we have no doubt that it is applicable to the case before us. With this construction it is

not unconstitutional as an *ex post facto* law. In punishing offences committed after its passage, it punishes the offenders for a criminal habit whose existence cannot be proved without showing their voluntary criminal act done after they are presumed to have had knowledge of the statute. Such an act is a manifestation of the habit, which tends to establish and confirm it, and for which the wrong-doer may well be held responsible. That statutes of this kind are constitutional is settled by well-considered adjudications of this court. *Ross's Case*, 2 Pick. 165; *Com. v. Phillips*, 11 Pick. 28; *Plumbly v. Com.* 2 Met. 413; *Com. v. Hughes*, 183 Mass. 496; *Com. v. Marchand*, (Bristol county, 1891,) 29 N. E. Rep. 573.

Exceptions overruled.

KANSAS SUPREME COURT.

Alvah SHELDEN

v.

B. H. FOX *et al.*, Commissioners of Butler County *et al.*

(.....Kan.....)

*1. The boards of county commissioners of the several counties of the state

*Head notes by HORTON, Ch. J.

NORM.—Power of public officers to make contracts binding on their successors, or for a term of years.

Reference must be had in every case to the statute or to the fundamental law to ascertain the power of public officers to contract, or indeed to do any act. Except in the construction of such written laws the decisions of courts afford no guidance or test.

For services of teachers, attorneys, depositaries.

Where there is no express limitation on the power of a school trustee to hire teachers, he may hire a teacher for a period extending beyond his term of office, and his successor is bound by the contract if made in good faith and without fraudulent collusion. *Walt v. Ray*, 87 N. Y. 36. It is said in this case that "a hiring for an unusual time would be strong evidence of fraud and collusion."

In Illinois the statute gives the voters, at the annual election of school trustees, power to prescribe the subjects to be taught. In view of this and other statutes which seem to confine the authority of the board to the current year, it is held that a contract for the services of a teacher which are not to commence till a time subsequent to the annual election is invalid. *Stevenson v. School Directors*, 87 Ill. 255; *Davis v. School Directors*, 92 Ill. 258.

Under a statute providing that "the school trustees or incorporated towns and cities shall have power to employ a superintendent for their schools," such trustees are authorized to contract for the services of a superintendent to commence at a date subsequent to the time fixed by law for the election of a new trustee and the reorganization of the board of trustees. *Reubelt v. School Town of Noblesville*, 4 West. Rep. 509, 106 Ind. 478. In this case the employment was only for one year. It is said of this case in *Jay County Comrs. v. Taylor*, *infra*: "We apprehend that if the board of trustees had undertaken to employ the superintendent for three years a different conclusion would have been reached." In both cases the boards consisted of three members, holding for three years each, one being elected each year.

16 L. R. A.

have exclusive control of the expenditures accruing either in the publication of delinquent tax lists, treasurers' notices, or other county printing, and, in pursuance of this power, have authority to designate the official newspapers of their respective counties, but such designation cannot continue for a longer period than one year, or so as to bind or tie the hands of their successors in office.

2. On the second Monday of January

A contract by which a board of county commissioners attempts to employ a legal adviser for a period of three years, to commence three months in the future and after the time for the election of a person to fill the vacancy caused by the expiration of the term of office of one member of the board, the term of employment extending over a period during which all the members of the board as constituted at the time of the contract will retire therefrom unless re-elected,—is against public policy and void. *Jay County Comrs. v. Taylor*, 7 L. R. A. 160, 128 Ind. 148.

Under a statute authorizing county commissioners to designate a bank in which to deposit public moneys, which gives no express authority to make such designation to continue for any particular length of time, a designation for such a definite period, during which the bank agrees to pay a given rate of interest, is not binding on the commissioners. *First Nat. Bank of Medicine Lodge v. Peck*, 43 Kan. 648; *First Nat. Bank of Medicine Lodge v. Barber County Comrs.* Id. 648. In the last case but one, *Johnston, J.*, said: "If it had been the purpose of the Legislature that county commissioners might tie their hands and those of their successors and bind the county to retain the funds in a certain bank through several changes in the membership of the board, or for any stated time, it would surely have made it clear in the statute enacted. The public interest will be best subserved by leaving the board free to change the depository whenever in the judgment of the commissioners the safety of the public moneys and the good of the county require such change."

Under a Michigan statute, the exact terms of which are not disclosed by the report, "it is not competent for a county treasurer and board of auditors to contract for depositing the public funds beyond the expiration of the term of office of county treasurer for the time being, but a designation of a depository by the treasurer and board is good and valid until the expiration of the term of his office, and until a new designation is made by the newly elected county treasurer and board." *City Sav. Bank of Detroit v. Huebner*, 84 Mich. 391.

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after each general election at which a commissioner has been elected, the board of county commissioners, as an organized body, is dissolved, and the office of chairman is vacant, and, before the commissioners can transact any county business other than to elect a chairman, or fill a vacancy in the office of a commissioner, the board must be again organized, and the hands of such new board or organization, as to the designation of the official newspaper of the county, are not tied by a prior order of the preceding board of county commissioners.

(April 2, 1892.)

PETITION for a writ of mandamus to compel defendants to allow plaintiff to do the county printing for Butler County in accordance with a contract which he had made with defendants' predecessors in office. *Denied.*

The facts are stated in the opinion.

Messrs. Aikman & Brooks and Redden & Schumacher, for petitioner:

This contract was not *ultra vires*, but a legitimate and proper contract, entirely within the power of the board of county commissioners and such as was very proper for the county commissioners to make. Moreover, this contract is an executed contract.

The rule *ultra vires* prevails in full force only when the contracts of corporations of this character remain wholly executory.

Thompson v. Lambert, 44 Iowa, 289; *Brown*

Under a statute prohibiting any contract on behalf of the United States unless it is "authorized by law or is under an appropriation adequate to its fulfillment," a valid lease of a building for a post-office cannot be made by the postmaster general for more than one year by virtue of an appropriation for such year only. *Chase v. United States*, 44 Fed. Rep. 732. In this case *Gresham, J.*, said: "The executive officers of the government have no power to bind it by contract, unless there be statutes expressly or by clear implication authorizing them to do so. The annual appropriations which are made by Congress to defray the expenses of the executive departments do not authorize heads of those departments to bind the government by contract beyond the time for which such appropriations are made applicable."

Contracts of municipalities for water, gas, etc.

Municipal corporations have no power to make contracts continuous in character, by which they will be, in effect, precluded from exercising from time to time any power legislative in character conferred upon them by law. *Brenham v. Brenham Water Co.* 67 Tex. 542.

The reasonableness of the duration and extent of a grant of privileges by a city which it has legislative authority to make, is for the exclusive determination of the city council, provided they do not create a perpetuity or absolutely surrender their control over the subject-matter. *Houston v. Houston City Street R. Co.* (Tex.) March 1, 1892.

The time for which the council of a city may bind by contract their successors in the matter of supplying water cannot exceed what is reasonable under all the circumstances. *Davenport v. Kleinschmidt*, 8 Mont. 502.

A city authorized to provide for a water supply may make a contract therefor which is not invalid because without limit of time other than the city can fix by purchasing the plant of the water company. *Atlantic City Water Works Co. v. Atlantic City*, 4 Cent. Rep. 341, 48 N. J. L. 373. 16 L. R. A.

v. Atchison, 39 Kan. 53. See *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

If the commissioners had the power to make a contract for county printing then the contract is binding on the company. There is no such thing as the board of county commissioners of 1891, or the board of county commissioners of 1892; but it was the board of county commissioners at the beginning, and the board of county commissioners at the ending.

First Nat. Bank of Medicine Lodge v. Peck, 43 Kan. 646.

Even the Legislature is bound by its contracts as much as an individual.

Speer v. Baker, 4 Kan. 379.

This contract was absolutely binding on Sheldon. He could not at any time he saw fit ignore it and recover upon a *quantum meruit* but was bound to carry it out.

Quigley v. Sumner County Comrs. 24 Kan. 293.

Then if binding upon the citizen why not binding upon the county.

If the board could not make a binding contract for a reasonable length of time, and to them as might appear proper under existing circumstances, then the interests of the county might be jeopardized. The county commissioners may authorize any person or corporation to construct, maintain, and operate a street railway across any state or county road or highway. Would such business permit of a week or a year contract? Not at all.

A city authorized to contract for a supply of water may contract for it for twenty years. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

A contract for a water supply for a township for ten years as authorized by N. J. Act, March 15 1881, p. 118, may be made for ten years, to commence after the lapse of a reasonable time. *State v. Bloomfield*, 1 Cent. Rep. 422, 47 N. J. L. 442.

A contract by a city for a water supply, which exceeds its authority by attempting to bind the city for twenty-one years, will not be held void for that reason, where water-works have been erected by the other party on the faith of the contract, at great expense, and the contract recognized and acquiesced in by the city for several years; but it will be upheld for a reasonable time. *Columbus Water Co. v. Columbus* (Kan.) 15 L. R. A. 364.

In *Garrison v. Chicago*, 7 Ill. 488, a contract made by a city for a supply of gas for ten years was held invalid, in the absence of express authority to the municipal authorities to bind it by contract for a series of years. It is there said, "In all cases of contracts to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city." The court was of the opinion that there was, under the circumstances, no reasonable necessity for a contract for so long a time.

In *Brenham v. Brenham Water Co.*, 67 Tex. 542, a contract made by a city for a supply of water for public purposes for twenty-five years was held invalid, principally on the ground that it created a monopoly, although the court also considered the long term obnoxious. It is there said, "We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official term of the officers who make the contract, but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things or any

See *Columbus Water Co. v. Columbus* (Kan.), 15 L. R. A. 354.

Messrs. Shinn & Knowles and George Gardner, for respondents:

Under the constitutional and statutory provisions, on the second Monday in January after each general election at which a commissioner has been elected, the board, as a body corporate, is dissolved, and the office of chairman is vacant; and before the commissioners can transact any county business, other than to elect a chairman or fill a vacancy in the office of commissioner, the board must be again organized, and such organization is effected and the board an organized body for the purpose of its creation, as soon as the commissioners elect a chairman.

Fuller v. Miller, 32 Kan. 180.

A legitimate result of that decision is that the Legislature intended to give the power to each separate board of county commissioners to have the exclusive control of all expenditures accruing, either in the publication of the delinquent tax lists, treasurer's notices, or county printing.

The designating of an official paper and contracting for the county printing is analogous to the designating by the board, of a bank or banks for the deposit of the public moneys, and this court held in the case of the *First Nat. Bank of Medicine Lodge v. Peck*, 43 Kan. 643, and again in the case of the same plaintiff, *First Nat. Bank of Medicine Lodge v. Barber County Comrs.* 43 Kan. 648, that the public interests will best be subserved by leaving

the board free to charge the depository whenever in the judgment of the commissioners the safety of the public moneys and the good of the county requires such change.

Horton, Ch. J., delivered the opinion of the court:

On and prior to the 9th day of January, 1889, and at this time, Alvah Sheldon was and is the publisher of the Walnut Valley Times, a weekly newspaper printed and published in El Dorado, in Butler county, in this state, and having general circulation therein. On the 9th day of January, 1889, the board of county commissioners of Butler county, then composed of J. K. Skinner, B. H. Fox and A. O. Rathburn,—the last named being the chairman of the board,—at a regular session designated the Walnut Valley Times as the official paper of Butler county, and directed that the county printing for the next two years be given to that paper, commencing on the 10th day of January, 1891, and ending on the 1st day of January, 1893. Subsequently a written contract was entered into between the board and Alvah Sheldon, the publisher of the Walnut Valley Times. At the time of the execution of the contract Sheldon made to the state of Kansas a bond in the sum of \$500, conditioned for the faithful performance of his duties, devolving upon him as county printer, which was approved and accepted by the board, and filed with the county clerk. Sheldon continued to do the county printing, under the terms of the contract, until the 26th of Janu-

others, by which they will be, in effect, precluded from exercising from time to time any power, legislative in character, conferred upon them by law."

A municipal corporation is not empowered to grant an exclusive franchise disabling it from itself establishing water-works for thirty years, by a statute empowering it to contract with a private corporation for the establishment of a system of water-works, although the statute also provides that the right of the city to purchase the works shall be part of such contract. *Long v. Duluth* (Minn.) April 8, 1892.

In the absence of any express power conferred by the charter of a municipal corporation, it cannot enter into a valid contract giving a monopoly for a long series of years to supply water to the municipality; and such authority cannot be implied from the mere general delegation of the usual power over the subject. *Greenville Water-works Co. v. Greenville* (Miss.) April 21, 1890.

It is not made clear in this case whether the contract was objectionable because running for "a long series of years" or only as giving a monopoly. For this latter feature of such contracts see note to *Altgelt v. San Antonio* (Tex.) 18 L. R. A. 383.

In Ohio a municipal corporation is, by statute, authorized to contract for ten years, as to the price to be paid for gas supplied to it, but is prohibited from granting the exclusive right to use streets for pipes or to deprive its council by contract of the right to regulate the quality or mode of measurement. *Cincinnati Gas Light & C. Co. v. Avondale*, 1 West. Rep. 91, 43 Ohio St. 257.

A contract between a city and a gas company providing that the price of gas may be fixed from time to time by agreement has a continuing force for ten years from its date, but no longer, under a statute providing that the city may fix the prices at intervals of ten years, and until that period has 16 L. R. A.

expired the city cannot fix the rate without agreement with the company. *Toledo v. Northwestern Ohio Nat. Gas Co.* 5 Ohio C. C. 557.

A contract for a term of years made under a statute empowering the board of auditors of a town to contract for the lighting of its streets, is annulled by the repeal of such statute. *Richmond County Gas Light Co. v. Middletown*, 59 N. Y. 223. Grover, J., who wrote the opinion, also thought the contract was void because it deprived the succeeding officers of control over the subject but in this the rest of the court did not concur.

A city which has, by valid contract, granted to an individual the exclusive right, for a stated period, of removing dead animals from its streets, cannot, upon mere caprice or to gain a pecuniary advantage, recall the contract and sell the privilege to the highest bidder. *Louisville v. Wible*, 84 Ky. 290.

A resolution and ordinance constituting a contract giving a person named or his assigns the exclusive right for a term of years to remove carcasses of animals not slain for food from the city limits, so that the same may not become a nuisance, where the owner or his direct servants or employees do not remove them within twelve hours, is a valid exercise of the police power, and is not invalid as constituting a monopoly, depriving persons of property without due process of law, or as in restraint of trade. *National Fertilizer Co. v. Lambert*, 43 Fed. Rep. 458.

The power of public officers to make contracts calling for payment of an aggregate amount payable in installments each year, when they are prohibited by law or charter from incurring an indebtedness over a certain amount, presents a different question depending upon whether such a contract is construed to create an indebtedness within such prohibition or otherwise. J. G. G.

ary, 1892, when the board of county commissioners, then composed of B. H. Fox, John Ellis and H. M. Brewer,—the first named being the chairman,—designated by a majority vote the Industrial Advocate as the official newspaper of Butler county. On February 8, 1892, the order of the board was spread upon the journal by the county clerk. The publisher of the Industrial Advocate entered into a contract with the board for the county printing, and executed a bond, which was approved by the board. Since the 8th of February, 1892, the board of county commissioners has refused to recognize the Walnut Valley Times as the official paper of Butler county, and has directed the county clerk to notify Shelden, the publisher of the Walnut Valley Times, that the Industrial Advocate has been designated as the official paper of Butler county until the further order of the board. Shelden objected to this, and demanded that he be permitted to do all the county printing of Butler county. This has been refused. On the 15th of February, 1892, Shelden commenced this proceeding in this court for a peremptory writ of mandamus to compel the board of county commissioners of Butler county, and the clerk thereof, to allow him, as the owner and publisher of the Walnut Valley Times, to do all the county printing, job work, etc., until January 1, 1893.

The principal question in the case is whether the board of county commissioners may designate an official newspaper of the county for a term of two or more years. On the part of the plaintiff it is alleged that this may be done, and on the part of the defendants this is denied. Paragraph 1655, Gen. Stat. 1889, provides that "the boards of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing either in the publication of delinquent tax lists, treasurers' notices, or county printing." Under this section the boards of county commissioners of the several counties have the legal right to designate the paper in which the delinquent tax lists shall appear. Gen. Stat. 1889, par. 1710; *Wren v. Nemaha County Comrs.* 24 Kan. 301. When a paper is designated by a board of county commissioners, it becomes the official newspaper of the county. In *Fuller v. Miller*, 32 Kan. 180, it was said: "We think that section 26, construed in connection with amended section 8, means that, on the second Monday of January after each general election at which a commissioner has been elected, the board, as a body corporate, is dissolved, and the office of chairman is vacant; and before the commissioners can transact any county business, other than to elect a chairman, or fill a vacancy in the office of a commissioner, the board must be again organized, and such organization is effected, and the board an organized body for the purposes of its creation, as soon as the commissioners elect a chairman.

"By this construction the sections of the Constitution and statute under consideration 16 L. R. A.

are in harmony. Then it follows that a chairman is to be elected in each year on the second Monday of January, or within thirty days thereafter, and will hold his office until the ensuing second Monday of January, and that the term of office of the chairman of a board of county commissioners is from the day of his election to that office until the next ensuing second Monday of January."

As the Legislature has provided that the boards of county commissioners of the several counties of the state shall have exclusive control to designate a paper, and to control the county printing, this of course means that the board of county commissioners of each county has that power. Therefore, as the board of county commissioners of a county, after one year, is dissolved as an organized body, such board ought not to have the control of the county printing after one year, or for an indefinite term of years. Each board of county commissioners of each county has authority and responsibility in designating the official newspaper of the county, and, as a necessary result, in providing for the county printing. If the board of county commissioners of a county could tie the hands of a subsequent board in designating the official newspaper, and in contracting for county printing, it might tie the hands of subsequent boards for several years,—at least for what would be a reasonable time; and it would be difficult to determine what, under all the circumstances of the case, would be a reasonable time. It follows logically that the board of county commissioners of a county must be limited to one year, or until the body is dissolved, or else its power is unlimited in this respect, and it may designate a paper as the official newspaper of the county for two, three or more years,—at least for a reasonable time, which is almost indefinite. See *First Nat. Bank of Medicine Lodge v. Peck*, 43 Kan. 643; *First Nat. Bank of Medicine Lodge v. Barber County Comrs.* 43 Kan. 648. It appears from the pleadings in this case that it has been the practice in Butler county for a newspaper to be designated by the board of county commissioners of that county as the official paper for the period of two years; and therefore, in this case, the board of county commissioners, in 1891, followed the usual practice in designating an official newspaper. It is the practice, however, in most of the counties of the state, for the boards of county commissioners to designate the official newspapers of the counties for the period of one year only. The latter practice seems to us to conform to the Constitution and statutes of the state. To avoid complications or other troubles, the designation of the official newspaper should be made as early in each January, after the board is organized, as is convenient for action to be had.

The peremptory writ will be denied, with costs.

All the Justices concur.

MINNESOTA SUPREME COURT.

Helen HENDRICKSON, Admx., etc., of
Michael Hendrickson Deceased, Appt.,
v.

GREAT NORTHERN R. CO.

(.....Minn.....)

- *1. A railway company must be exonerated where a collision occurs at the crossing of a public highway between a traveler on the way and one of its trains, when the company has used such reasonable care to avoid the collision as ordinary prudence would suggest.
2. A plaintiff administrator is not required, in all cases, to prove affirmatively that his intestate, who has been killed at the intersection of a public road with a railway, looked or listened for approaching trains.
3. When, by reason of an omission or a neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing, the vigilance of a traveler upon the wagon road is alayed, and he is led into a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence as a matter of law.
4. Evidence examined, and held not to have justified the trial court in directing a verdict for defendant railway company.

*Head notes by COLLINS, J.

NOTE.—Presumption as to exercise of due care by person who is found to have been killed by the alleged negligence of another.

The conflict as to the burden of proof of contributory negligence assumes its most serious aspect when the injured person was killed outright and there were no eye witnesses of the accident. As a rule under those circumstances the party who has the burden of proof will lose his case. In addition to the placing of the burden of proof there has been a strong tendency to raise a presumption of law either of care or of negligence, and now there are three well marked divisions into which the cases fall: (1.) those in which it is held that the law raises a presumption of due care; (2.) those which hold that the law raises a presumption of contributory negligence; (3.) those which admit no presumption whatever. The subdivisions of these three main divisions are almost as numerous as the cases on the subject. The statements of principles are almost infinite but the application of them to facts makes the disposition of the cases quite uniform and for the most part just.

Where there are witnesses to the accident there is no room for presumption either way. *State v. Maine Cent. R. Co.* 1 New Eng. Rep. 236, 77 Me. 536; *Mynning v. Detroit, L. & N. R. Co.* 12 West. Rep. 427, 67 Mich. 677.

a. Presumption of care.

Where there is absolutely no evidence as to how the accident occurred the presumption is that the deceased was in the exercise due care. *Schum v. Pennsylvania R. Co.* 107 Pa. 8.

The presumption of law is that the person killed at a crossing did stop and look, and listen, and the presumption will prevail in the absence of direct testimony on the subject. *Mynning v. Detroit, L. & N. R. Co.* 7 West. Rep. 824, 64 Mich. 93; *McBride v. Northern Pac. R. Co.* 19 Or. 64, 16 L. R. A.

See also 22 L. R. A. 33; 23 L. R. A. 715; 26 L. R. A. 406; 33 L. R. A. 492; 40 L. R. A. 364; 43 L. R. A. 487; 45 L. R. A. 261.

(April 7, 1892.)

APPEAL by plaintiff from an order of the District Court for Meeker County overruling her motion for new trial after verdict in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Francis Bergstrom, F. D. Larabee and Shaw & Cray, for appellant:

A jury might conclude that the railway company was negligent in not giving a signal of the approach of its train to the crossing in question at the time in question.

Note in 6 Am. & Eng. R. R. Cas. 128; *Loucks v. Chicago, M. & St. P. R. Co.* 31 Minn. 526.

It was a question for the jury to determine whether or not Michael Hendrickson was guilty of contributory negligence.

Brown v. Milwaukee & St. P. R. Co. 23 Minn. 165; *Faber v. St. Paul, M. & M. R. Co.* 20 Minn. 465; *Loucks v. Chicago M. & St. P. R. Co. supra*; *Hutchinson v. St. Paul, M. & M. R. Co.* 32 Minn. 398; *Boonstrom v. Northern Pac. R. Co.* 46 Minn. 193.

Messrs. M. D. Grover, E. A. Campbell and S. L. Campbell for respondent.

Collins, J., delivered the opinion of the court:

In this action defendant corporation was

The court cannot assume that deceased came to his death through his own contributory negligence. *Lehigh Valley R. Co. v. Hall*, 61 Pa. 386.

The plaintiff is under no obligation to repel any presumption arising from the mere fact that a collision between a person riding across a railroad track and a train of cars that he did not look or listen, or, if he did, rode heedlessly and purposely to his death. *Gugenheim v. Lake Shore & M. S. R. Co.* 9 West. Rep. 903, 66 Mich. 150.

Where a person driving along a highway was killed by being thrown from his wagon in consequence of becoming entangled with a telephone wire which had become loose and sagged over the street, the presumption is that he did his duty of stopping and loosening the wire as soon as he discovered that he was caught by it. *Pennsylvania Teleph. Co. v. Varnau (Pa.)* Oct. 1, 1888.

Where one was killed while walking upon a public sidewalk by a car running upon him, there is a presumption that he placed himself upon the walk without any want of ordinary care. *Phillips v. Milwaukee & N. R. Co.* 9 L. R. A. 521, 77 Wis. 349.

In the absence of evidence of inattention or recklessness of the deceased, who was killed by falling from a gutter on which he was at work, the presumption is that he was in the exercise of ordinary care. *Fugler v. Bothe*, 43 Mo. App. 55.

If the plaintiff's own case shows he brought the injury on himself by his own carelessness he may be consulted, but if he does not, the case should be submitted to the jury, there being a certain degree of presumption that a person of ordinary intelligence will not purposely expose himself to danger. *Cassidy v. Angell*, 12 R. I. 447, 84 Am. Rep. 690.

Application of presumption; question for court or jury.

As applied in practice it seems that the only ef-

charged with having so carelessly and negligently run and operated one of its trains when crossing public highway as to have brought it in collision with plaintiff's intestate, thereby killing him instantly. The court below ordered and the jury returned a verdict for defendant upon all of the testimony, and plaintiff appeals from an order denying her motion for a new trial.

The crossing, which seems to have been an exceedingly dangerous one, known as "King's Crossing," was about midway between the stations of Darwin and Dassel, some six miles apart, on defendants' line of road. The highway was the main traveled road between these places, and along the entire distance ran nearly parallel to the railway, crossing it at the scene of the accident. The deceased had resided for several years some eight miles from this crossing, about five miles from defendant's railway at the nearest point, and it was not made to appear that he knew anything of the specially dangerous character of the place, except as knowledge might be imputed to him from the fact that he had previously driven over the road, twice, according to the testimony to his widow, the plaintiff.

On this particular day he was driving easterly from Darwin to Dassel, having a pair of horses attached to an unloaded lumber wagon. The train, also going easterly, was a regular passenger upon time, running thirty miles an hour, and due at the crossing

about 8 o'clock P. M. Westerly of the crossing was deep cut, over 1,000 feet long, and, at places, more than twenty-five feet in depth. Beside it, on top of the bank and some forty feet from its edge, was the wagon road, and at various places between the road and the cut were piles of earth and bushes or small trees, which naturally obscured the vision of travelers upon the highway, and rendered it more difficult for them to observe a train approaching from the west. When within less than 300 feet of the crossing, the wagon road entered upon a slight depression in the surface of the ground, and thence, through a small ravine, down hill, and, bearing northerly, to the railway tracks, which were crossed at an angle of about thirty-five degrees between the cut referred to and another on the east. The limited opportunity for observing the coming of a train can best be judged by the testimony of the engineer, who at his post upon the south or right-hand side of the cab, was looking out for the crossing. He saw the horses first, the moment they came in sight, and, an instant after, the wagon, in which Mr. Hendrickson was seated. In his opinion, the locomotive was not over 120 feet from the crossing when the team emerged in view at a point on the wagon road not to exceed fifty feet from the rails. From this testimony it is evident that Mr. H., fully aware of the proximity of a railway crossing, as we must presume him to have been, could not have seen, with-

fect of this presumption is to send cases to the jury in which in other jurisdictions there would be a nonsuit and in permitting the jury to find for plaintiff unless contributory negligence appears, which is merely placing the burden of proof on defendant. In many cases decided where this presumption obtains it is little more than permission to the jury to infer due care from other facts proved, which is just what the jury is permitted to do in jurisdictions where the presumption is denied. *Schultz v. Moon*, 33 Mo. App. 333.

So where a person was killed at a road crossing while attempting to drive over in a wagon the presumption in his favor entirely disappeared in the disposition of the case, and the court said there is a presumption of negligence on neither side but the right of recovery is a question of fact for the jury. *Richey v. Missouri Pac. R. Co.* 7 Mo. App. 157.

Where there is nothing to show contributory negligence the presumption is against it and the burden is on defendant. If it conclusively appears a nonsuit will be granted; if the evidence merely tends to show such negligence the question will be for the jury. *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714.

If the undoubted evidence clearly shows contributory negligence the court should say there can be no recovery, but if the fact rolled on to establish negligence is doubtful the case must be submitted to the jury. *Pennsylvania R. Co. v. Fortney*, 90 Pa. 323.

Where one is found killed on a railroad crossing, in the absence of evidence the presumption is that he exercised all the precautions of due regard for his own safety and that of others required. In such cases the circumstances in evidence are sometimes sufficient to warrant the inference of negligence, but such inferences are always for the jury and not for the court. *Longenecker v. Pennsylvania R. Co.* 105 Pa. 332.

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Where plaintiff has given evidence of negligence on the part of defendant and no contributory negligence appears there is a case for the jury. The presumption of law is that deceased has done all that a prudent man would do under the circumstances to preserve his own life. *Weiss v. Pennsylvania R. Co.* 79 Pa. 390.

Although from the uncontradicted evidence it might have been inferred that if the traveler had stopped and looked and listened he would have seen the approaching train, it was for the jury to determine the facts. *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407.

In *Allen v. Willard*, 57 Pa. 380, deceased lost his life by falling into an unguarded excavation by the side of the highway. There was no witness of the accident. The court, to the circumstances of the case as they appeared when he was found, added the natural instinct which leads men in their sober senses to avoid injury and preserve life, and held that they could not say that the evidence was insufficient to go to the jury as proof of actual negligence on the part of the defendant.

In *Achtenhagen v. Watertown*, 18 Wis. 331, 86 Am. Dec. 789, where it appeared that a boy fell through a bridge and was drowned, the court said that the circumstances raised such a presumption of negligence against him that plaintiff was bound by proper proof to negative the presumption and to show that deceased was guilty of no want of care, before the case could have been submitted to the jury; but in the subsequent case of *Barstow v. Berlin*, 84 Wis. 362, the judge who wrote the opinion in the *Achtenhagen* case said that he feared the court was wrong in saying, as matter of law, that the fact that the boy fell through the hole raised an inference of negligence which the plaintiff was required to repel in order to establish a cause of action. He further said that negligence was not to be presumed but must be proved, or, at least, there must be some facts upon which it

out getting down from his wagon, and did not see, the locomotive before the moment his horses were discovered by the engineer, as before stated, and who instantly realized that they were uncomfortably close to the track over which the train must pass. By reason of the deep cut, the obstructions to the vision before mentioned, the conformation of the ground over which the wagon road descended to within a few feet of the railway, and the angle of the crossing itself, the risk and hazard to wayfarers upon the road were largely augmented. These facts and circumstances were peculiarly within the knowledge of defendant company, and the engineer in charge of the locomotive admitted, when testifying, that he knew it to be a dangerous crossing.

To sum up the situation, this junction of ways was of such a nature that a person driving on the public road came down a hill in a depression or ravine almost parallel with the track, to a point some fifty feet distant, before he could discover a train coming in his rear, and it would then be but about 120 feet away. Running at the rate of the one in question, it would cover that distance (unless checked by the brakes) within three seconds. The imperative necessity for ample cautionary signals by the trainmen as they approached this place, the vigilance which ought to be exercised by the traveler upon the highway as he came to the track, and the exceedingly dangerous character of

such an intersection, need not be enlarged upon. There was a sharp conflict of testimony as to whether the whistle was sounded at the caution post eighty rods west of the crossing, or whether the bell was then rung, or rung at all until a collision with the wagon seemed imminent. The engineer and fireman, and other persons who were on the train, asserted with great positiveness that the whistle was sounded at the post, and that thereafter the bell was rung as the train approached the crossing. Other persons who resided and were at work in the immediate vicinity, some of whom had reason to observe the approach of the train and to notice the signals, if they had been given, were equally as positive that there was no whistle sounded and no bell rung until the engineer discovered the horses within fifty feet of the track.

On this conflicting testimony it stands conceded that the jurors would have been justified in concluding that no cautionary signal was given, and that the defendant's servants were negligent in this respect when driving their ponderous machinery along the track towards the crossing, a place where every traveler upon the public road is expected to listen for, and therefore has a right to rely to some extent upon the sounding of, a warning or cautionary signal,—a signal to be regulated by and commensurate with the necessities of the locality, the risk and hazard at the intersection. More care

could be based, and that it seemed to him that it was an inference of fact and not of law, and so one to be drawn by the jury and not by the court.

Weight of presumption.

Although proof of due care is essential to plaintiff's case, it may, in the absence of evidence to the contrary, be supplied by presumption that persons of mature years in the possession of their senses are ordinarily prudent and will exercise ordinary diligence to avoid danger. *Lyman v. Boston & M. R. Co.* (N. H.) 11 L. R. A. 364.

The love of life and instinct of preservation will stand for proof of care until the contrary appears. *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 399.

Contributory negligence is a matter of defense and must be pleaded and proved in order to escape liability. *Schlereth v. Missouri Pac. R. Co.* 96 Mo. 514; *Huckshold v. St. Louis, I. M. & S. R. Co.* 7 West. Rep. 764, 90 Mo. 543.

Unless the jury are satisfied by affirmative proof that the deceased did not use ordinary care defendant is liable. *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. 244.

Overcoming presumption.

The presumption is not overthrown by the fact of injury but the burden is on defendant to rebut it. *Flynn v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 211.

There is a presumption of due care which inferences from circumstances, in the absence of direct proof, may overcome. *Buesching v. St. Louis Gas Light Co.* 78 Mo. 233, 39 Am. Rep. 503.

Where there is no direct testimony on the subject the presumption will prevail, but where there is affirmative, direct, and credible testimony of contributory negligence the presumption is rebutted and displaced. *Reading & C. R. Co. v. Ritchie*, 102 Pa. 423.

That the plaintiff has the *onus* of showing affirmative proof is a question for the jury. *16 L. R. A.*

actively that the deceased was guilty of no negligence at the time of the injury, is in one sense the rule; it is true that negligence on his part would defeat the right of recovery, but to call witnesses to declare the absence of such negligence before defendant is bound to answer, is not required. But if negligence appears in plaintiff's testimony the defendant may rest on it as securely as if proved by himself. *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 399.

The absence of any fault upon the part of deceased may be inferred from the circumstances in connection with the ordinary habits and conduct and motives of men. The natural instinct of self-preservation in the case of a sober and prudent man stands in the place of positive evidence. *Thomas v. Delaware, L. & W. R. Co.* 8 Fed. Rep. 729.

b. Presumption of negligence.

The fact that a person traveling on a highway comes in collision with a train on a railway crossing is of itself sufficient to suggest a presumption of contributory negligence against him. In a suit for such injuries the facts and circumstances illustrating the conduct of the injured person at the time of the accident must be made to appear. If, from those, the inference can be drawn that proper caution was exercised it may be said that the presumption of contributory negligence has been affirmatively removed. *Indiana, B. & W. R. Co. v. Greene*, 3 West. Rep. 883, 106 Ind. 279.

Where deceased fell into a culvert and was killed, and the evidence showed that he knew of the culvert and its surroundings and that a man using due care might easily have passed it in safety, there was nothing that would justify a recovery. *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 494.

It will be seen that these cases are little different from those where there is no presumption and the burden is placed on plaintiff to prove due care.

and vigilance are required at a crossing of extremely dangerous character, as this was, by all parties, trainmen and travelers on the highway, than at a place where there are no obstructions to interfere with sight and hearing, the difference between the parties being that the trainmen are presumed to know all about the peculiarities of the intersection, while the travelers on the highway are not presumed to have the same knowledge. That they are acquainted with the crossing may be shown of course.

As there was testimony which would have justified the finding that defendant was negligent, the real question resolves itself into an inquiry whether the proofs conclusively established defendant's contention that Hendrickson contributed to the negligence which caused his death. This depends wholly upon the testimony of one witness, the only one, aside from the engineer and fireman, who saw the deceased after he came upon defendant's right of way, not far from the point, before mentioned, where he was first discovered by the engineer. This witness was at least thirty rods away, upon the north side of the track, and walking in the direction of the scene of the casualty. He testified that Hendrickson carefully walked his team down the hill, to the point where he could command a view of the track westerly, some fifty feet from the rails, and just at that moment the locomotive emerged in view in

the cut about 150 feet away, the short, shrill, danger whistles were at once given, the horses became frightened and unmanageable, reared and plunged forward toward the rail, notwithstanding the driver tried to control them, and man, wagon, and team disappeared from his view in the dust and smoke, the crash of the collision coming instantly to his ears. This witness and the engineer and fireman were greatly at variance as to the manner in which the horses were driven towards the crossing, and as to their behavior when the danger signals were given, but these differences were for the jury to pass upon.

We are of the opinion that a case was made which ought to have been submitted to the jury. Where a railway and a public road intersect, the rights of the traveler and of the railway company are regarded as equal, but, of course, the traveler must yield the right of way to a train drawing near. In other words, if a traveler on the public road, having had an opportunity to learn in any manner of the approach of a railway train, sustains injuries from a collision while attempting to cross the rails when the train is crossing the highway, he has no cause of action. A railway company must be exonerated when a collision occurs at an intersection with a public road, if it has used such reasonable care to avoid the collision as ordinary prudence would sug-

a. Where no presumption is allowed.

In case a person is found killed, the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon plaintiff may be deemed sufficient than where the injured person is alive and competent to testify. *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 528.

Negligence cannot be presumed. *Palmer v. New York Cent. & H. R. R. Co.* 112 N. Y. 245.

Under this rule there are two general subdivisions, 1st, where the burden is on plaintiff; 2d, where it is on defendant.

1. Burden of proof on plaintiff.

Absence of contributory negligence is a part of plaintiff's case and the burden of satisfying the jury upon that point rests upon him. *Hart v. Hudson River Bridge Co.* 84 N. Y. 62; *Brunswick v. Strilka*, 30 Ill. App. 188; *McDermott v. Third Ave. R. Co.* 44 Hun, 107; *Prather v. Richmond & D. R. Co.* 30 Ga. 427.

Method of sustaining burden.

In *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375; *Denio, J.*, said: "It is not a rule of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The judge is to determine whether a case is fit for the deliberation of the jury, not by the application of any artificial rule respecting the *onus probandi*, but by considering the facts and circumstances in evidence in connection with the ordinary habits, conduct, and motives of men. The jury must eventually be satisfied that plaintiff did not by any negligence of his own contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident or in any other competent proof. To carry the case to the jury the evidence on the part of plaintiff must be such as, if believed, would authorize

them to find that the injury was occasioned solely by the negligence of defendant. It is not absolutely essential that plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of defendant's delinquency may be such as to prove *prima facie* the whole issue or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself.

In *Tolman v. Syracuse, B. & N. Y. R. Co.*, 38 N. Y. 208, 50 Am. Rep. 649, *Finch, J.*, said: "The burden of establishing affirmatively freedom from contributory negligence may be successfully borne though there was no eye-witnesses at the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased that inference becomes possible in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury and require a choice between possible but divergent inferences. If, on the other hand, those facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn and nonsuit becomes inevitable.

Although there are many expressions in the New York decisions which do not fully accord with what is said above, those two cases state with a fair degree of accuracy, the rules which have governed the disposition of the cases. Many claims have been made that the *Johnson Case*, *supra*, has been overruled. It has never been done directly, and although the right of the court to consider the habits, conduct, and motives of men does not appear in the later cases that statement seems not far dif-

gest. If it has, and a collision ensue, the fault must be with the traveler on the highway, consisting in his failure to exercise ordinary care. In such cases it has been well said that if, as a matter of common knowledge and experience, the trial court sees, upon the undisputed facts in the case, that the injured traveler was not in the exercise of ordinary care, and that the injury was in part attributable to his want of such care, it will, as he has shown no legal cause of action, dismiss the case or direct a verdict against him. But the measure of ordinary care is so variable that the question of negligence becomes usually and peculiarly a function for the jury, and the courts can but rarely declare a particular act to be conclusive evidence of negligence. And that is precisely what was done in this instance, the ruling being the same as if Mr. Hendrickson's view of the railway and the coming train had been wholly unobstructed as he came down the hill towards the crossing. A plaintiff administrator is not required in all cases of this character to prove affirmatively that his intestate looked or listened. It may be inferred, in view of the circumstances, that the deceased, governed by the instinct of self-preservation, did what a prudent man ordinarily would do to save his life. See *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407.

It was demonstrated that Hendrickson was

in a position or situation extremely perilous to him, and which he had not been cautioned to avoid, if we are to believe plaintiff's witnesses, before he had reached a point in the public road where the train was visible, or when looking for it would have availed. This situation or position became dangerous, not by the simple act of Mr. Hendrickson in driving there, but through the neglect of defendants' servants to give the warning signals required by law (sec. 843, Penal Code) in reason to prevent his near approach, and it was made still more perilous by the short, sharp danger whistle made necessary by reason of the neglect before mentioned, blown in such close proximity to the horses as to frighten and cause them to plunge forward upon the tracks directly in front of the destructive force.

As was said in *Pennsylvania R. Co. v. Opler*, 85 Pa. 71, 78 Am. Dec. 323: "If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveler accustomed to expect this would not only not be so likely to look out for danger, or be in such preparedness to avoid it, as he otherwise might have been, and this without any culpable negligence on his part; for if by the negligence or omission of those in charge of the train his vigilance was allayed, they are not at liberty to impute the consequences of their acts to his want of vigilance, a

ferent from the one in the Tolman Case which permits the case to go to the jury if the surrounding circumstances reasonably indicate that the accident might have occurred without negligence of the deceased.

The editor of the Albany Law Journal after a careful examination of all the cases decided at that time, Vol. 20, p. 360, states his understanding of the New York rules as follows: "If on the plaintiff's affirmative evidence it clearly appears that he himself was materially negligent he may be nonsuited; otherwise the defendant, if negligence on his part has been shown, must give proofs. If on the whole case, it clearly does not appear that the plaintiff was free from negligence he may be nonsuited; but if the evidence is conflicting the case must go to the jury."

Direct evidence to disprove negligence is not required in the first instance. *Button v. Hudson River R. Co.* 18 N. Y. 248.

Evidence of due care may be given by showing circumstances from which the inference is fairly to be drawn that such fact existed. *Hart v. Hudson River Bridge Co.* 80 N. Y. 622.

The burden may be sustained by direct testimony or by presumptions arising from facts and circumstances already proved in the case. *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 289, 87 Am. Dec. 391; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 47, 4 Am. Rep. 181.

The burden is on plaintiff of showing that the injury occurred without fault on the part of the person injured or of giving evidence from which the jury may infer that he was without fault and that his act did not contribute to the casualty. *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 122.

In such cases the fact of due care may, and in most instances can, only be established by reasonable inference from the attending circumstances proved in the case, which inferences are to be 16 L. R. A.

drawn by the jury. *Mulligan v. New York Cent. & H. R. Co.* 39 N. Y. S. R. 584.

In *Mayo v. Boston & M. R. Co.* 104 Mass. 140, in which the injured person was not killed, the court said that the burden of showing due care need not necessarily be borne by affirmative testimony. If the evidence to show defendant's negligence excluded fault on the part of plaintiff the proposition of due care was established.

Failure of suit.

In the absence of evidence of due care the action cannot be maintained. *Barstow v. Old Colony R. Co.* 3 New Eng. Rep. 748, 148 Mass. 585; *Wakelin v. London & S. W. R. Co.* L. R. 12 App. Cas. 41.

In the absence of proof of due care a nonsuit should be granted. *Becht v. Corbin*, 92 N. Y. 658.

There can be no recovery where the circumstances of the accident are not sufficiently disclosed to warrant any inference upon the question of care or negligence. *Crafts v. Boston*, 109 Mass. 519.

An action cannot be maintained for the death of a brakeman by falling from a moving train, if the evidence wholly fails to show how he fell and what he was doing at the time. *Corcoran v. Boston & A. R. Co.* 138 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 232.

When a person has been killed at a railroad crossing and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited; the presumption that every person will take of himself from regard to his own life and safety cannot take the place of proof. *Cordell v. New York Cent. & H. R. Co.* 75 N. Y. 332.

When plaintiff offers no evidence that he was in the exercise of care, but on the contrary the whole

quality of which they deprived him." Assuming, then, as we must, for the jury might have so determined, that no cautionary or warning signals were given, it must be held that if, by reason of this omission or neglect on the part of defendants' servants, Mr. Hendrickson was led to be less vigilant when drawing near to the railway, his view along the tracks being obscured until he reached a place or situation in which his life was jeopardized and finally lost, his want of vigilance cannot be pronounced culpable, or concurring negligence as a matter of law. It is not an absolute answer to the claim for redress made by his legal representative that, notwithstanding the alleged omission of cautionary signals by the persons in charge of the locomotive, he might, by the exercise of greater vigilance, have discovered the approaching train, if he had foreseen a violation of the statute, instead of relying, perhaps, on its observance. *Ernst v. Hudson River R. Co.* 85 N. Y. 9, 90 Am. Dec. 761.

In respondent's brief, reference has been

frequently made to the excellent opportunity there was for observing the line of railway as a person on the public road journeyed easterly from Darwin towards King's crossing. When so journeying, and with a crossing of the track to be made, it would be the duty of the traveler to be watchful, and at all times to exercise ordinary care; but the fact that for two or three miles along the road, and before reaching the point where the view was obstructed, Mr. Hendrickson might have seen the train had he looked to the rear some distance, was, at most, a simple circumstance to be considered by the jury when considering the claim that he ought to have seen the train in ample time to avoid the collision. While the view for some two or three miles west of the cut was not interfered with, it was greatly obstructed for a distance of more than 1,000 feet, just at the point where the opportunities for observation were most needed, and are ordinarily regarded and made useful. Of course, if the train was within range of the traveler's vision, as he looked over or be-

evidence on which the case rests shows that he was careless, the court may rightfully instruct the jury as a matter of law that the action cannot be maintained. *Gabagan v. Boston & L. R. Co.* 1 Allen. 187, 79 Am. Dec. 724.

The case will not be taken from the jury if the facts proved fall short of requiring as the sole inference from them that a want of ordinary care on the part of the intestate contributed to the injury." *Palmer v. New York Cent. & H. R. R. Co.* 112 N. Y. 245.

Applications of the rule.

Where a person attempting to deliver coal at a court-house was killed by the iron grating covering the area falling upon him, and there was nothing to show how he happened to be so situated as to be caught by it, the jury were permitted to draw the inference that the proper discharge of his duties called him there. *Galvin v. New York*, 112 N. Y. 223.

Where a woman was killed at a crossing while riding with her husband who was guilty of negligence, and the evidence did not disclose what her actions were previous to and at the time of the injury, the jury were left to infer her probable course of action and whether or not it was negligent. *Hoag v. New York Cent. & H. R. R. Co.* 111 N. Y. 202.

Where a laborer on a railroad was engaged in cleaning snow from a street crossing and an engine backed down upon and killed him, the court ruled that it was for the jury to determine what inferences should be drawn from the facts and circumstances disclosed by the evidence. *Wall v. Delaware, L. & W. R. Co.* 54 Hun. 454.

Where a night-watchman was found dead at the bottom of an area, the court said that plaintiff had furnished the jury with nothing from which they could infer the freedom of the intestate from fault. They were simply furnished with food for speculation and that would not do for the basis of a verdict. *Bond v. Smith*, 113 N. Y. 385.

Where a person going to a railroad station was killed by a car running in on a switch, and the circumstances under which he was struck were not developed, and there was nothing in the evidence which tended to show due care or the want of it on his part, the court said that it is impossible to infer from the evidence offered that he exercised the care and circumspection properly to be de-

manded from one in his situation and that the action could not be maintained. *Hinckley v. Cape Cod R. Co.* 120 Mass. 262.

How far jury may draw inference of due care.

In *Chase v. Maine Cent. R. Co.*, 77 Me. 63, 52 Am. Rep. 746, the court said that the fact of a natural instinct of men to preserve themselves from injury was not evidence and was no more than an accompaniment or appurtenance of evidence. It may have some influence on the interpretation of facts affirmatively proved. It pertains to those natural laws in connection with which all evidence may be weighed. Taken singly, it does not constitute proof or shift the burden. It may give character or force to facts already proved. It is a mode of reasoning upon the evidence.

In weighing the circumstances it may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm. *Morrison v. New York Cent. & H. R. R. Co.* 63 N. Y. 643.

In connection with the facts and circumstances of the case it is competent for the jury to infer the absence of fault on the part of the deceased from the general and well known disposition of men to take care of themselves and to keep out of the way of difficulty and danger. *Northern Cent. R. Co. v. Stutz*, 29 Md. 420, 96 Am. Dec. 545, 31 Md. 357, 100 Am. Dec. 70.

The inference of care is only warranted when circumstances are shown which fairly indicate care or exclude the idea of negligence. *Hinckley v. Cape Cod R. Co.* 120 Mass. 262.

The jury cannot be permitted to assume that the deceased had not omitted the precautions which a prudent man would take in the presence of known danger. *Riordan v. Ocean S. S. Co.* 124 N. Y. 655.

While want of contributory negligence may be established by inference drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. *Witkowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420.

Where a person was seen going toward a railroad track, and shortly afterward his body was found in a cattle-guard after having been struck by a train, the court said that there was nothing to show absence of negligence on his part. "Doubtless the jury might infer that the deceased was

tween the piles of earth, small trees, and other obstructions between the track and the highway, it would be seen, but it would remain unseen and unobserved unless it was at the exact place commanded by a view from that precise point of observation. The view and the presence of the train would have to concur as to time and place.

Nearly all of plaintiff's witnesses, residents of that immediate locality, testified that, although no signals were sounded for the crossing, they heard the train coming from the time it left Darwin station, some three miles west; and from this it is maintained by respondent that had the deceased listened, as was his duty, when he approached the crossing, he, too, would have heard it coming, and would have been warned in ample time to prevent his driving so near the rails. The fact that the swift coming of the train was clearly manifested to the witnesses by the noise it made when running, conclusively established, it is argued, that the deceased failed to listen, or, listening, neglected to pay attention to the obvious

warning of imminent danger. But in this contention respondent's counsel overlooked two conditions, both present, which might have a bearing upon the matter: *First*, that Mr. Hendrickson was in an empty lumber wagon, which must have made more or less noise as it was driven along; and, *second*, and of more moment probably, that all of these witnesses were well acquainted with the movements of this particular train, knew when it might be expected at Darwin station, as well as at the crossing, while some of them were paying special attention to its coming on that occasion. A stranger to the neighborhood and to the movements of this train would not be expected to know that a train was approaching King's crossing from the west simply because it whistled and blew off steam at Darwin, or because its approach was apparent to those who knew all about its running time and movements.

Order reversed.

Gillilan, Ch. J., absent, sick, did not sit.

governed by the natural instinct of self-preservation and would not put himself recklessly and consciously in peril of death; but that no presumption exists in the absence of proof that he was exercising due care at the time. *Reynolds v. New York Cent. & H. R. R. Co.* 58 N. Y. 232.

Special circumstances which relieve from care.

It seems that the evidence of due care may be less strong in cases where the defendant has by his conduct justified the decedent in taking the course which resulted in his death. *Newell v. Ryan*, 40 Hun. 226; *Palmer v. New York Cent. & H. R. R. Co.* 112 N. Y. 245.

It is not necessary to show that a passenger was free from negligence. *McKimble v. Boston & M. R. Co.* 139 Mass. 542.

Evidence of due care on the part of a passenger may be less strong when the injury is caused by the carrier than though there was no relation between them. *Parsons v. New York Cent. & H. R. R. Co.* 3 L. R. A. 653, 118 N. Y. 363.

Where a person in attempting to cross a railroad track after dark was struck and killed by a train running down grade without steam and with no lights or signals as it approached the crossing, defendant insisted that since there was no witness to testify that deceased looked or listened when he approached the crossing it must be assumed that he did not, and that such omission was negligence on his part; but the court ruled that it was only where it appeared from the evidence that he might have seen had he looked, or might have heard had he listened, that the jury was authorized to find that he did not look and did not listen. *Smedis v. Brooklyn & B. R. R. Co.* 83 N. Y. 19.

Circumstances showing negligence.

The very happening of the accident may negative the existence of due care. *Rioeman v. Havemeyer*, 84 N. Y. 647.

When the only theory upon which the deceased

could have been on the track was that either he did not see the train, or did not stop when he should have done so, either of which would have been negligence, a nonsuit should have been granted. *Connelly v. New York Cent. & H. R. R. Co.* 88 N. Y. 346.

It will be presumed that deceased did not look, if by looking he could have seen the approach of the train and escaped. *Wilcox v. Rome, W. & O. R. Co.* 39 N. Y. 368, 100 Am. Dec. 440; *Havens v. Erie R. Co.* 41 N. Y. 236; *Nicholson v. Erie R. Co.* Id. 525; *Harty v. Central R. Co. of N. J.* 42 N. Y. 468; *Madden v. New York Cent. & H. R. R. Co.* 47 N. Y. 665; *Mitchell v. New York Cent. R. Co.* 64 N. Y. 655.

Where the only reasonable way of accounting for the collision is, that deceased did not look or listen for the approaching train, it will be presumed that he did not do so and he cannot recover. *Brown v. Milwaukee & St. P. R. Co.* 23 Minn. 165; *State v. Maine Cent. R. Co.* 76 Me. 337, 49 Am. Rep. 622.

2. Burden on defendant.

Although the general rule is that the burden is on plaintiff to make a case which will leave him blameless, he need not in all cases prove affirmatively that he exercised ordinary care and diligence. In the absence of any direct proof the jury are at liberty to infer ordinary care from all the circumstances of the case. To hold otherwise would be to presume negligence on the part of one in excuse of negligence on the part of another. If the plaintiff makes a case which does not charge him with negligence the case must go to the jury. *Gay v. Winter*, 34 Cal. 164.

Later California cases have placed the burden of showing contributory negligence on defendant. *McQuilken v. Central Pac. R. Co.* 50 Cal. 7; *MacDougall v. Central R. Co.* 63 Cal. 434.

H. P. F.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE R. CO.

Appt.,
v.

Dora NORTHINGTON.

(.....Tenn.....)

1. Showing that loose boxes placed by the foreman of a gang of railroad laborers upon a car to be pushed along the track by a hand-car and remaining in his charge, came in contact with a station platform while the cars were in motion, causing injury to an employé on a hand-car, makes out a prima facie case of negligence for which the company is responsible without showing that the foreman could have prevented the boxes slipping or that the slipping was not caused suddenly by a joint in the rails.
2. A negligent injury to one having an incurable disease followed by his death furnishes a good cause of action if the death was materially hastened by reason of the injury as an efficient cause; but not if death was inevitable in a short time from the disease and the injury was so slight as to simply aggravate the disease which remains the cause of death.

(December 19, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

NOTE.—Effect of previous disease of person injured on liability for causing the injuries.

The measure of damages for personal injuries caused by negligence is the injury done although it might not have resulted except for a disease or peculiar physical condition of the person injured or may have been aggravated thereby. *Lapline v. Morgans' L. & T. R. & S. B. Co.* 1 L. R. A. 378, 40 La. Ann. 661; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443; *Louisville, N. A. & C. R. Co. v. Jones*, 7 West. Rep. 38, 108 Ind. 551; *Louisville, N. A. & C. R. Co. v. Wood*, 12 West. Rep. 303, 113 Ind. 544; *Louisville, N. A. & C. R. Co. v. Falvey*, 1 West. Rep. 883, 104 Ind. 408; *Louisville, N. A. & C. R. Co. v. Snider*, 8 L. R. A. 434, 117 Ind. 436; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74; *Stewart v. Ripon*, 38 Wis. 584; *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180; *Driess v. Friederick*, 73 Tex. 490; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274.

The same rule has been applied in many cases to a miscarriage caused by personal injuries to a pregnant woman or by frightening her. *Hill v. Kimbell*, 7 L. R. A. 618, 76 Tex. 210; *Barbee v. Reese*, 60 Miss. 906; *Oliver v. LaValle*, 36 Wis. 596; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Shurtle v. Minneapolis*, 17 Minn. 308; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645; *Powell v. Augusta & S. R. Co.* 77 Ga. 179; *Campbell v. Pullman Palace Car Co.* 42 Fed. Rep. 484.

By application of the same principle proof of the pregnancy of a woman was allowed to show aggravation of the wrong of a steamboat carrier in failing to stop at a landing for passengers where the woman was waiting to take passage and suffered from exposure. *Helrn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588. But see *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, 16 L. R. A.

The facts are stated in the opinion.

Mears, Leech & Savage and *T. L. Yancey* for appellant.*Mears, West & Burney* for appellee.

Snodgrass, J., delivered the opinion of the court:

The defendant in error sued and obtained a verdict for \$5,000 damages of the Louisville & Nashville Railroad Company for the negligent killing of her husband. Pending a motion for a new trial, \$2,000 of this amount was remitted, and judgment was rendered for the plaintiff for \$3,000. The railroad company appealed.

Several errors are assigned, the first being that there was no evidence of negligence. The accident occurred on a hand-car running from a point north of Hampton station, in Montgomery county, to a point south of said station, where the hands using the car were to resume work after dinner, this being just before. The foreman in charge of the work ordered the men (of whom Henderson Northington, husband of plaintiff, was one) to get on the hand-car and go to the place indicated. They did get on and set out for it, pushing before them a truck or push-car containing two dump beds or boxes, as was the custom in such removals from place to place for work. These were empty, and there was no way to fasten them. The foreman stood upon them with a foot in each, thus holding them on. The hands rode on the car, and worked the levers propelling it. In attempting to pass the station platform, one of these boxes struck it, and was

The principle above stated is illustrated also in the following cases:

The fact that a person was suffering from Bright's disease at the time he was injured does not impair his right of recovery against the party in fault for the injury although the injury was aggravated by the disease. *Louisville, N. A. & C. R. Co. v. Snider*, *supra*.

The fact that a person injured had a tendency or predisposition to cancer will not defeat the liability of the party causing the injury for a cancer which develops as a result of it. *Baltimore City Pass. R. Co. v. Kemp*, *supra*.

The aggravation of damages from an injury to a person's arm by an organic scrofulous tendency is within the damages for which recovery may be had from the person liable for the injury. *Stewart v. Ripon*, *supra*.

So a person predisposed to malarial, scrofulous, or rheumatic tendencies, but otherwise in good health, may recover damages for the development of such tendencies in an action for wrongful injuries. *Louisville, N. A. & C. R. Co. v. Falvey*, *supra*.

A passenger subject to chronic rheumatism may recover for injuries occasioned by a carrier's fault in taking him beyond his destination and compelling him to walk back through the rain. *Mobile & O. R. Co. v. McArthur*, *supra*.

The prior fracture of a leg does not affect the measure of damages recoverable for another fracture caused by negligence. *Driess v. Friederick*, *supra*.

A previous fracture of a person's arm will not prevent his recovering from a defendant who is in fault for an injury by which his arm is again broken and his shoulder and collar bone permanently in-

thrown under the car, stopping it suddenly. This threw deceased against the lever, and injured his right side. Of this injury it is claimed he died. This, of itself, made out a case of negligence. If the foreman allowed the boxes to be so balanced as to strike a platform on the road, and bring about this injury, it devolved upon the company to show that it was unavoidable, or not the result of negligence; but, in addition to this, it is proven that the foreman said, at the time of the accident, that he saw the dump-box had slipped, or was slipping, but did not think it would strike the platform,—thus letting the men, without warning, take the risk of a danger he foresaw and speculated about. The argument for the company is that the proof fails to show that the foreman could have prevented the box slipping, or that it did not slip suddenly, when the car passed over a joint in the rails at the place of the wreck. The car having struck or dump-box thereon having struck, the platform, this was a circumstance showing negligence (as the overturned coach in *Stokes v. Saitonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115), and made out a prima facie case, which it devolved upon defendant to meet. This it not only did not do, but predicates its reliance for reversal on weakness of plaintiff's additional affirmative evidence of negligence. It was the duty of the foreman representing the company to see that it was so placed it would not strike the platform naturally, and when it did strike it then devolved upon the company to show that this was not the result of any negligence. The *onus* was not upon the plaintiff to show why it struck after having shown that it did strike. The reason, if there were any

proper one therefor, should have been shown by the defendant to remove the presumption of negligence arising from the fact of collision. The case referred to in 88 U. S. 18 Pet. 181, 10 L. ed. 115, has been often followed in this state.

The remaining error to be noticed in the number assigned is that on the qualification of a proposition submitted by defendant to the court as instruction to the jury. Though the plaintiff's intestate died about a month after the injury, and there was evidence to sustain the theory that his death was the direct result thereof, there was evidence tending to show that he died of galloping consumption, of which he was probably, though not very visibly, affected when injured. In this condition of the evidence the court was asked to charge as follows: "If you find that the company was negligent, and the deceased was injured by such negligence, then did the injury cause his death, or did he die of some disease? If he died of the injury,—and by that is meant the injury produced the death, or produced a disease which resulted in death, or so weakened the powers of deceased as to render him unable to resist a disease of which he might otherwise have recovered, or with which he might have lived an indefinite time,—the plaintiff should recover. But, if deceased already had a fatal disease from which there was no hope of recovery, and his death was inevitable from that disease in a short time, and the injury was slight, and of such a character as to simply aggravate the disease, and he died of the disease, and not of the injury, then plaintiff cannot recover at all, for this is a suit for the death of deceased." The court gave this instruction to the jury, with this addition:

jured, even if the latter injury would not have been received if the arm had been well and sound. *Allison v. Chicago & N. W. R. Co. supra*.

Where an injury to a child was aggravated by a latent, hereditary, hysterical diathesis which had never exhibited itself before the accident and might never have developed but for it, the entire damages were recoverable from the party whose negligence caused the accident. *Lapleigne v. Morgans L. & T. R. & S. B. Co.* 1 L. R. A. 378, 40 La. Ann. 661.

In other cases similar to these a party causing an injury has been held liable for a disease developing as the result of the injury, but without anything to show a previous diseased condition or tendency to disease. As for instance in a case where erysipelas develops in a wound or in consequence of an injury. *Dickson v. Hollister*, 123 Pa. 421; *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83.

So where pneumonia supervened causing the death of a boy who had been seriously injured by a blow on the head. *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30.

The same rule was applied to the development of catarrh as a result of an injury to the nose of a person who never had catarrh before. *Quackenbush v. Chicago & N. W. R. Co.* 73 Iowa, 458.

Of course there is no question that a disease which supervenes as the direct result of an injury is to be regarded as part of it, if there was not in fact any prior diseased condition or tendency.

Causing death of diseased person.

The distinction taken in the main case between a slight hastening of death merely by aggravation of the disease itself consequent upon an injury and a material hastening as a result of the injury to a

diseased person does not appear to have been made in any prior case.

A statute giving an action for causing death was held in a Missouri case not to extend to a case where the death of a person already mortally wounded was merely hastened but "not caused" by taking him as a passenger on a railroad train. The court said that the statute was in derogation of the common law and must be construed strictly. *Jackson v. St. Louis, I. M. & S. R. Co.* 8 West. Rep. 236, 37 Mo. 422, 25 Am. & Eng. R. R. Cas. 227.

But this case, unless limited strictly to its peculiar facts and so harmonized with the main case, is not in harmony either with other cases as to death or with the principle of the great bulk of the cases concerning lesser injuries as shown above.

In line with that case is the decision that liability for wrongfully causing the death of a person is not defeated by the fact that he had a tendency to insanity or disease and that the injury would not have caused the death of a well person. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568.

Also that death from a disease may be legally attributable to negligence which causes an injury that renders a person more susceptible to disease and less able to resist it. It is not necessary that the injury should be the sole or direct cause of the death if it concurs in producing death. *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168.

This accords also with the recognized doctrine in criminal cases. *Com. v. Fox*, 7 Gray, 585; *State v. Morea*, 2 Ala. 275.

Limitations and exceptions to the rule.

The fact that a person who is injured was at that time an invalid may be taken into account in de-

"This is the law, but, if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death." It is objected that the addition of the court to the request submitted is not the law, and a case to the contrary in terms, if not in effect, as to "hastening" the death, is cited in 25 Am. & Eng. R. R. Cas. 327. The case is from Missouri, and is that of *Jackson v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 422, 3 West. Rep. 286. There the evidence showed that a mortally wounded man had been suffered to be placed upon a train, and removed from the place where he was injured, under circumstances of, at least, slight negligence on the part of the conductor. The court charged that "if the conductor was informed of the condition of the wounded man, and knew he was being taken against his will and consent of plaintiff (his wife), and that he was so taken and transported from Dexter to Clay county, thereby causing or hastening his death, the jury should find for plaintiff." He further refused, on request of defendant, to charge "that if the wrongful act only hastened the death of Jackson, and was not the cause of same, you must find for defendant." The Supreme Court of Missouri on appeal held that the giving of the first and refusal of second instruction quoted was error.

Under the facts of that case, with the brief and summary propositions standing as they do, the case may be right,—it is not necessary to determine that question,—but the charge we have here is not the same. It presents in the proposition submitted by the circuit judge all the qualification which makes the use of the term "hastened" objectionable in the Missouri case. He had already said that, "if the injury was slight, and of such a character as to simply aggravate the disease, and he died of the disease, and not of the injury, then plaintiff cannot recover." He now adds, "but if the death was hastened or occurred sooner by rea-

son of the injury," in other words, if the death was hastened or occurred by reason of the injury, and sooner than deceased would have died of the disease,—then the injury was the cause of the death,—that is, of the death when it occurred, at another and different time than death would have occurred from the disease. This must be true, or there could be no cause of an earlier death than that, which, nothing else intervening, would have produced a later one. A man might be suffering from an incurable disease, or a mortal wound, with only two days to live, when a negligent wrong-doer inflicted upon him an injury which in his condition of debility took his life, or developed agencies which destroyed him in one day, and yet the latter wrong be in a legal sense the cause of his death, though it only hastened that which on the next day would have inevitably happened. We think the proposition submitted by counsel, and qualified by the wise and judicious view of the court, an admirable statement of the true rule on this very delicate question. The Supreme Court of Missouri said it found no precedent for the decision rendered in the *Jackson Case*, and there are confessedly few reported cases that touch upon the question. Those supposed to present an antagonistic view are embodied and cited in 1 Sedgw. Damages, 8th ed. p. 160; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 80. It is sufficient, for the purpose of this opinion, to say that, treating it from the stand-point of an original proposition, we were entirely content with the view of it embodied in the instruction submitted as qualified by the court upon the facts of this case. That qualification upon the proposition put, removed here in fact, and will remove hereafter, in precedent, all danger that this case will be authority, or treated as authority, for holding that any slight aggravation of a disease is a cause of death, within the meaning of the

termining how much of the subsequent suffering and ill health is to be attributed to the injury. *Robinson v. Waupaca*, 77 Wis. 544.

This is manifestly just on any theory, as suffering and ill health which would have existed independent of the injury cannot constitute an element of damages for causing it.

So it is a question of fact for the jury to determine whether a cancer which developed on a person at a place where she was injured and shortly after the injury was a result of the injury. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

If a person injured was already suffering under permanent disability, his recovery for the injury is only for the additional disability resulting therefrom. *Whelan v. New York, L. E. & W. R. Co.* 88 Fed. Rep. 15.

The decisions just cited are plainly in harmony with the line of decisions given at the beginning of this note, and merely show the true application of the rule. Evidently the same should be said in regard to the following language of the court in a Georgia case, where it is said: "A tort to health already impaired cannot be redressed except by giving damages for any further impairment and for any obstruction occasioned by the tort, to recovery from existing maladies." Also "Where the subject of a tort is already diseased the question should be how much if any the tort contributed to 16 L. R. A.

aggravate or protract the disorder. This was said in condemnation of an instruction to the jury denying a right to damages so far as prior sickness or disorder contributed to plaintiff's unsound condition after the tort. *Bray v. Latham*, 81 Ga. 640.

But in conflict with the above current of decisions it is decided in a Colorado case that the increased risk of injury resulting from the fact that she is "unwell" must be taken by a woman who is a passenger on a railroad train and the carrier is not liable for a long sickness which results from her exposure when compelled to leave a burning car only half clad, if the sickness would not have resulted except for her condition at the time of the exposure. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 84 Am. Rep. 89.

So an English decision which has been frequently disapproved in this country holds that illness caused by a cold which is caught by a passenger in a drizzling wet night during a walk to her home, which was rendered necessary by the carrier's fault, is not within the damages for which she can recover although recovery is allowed for the inconvenience caused. The court said the action must be regarded as one upon contract and the damages limited to what could have been reasonably within the contemplation of the parties. *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111. B. A. R.

statute. The circuit judge had already charged upon the propriety of reducing damages according to expectation of life, and had justly exercised his judgment and discretion in requiring a remission if the judgment was to

stand, there being no grossly negligent or wanton conduct in bringing about the injury.

We are satisfied with the judgment, and it is affirmed, with costs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

M. A. MANNING, Admr., etc., of A. D. Woolwine, Deceased, *Plff. in Err.*,
v.

CHESAPEAKE & OHIO R. CO.

(.....W. Va.....)

***1. A person who, without invitation, visits a telegraph office merely for the purpose of paying a friendly call to the operator, which office is owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, from which occasional messages are sent and received for outside parties for pay, visits said office as a mere voluntary licensee, subject to the concomitant risks and perils, and no duty is imposed upon the owner or occupant to keep its premises in safe and suitable condition for such visitors, and the owner is only liable for such willful or wanton injury as may be done such licensee by the gross negligence of its agents or employes.**

2. Where there is no controversy in regard to the facts or inferences that may be fairly drawn therefrom, the question of negligence is one of law for the court to determine.

3. This is a case in which the facts proven did not tend in any clearly appreciable degree to sustain the plaintiff's claim, and the evidence was properly excluded from the jury by the court.

(April 2, 1892.)

ERROR to the Circuit Court for Summers County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Adams & Miller, for plaintiff in error:

The ruling that a railway company is not responsible for the death of a person who is not in its employ, and who has no special business with said company, if said person is killed on the property of the railway company, and although the accident was caused by its gross negligence, was error.

Skout City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745; 2 Rorer, Railroads, p. 1181; *Hicks v. Pacific R. Co.* 64 Mo. 430, 17

Am. Ry. Rep. 278; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413, notes p. 421; *Hann v. Wickham*, 55 Iowa, 546; *Lanigan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 393; *McMillan v. B. & M. R. Co.* 46 Iowa, 231; *Freer v. Cameron*, 4 Rich. L. 223, 55 Am. Dec. 674; *State v. Manchester & L. R. Co.* 52 N. H. 556; *Norris v. Litchfield*, 85 N. H. 271, 69 Am. Dec. 549; *Kerwacker v. Cleveland, O. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Lynch v. Smith*, 104 Mass. 53, 6 Am. Rep. 188; 2 Wood, Railway Law, p. 1292.

There is a general principle which governs the cases which decide that a trespasser or licensee cannot recover damage against the owner of land on which the trespasser or licensee goes, in case the licensee be there injured by defects in the premises.

By bearing in mind this general principle, and a general and manifest distinction (sometimes lost sight of) the difficulty vanishes.

That general principle is that trespassers and licensees going upon the premises of another take the premises as they find them, and run such risks as are incident to the existing condition of such premises, and therefore cannot complain of their needing repairs, and cannot recover for injuries resulting from the condition in which they find the premises.

But the distinction is, that they can recover for injuries resulting from the subsequent actual negligence of the defendant, while the licensee is on the premises.

Patterson, Railway Accident Law, p. 178, § 187; *Gallagher v. Humphrey*, 6 L. T. N. S. 684.

Patterson, on p. 179, § 188, says that it is on this principle that railway companies are held liable to licensees for injuries caused by movement of trains by a flying switch.

Kay v. Pennsylvania R. Co. 65 Pa. 269; *Philadelphia & R. R. Co. v. Troutman*, 11 W. N. C. 455.

A railway company is held liable for negligence in leaving unattended the boiler of a steam pile-driver, which exploded and injured one passing over a footway, which, without objection from the railway company, had been used for many years by the public.

Davis v. Chicago & N. W. R. Co. 53 Wis. 646, 46 Am. Rep. 667.

Where a railroad company permits persons to cross its lines or its premises, it is bound, as to those persons, to exercise care in the opera-

*Head notes by ENGLISH, J.

NOTE.—In addition to the very full review of the subject of negligence towards licensees which appears in the above opinion, we refer to *Redigan v. Boston & M. R. R. (Mass.)* 14 L. R. A. 276; *Gordon v. Cummings*, 9 L. R. A. 640, and note, 152 Mass. 513; *Schmidt v. Bauer*, 5 L. R. A. 580, and note, 80 Cal. 465.

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The above case seems to come fairly within the rule applied; nevertheless, the application of the rule to the facts of this case is not without an appearance of hardship that suggests the question whether the rule has not some limitation.

See also 17 L. R. A. 588; 20 L. R. A. 714; 24 L. R. A. 215.

tion of its line, and cannot treat them as trespassers.

Townley v. Chicago, M. & St. P. R. Co. 53 Wis. 626; *Murphy v. Boston & A. R. Co.* 138 Mass. 121; *Barrett v. Midland R. Co.* 1 Fost. & F. 361; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461.

In cases of technical trespasser, the trespass is not enough to convict him of contributory negligence.

1 Shearm. & Redf. Neg. pp. 154-156, § 97; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375; *Larmore v. Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 891, 54 Am. Rep. 718; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Parker v. Portland Pub. Co.* 69 Me. 173, 81 Am. Rep. 262; *Honnell v. Smyth*, 7 C. B. N. S. 731; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Beck v. Carter*, 68 N. Y. 288, 28 Am. Rep. 175; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 257; *Blackmore v. Toronto Street R. Co.* 38 U. C. Q. B. 178; *Forreth v. Boston & A. R. Co.* 108 Mass. 518; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120.

A trespasser on the railway track may recover if hurt by gross negligence of the railroad company.

Spicer v. Chesapeake & O. R. Co. 11 L. R. A. 585, 34 W. Va. 514.

It will not do to say that the negligence must be directed against that particular person. Gross negligence warrants a recovery, even where the trespass is actual and not merely technical.

Cincinnati & Z. R. Co. v. Smith, 23 Ohio St. 227, 10 Am. Rep. 729; *Card v. New York & H. R. Co.* 50 Barb. 39; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Thomp. Neg.* 1155; *Chicago, B. & Q. R. Co. v. Cauffman*, 88 Ill. 424; *Shearm. & Redf. Neg.* pp. 163, 164, § 99; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Hicks v. Pac. R. Co.* 64 Mo. 439.

Bradley v. Pratt, 23 Vt. 378, says: "A direct liability exists in all cases where injuries are sustained by a neglect of duties which are of a general and public character, and where the observance of those duties is required as a matter of public security and safety."

See also *Com. v. Power*, 7 Met. 602, 41 Am. Dec. 465; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 485, 14 L. ed. 509; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 418; *Lynch v. Nurdin*, 1 Q. B. 29; 2 Rorer, Railways, 1180.

Persons at depots to see friends arriving or departing, can recover if injured by want of ordinary care of railroad company.

Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 817; 2 Rorer, Railways, p. 1181, citing *Hicks v. Pacific R. Co.* 64 Mo. 439, 17 Am. Ry. Rep. 273.

Whether an intruder be an infant or an adult, his being technically a trespasser on the railroad company's premises will not dispense 16 L. R. A.

with the duty of ordinary care on the part of the railroad company, to avoid his injury by negligence.

2 Rorer, Railways, p. 1068, citing *Pennsylvania R. Co. v. Lewis*, 79 Pa. 38; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 418; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475, 9 Am. Ry. Rep. 2611. See also 1 Addison, Torts, pp. 202, 205, 228; 2 Wood, Railway Law, p. 1200; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 811.

A person on the track or premises of a railroad company by license is not a trespasser.

Harty v. Central R. Co. of N. J. 43 N. Y. 463; *Patterson v. Philadelphia, W. & B. R. Co.* 4 Houst. (Del.) 103; *Illinois Central R. Co. v. Hammer*, 73 Ill. 347. See *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Campbell v. Boyd*, 83 N. C. 129, 43 Am. Rep. 740.

If the distinction between active and passive negligence—between leaving the owner's premises as the licensee finds them, and committing some positive act of negligence while the licensee is on the premises,—is borne in mind; and also the requirement that the degree of care exercised must be commensurate with the danger incident to the business engaged in by the defendant; and also the fact that even an actual trespasser on a railroad company's track, where danger is expected always, can recover for injuries resulting from gross negligence of a railroad company, (*Spicer v. Chesapeake & O. R. Co.* 11 L. R. A. 585, 34 W. Va. 514),—it would seem incredible that there can be no recovery against a railroad company by the administrator of one who is killed by the grossest negligence of the railroad company, and while he was doing no wrong and in no one's way, and in a place where no danger could be expected, except from gross negligence, and while he was either seeking employment as telegraph operator, or visiting the railroad company's operator, under whom he had formerly worked for that company, in that office.

See *Patterson, Railway Law*, pp. 176, 178, 179,, §§ 187, 188; *Gallagher v. Humphrey*, 6 L. T. N. S. 684; *Kay v. Pennsylvania R. Co.* 65 Pa. 269; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Murphy v. Boston & A. R. Co.* 133 Mass. 121; *Barrett v. Midland R. Co.* 1 Fost. & F. 361; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461; 1 Shearm. & Redf. Neg. pp. 154, 163, 164, §§ 97-99; *Cincinnati & Z. R. Co. v. Smith*, 23 Ohio St. 227, 10 Am. Rep. 729; *Card v. New York & H. R. Co.* 50 Barb. 39; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Chicago, B. & Q. R. Co. v. Cauffman*, 88 Ill. 424; *Thomp. Neg.* 1155; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Hicks v. Pacific R. Co.* 64 Mo. 439; *Bradley v. Pratt*, 23 Vt. 378; *Com. v. Power*, 7 Met. 602, 41 Am. Dec. 465; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 485, 14 L. ed. 509; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 418;

2 Rorer, Railways, 1068, 1180, 1181; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 38; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; 1 Addison, Torts, pp. 202, 203, 223; 2 Wood, Railway Law, pp. 1200, 1206, 1270, 1271, 1292; Wharton, Neg. §§ 346, 348, 388; Cooley, Torts, top page, 353; 3 Lawson, Rights & Remedies, § 1194; *Nuzum v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 229.

Mr. J. E. Chilton, for defendant in error: When all the evidence introduced by the plaintiff is insufficient to sustain a verdict in his favor, should such verdict be rendered the court will on motion of the defendant before he offers any evidence exclude the evidence from the jury.

Wandling v. Straw, 25 W. Va. 692; *Christy v. Chesapeake & O. R. Co.* 35 W. Va. 117.

Woolwine while in this office was there as a mere trespasser, and in law should be so treated.

The gist of the plaintiff's action is the negligence of the defendant in causing Woolwine's death.

"Negligence in law is a breach of some duty. There can be no negligence where there is no breach of duty."

1 Shearm. & Redf. Neg. § 15; Bigelow, Torts, 662.

A trespasser on a railroad company's premises cannot recover for injuries, unless the company was guilty of wanton or gross negligence.

Spicer v. Chesapeake & O. R. Co. 11 L. R. A. 385, 34 W. Va. 514.

The only duty owing to a trespasser is not to wantonly or willfully injure him.

See Wood, Railway Law, pp. 1270, 1271; *Norfolk & W. R. Co. v. Harman*, 83 Va. 554; *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609.

A licensee is one who enters premises by permission, either express or implied.

A licensee takes his own risk, and so long as there is no active misconduct towards him no liability is incurred by the occupier of the premises by a visitor on his premises.

Bigelow, Torts, p. 697; *Nichols v. Washington, O. & W. R. Co.* 38 Va. 102, *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317. See also *Hargreaves v. Deacon*, 25 Mich. 1; *Sanders v. Reister*, 1 Dak. 166; *Victory v. Baker*, 67 N. Y. 368, 370; *Lary v. Cleveland, O. O. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 573; *Carleton v. Franconia I. S. Co.* 99 Mass. 216; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Howland v. Vincent*, 10 Met. 371; *Larmore v. Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 891; *Wright v. Boston & A. R. Co.* 2 New Eng. Rep. 725, 143 Mass. 290; *Hounsell v. Smyth*, 7 C. B. N. S. 781; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; *Gwynn v. Duffield*, 66 Iowa, 708, 718; *Parker v. Portland Pub. Co.* 69 Me. 173; 2 Wood, Railway Law, p. 1271; Bishop, Non-Cont. Law, 446, 1054; Cooley, Torts, 358.

English, J., delivered the opinion of the court:

This was an action of trespass on the case, 16 L. R. A.

Instituted on the 18th day of March, 1890, by M. A. Manning, administrator of the estate of A. D. Woolwine, deceased, in the circuit court of Summers county, against the Chesapeake & Ohio Railway Company charging that the death of his intestate was occasioned by the gross carelessness and negligence of the defendant, and claiming \$10,000 damages. There was a demurrer interposed to the declaration, which was overruled; the defendant pleaded "not guilty," and the case was submitted to a jury. The plaintiff, having introduced his evidence, rested his case, and the defendant moved the court to strike out all of the plaintiff's evidence, which motion was sustained, and the plaintiff's evidence was stricken out, to which action of the court the plaintiff excepted, and thereupon the jury rendered a verdict for the defendant. The plaintiff then moved the court to set aside said verdict, which motion the court overruled, and the plaintiff excepted, and tendered a bill of exceptions, setting out all of the evidence of the plaintiff, and the plaintiff applied for and obtained this writ of error.

The facts shown by the evidence are, in substance, as follows: At the east end of the Big Bend Tunnel, in said county of Summers, and about eighty yards from the eastern portal of said tunnel, the defendant had constructed a switch, which diverged from the main track of the defendant to the right, passing along near the bank of the Greenbrier river; and that immediately on the bank of said river, and between said switch and the river, the defendant had erected a small building, fourteen by sixteen feet in size, for its own convenience as a telegraph office, the front part of which building rested on the bank, and the back rested on perches. Those living in the immediate vicinity of this telegraph office were employes of the defendant, who compose the tunnel hands. The plaintiff's intestate was a telegraph operator on the Norfolk & Western Railroad, and was at home on a visit to his parents who lived about two miles from the tunnel; and on the evening of the 6th day of February, 1890, he paid a visit to this office, being an acquaintance of Bryant, the operator. At the time of this visit the train which was used for working in the tunnel was standing in front of the telegraph office, on the side track, which was seven feet from the front of said office, and had been so standing for one hour and fifteen minutes, and it appears that Joe Towns, one of the employes, whose duty it was to close the switch after the tunnel train came in on the side track, had failed to do so, and a freight train, coming east through the tunnel, ran into this open switch on to the side track, and wrecked the tunnel train, throwing some of its cars against said office, knocking it over the river bank into the river, thereby causing the death of the plaintiff's intestate, who had entered said telegraph office about twenty-five minutes before and at the time of the accident was lying on a table in the said office. It appears that the plaintiff's intestate had, about a year previous to that time, been employed by said Bryant, and worked a week in his place as operator in said office; and the natural inference is that he called on this occasion, as is natural for persons engaged in the same business, to pay Bryant a friendly visit. So far as is disclosed by

the evidence, he had no business to transact of any character with the office, although it appears that messages had occasionally been sent and received from this office by parties having no connection with the railroad, but that the office was maintained by the defendant for its own convenience, as is shown by the plaintiff's testimony. No one could presume from anything that appears in the case that any employé of the defendant left this switch open with the intent of injuring the plaintiff's intestate, A. D. Woolwine. On the contrary, it appears that said Woolwine did not come to said telegraph office for more than an hour after the tunnel train ran in on the side track, and said switch was accidentally left open by Joe Towns, whose duty it was to have closed it after said tunnel train came on to the siding. No one appears to have been aware of said Woolwine's intention to visit said telegraph office, and, if they had, it does not appear that any employé of the defendant had any ill feeling or spite against said Woolwine; and we cannot say that any person so employed would intentionally wreck two trains and demolish the telegraph office for the purpose of injuring Woolwine. And again, no one could possibly have foreseen that the freight train, by leaving the main track, and running out on this siding, would have thrown the tunnel cars against the telegraph office, which stood seven feet from the side track, and knocked it down the river bank and into the river. This, however, appears to have been one of the possibilities.

The evidence in the case shows that said Woolwine was fully acquainted with the telegraph office and its surroundings, as he had during the previous year been employed for a week as operator in said office by said Bryant. Counsel for the plaintiff in error, in their brief, assert that "the general principle is that trespassers and licensees going upon the premises of another take the premises as they find them, and run such risks as are incident to the existing condition of such premises, and therefore cannot complain of their needing repairs, and cannot recover for injuries resulting from the condition in which they find the premises; but the distinction is that they can recover for injuries resulting from the subsequent actual negligence of the defendant while the licensee is on the premises." This, we believe, states correctly the law where parties go upon the premises of another under the circumstances that Woolwine did in this case. If we apply this law to the facts of this case, we find that the switch was open when he went to the telegraph office, and so remained for an hour and twenty minutes before the accident happened; and Woolwine had been in the office about twenty-five minutes when the collision occurred. There was no change in the switch after the arrival of said Woolwine, and he took upon himself the risk of the premises in the condition he found them. We may next inquire whether the circumstances of this case are such as to entitle the plaintiff to complain of a breach of duty on the part of the defendant towards his intestate. 1 Shearm. & Redf. Neg. § 316, under the head of "Who may complain of a breach of duty," says: "The plaintiff must show a breach of some duty owing to him, or which was imposed for his

benefit." It is not every one who sustains an injury by reason of some act or omission on the part of an employé of a railroad company that entitles a person injured by reason thereof to demand and recover damages from said company by reason thereof. See Bishop, Non-Cont. Law, § 446; *People v. Fairchild*, 67 N. Y. 386. We find that 1 Shearm. & Redfield, Negligence, § 97, says: "The injury which a stranger does to the railroad company by entering upon its way is infinitesimal, while the risk to himself is great. The injury which he does to his neighbor by secretly entering his bedroom is great, while the risk to himself, if undiscovered, is infinitesimal. In each case, it is true, the effect upon the trespasser's right to sue for damages may be the same, but this will be for very different reasons. If he walks along the track he knowingly takes the risk of fatal injuries, and should not recover for that reason. If he secretes himself in the bedroom, he knowingly engages in a gross invasion of his neighbor's rights, and should not recover for that reason. Most of the reported cases which appear at first sight inconsistent with this proposition, and all of them which are not inconsistent with other and better considered decisions, will prove upon examination to be cases which turned, not upon contributory negligence, but upon the question whether the defendant owed any duty to persons in the plaintiff's situation, which he had neglected to perform."

Now, let us inquire what duty the defendant owed to this unfortunate young man under the circumstances detailed by the evidence. He went upon the defendant's premises, and into its telegraph office, not for the purpose of sending a message, or transacting any business of any kind whatever with any of the agents or employés of the company, but for the purpose of paying a social visit to the operator, who was an old acquaintance. In the case of *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, Bigelow, Ch. J., in delivering the opinion of the court, said: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfill. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the

owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure." In the case of *Diebold v. Pennsylvania R. Co.* 50 N. J. L. 478, 12 Cent. Rep. 799, it was held that, "where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty." There appears to be a marked distinction as to the liability incurred by property owners to persons who go upon their premises as trespassers, or as licensees or volunteers, and those who go there upon business, and we find in a note on page 697 in "Leading Cases on the Law of Torts," by Bigelow, it is said, in commenting upon this distinction that "*Sweeney v. Old Colony & N. R. Co.* [10 Allen, 868, 87 Am. Dec. 644] and *Indemaur v. Dames* [L. R. 1 C. P. 274, L. R. 2 C. P. 311] have settled the distinction between the duty which a man owes to persons who come upon his premises as bare volunteers or licensees, and those who come as customers or otherwise in the course of business, upon the invitation, express or implied, of the occupier. As to the latter, the occupier is bound to exercise reasonable care, to prevent damage from unusual danger, of which the occupier has or ought to have knowledge; and this, though the transaction had already been completed, and the plaintiff had returned only for some incidental (if proper and usual) purpose connected with it. As to the former, the party takes his own risk, and, so long as there is no active misconduct towards him, no liability is incurred by the occupier of the premises by reason of injury sustained by a visitor on his premises."

"Upon careful examination of the above and other cases, however, it will be found that the authorities may be classed under three heads, to wit: (1) Bare licensees or volunteers; (2) those who are expressly invited or induced by active conduct of the owner to go upon his premises; (3) customers and others, who go there on business with the occupier. The general rule will then be that in those cases which fall under the first head the party injured has no right of action against the occupant of the premises, and the contrary in cases falling under the second and third heads." The case of *Indemaur v. Dames*, above referred to, was a case in which the defendant was a sugar refiner, and there was a hole or hatchway through the floors of the different stories for the purpose of raising and lowering sugar to and from the different stories, which hatchway was level with the floors, and might have been, but was not, fenced. The plaintiff was a gasfitter, and went upon the premises for the purpose of examining some gas jets, with the view of applying a patent gas regulator, and while on the premises the plaintiff accidentally fell through said hatchway while thus engaged

upon an upper floor. "Held that, inasmuch as the plaintiff was upon the premises on lawful business in the course of filling a contract in which he (or his employer) and the defendant both had an interest, said hatchway or hole was, from its nature, unreasonably dangerous to persons not usually employed upon the premises, but, having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced." The testimony of Bryant in the case under consideration shows that he had not seen said Woolwine for a month or two; that his business was that of a telegraph operator on the Norfolk & Western Railroad, and when asked what was said Woolwine's business there, (meaning at the time of the accident), answered: "I do not know, I am sure. I supposed he just came in to speak to me;" and, in answer to the question whether said Woolwine had any business there that night, answered: "He did not transact it, if he did;" and he also stated that he left said Woolwine lying on the table where his instruments were placed when he went out of the office, in reply to the question, "Where was Woolwine when the accident occurred?" So far, then, as the presence of said Woolwine at the time of the accident is concerned, it appears that he was not invited there by Bryant, the operator in charge of the office, as he had not seen him for a month or two previous to that evening. He was not there on business, as he had been there for nearly a half hour, and had not intimated that he had any business of any description with the operator, and had produced the impression on Bryant that he had merely called to see him; and his attitude on the table at the time of the accident would not indicate that he was there on business, but rather for the purpose of passing a little idle time with an old acquaintance. If he had been there for the purpose of sending or receiving a telegram, he might properly have been regarded as a licensee, as the evidence shows that telegrams were occasionally sent for persons not in any manner connected with the railroad company, and messages so sent had been charged for; but, under the circumstances, we can but regard him as a mere volunteer, going to this office for his own pleasure.

In the case of *Gillis v. Pennsylvania R. Co.*, 59 Pa. 129, 98 Am. Dec. 317 (section 4 of the syllabus), it was held that "a trespasser may maintain an action for wanton or intentional injury by the owner of the land," and in section 5: "The owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common." In that case the facts were as follows: A large crowd had congregated on the platform at the depot for the purpose of seeing the president of the United States, who was to pass the depot at a certain hour. The platform fell by reason of the unusual weight, and the plaintiff was thereby injured; and Shurswood, J., in delivering the opinion of the court, said: "The platform was open. There was a general license to pass over it, but he was where he had no legal right to be. His presence there was in no way connected with the purposes for which

the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendants, as much as if he was actually a passenger; and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have a structure strong enough to bear all who could stand on it; as to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that." He further says: "I am bound to have the approach to my house sufficient for all visitors on business or otherwise, but if a crowd gathers upon it, to witness a passing parade, and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd; I owe no duty to him." And in that case the court held that the court below was right in directing the jury to find a verdict for the defendant. In the case of *Pittsburgh, Ft. W. & O. R. Co. v. Bingham*, 29 Ohio St. 864, it was held that "a railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or any business connected with the operation of the road." While I am disposed to regard the plaintiff in this case as a mere volunteer, going upon the premises of the defendant for the purpose of pleasure or pastime, yet, giving the circumstances the most favorable construction that can be given for the plaintiff, we can consider him as nothing more than a licensee; that is (as defined by Patterson in his *Railway Accident Law*, p. 176, § 184), "persons who be neither passengers, servants, nor trespassers, and not standing in any contractual relations to the railway, are permitted by the railway to come upon its premises for their own interests, convenience, or gratification." In the case of *Sutton v. New York Cent. & H. R. Co.*, 66 N. Y. 243, the railway was held not to be liable to licensees for a failure to set the brakes on the cars stored on a siding, or otherwise block them to prevent their moving by force of the wind or by gravity. So, also, *Pierce on Railroads*, p. 275, says: "But the duty and liability to keep its premises safe for public use do not arise out of a bare license or permission to use its premises. Still less do they exist in favor of a trespasser, although the company will be liable even to him for a wanton injury." And in the case of *Parker v. Portland Pub. Co.*, 69 Me. 178, the court held that "no duty is owed to a mere licensee, and he has no cause of action for negligence in the place he is permitted to enter." In the case at bar there is no controversy about the facts, the only witnesses introduced being those called by the plaintiff. It was held in the case of *Gonzales v. New York*

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& H. R. Co., 38 N. Y. 440, that "a question of negligence is one of law, where facts are uncontroverted." In the case of *Phenix Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, the court held, in its opinion, delivered by Harlan, J., that, "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury under proper directions as to the principles of law involved;" and in section 1 of syllabus: "A case should not be withdrawn from the jury unless the facts are undisputed, or the testimony is of such conclusive character that a verdict in conflict therewith should be set aside." So, also, in the case of *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 27 L. ed. 1008, it was held (first point of syllabus) that "when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant." This court, in the case of *Johnson v. Baltimore R. Co.*, 26 W. Va. 571, while it holds, in the third point of the syllabus, that "negligence is in most cases a mixed question of law and fact, and generally what particular facts constitute negligence is a question for the determination of the jury from all the evidence before it bearing on the subject, rather than a question of law for the determination of the court," yet, in the fifth clause of syllabus, in the same case, this court holds that, "if the facts are unambiguous, and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute."

Now, taking the entire evidence that was introduced in this case, there is nothing that indicates that the plaintiff was either directly or indirectly induced by the defendant to visit this office; but, on the contrary, it is clear from all the circumstances that he went there without invitation, either express or implied, and, while no one objected to his visiting the place, yet the law fixes the liability of either a corporation or an individual towards a party who comes upon its premises as the plaintiff did in this case; and, as we have said above, he cannot be regarded in a more favorable light than an ordinary licensee. In the case of *Nichols v. Washington, A. & W. R. Co.*, 83 Va. 102, the court says: "Now, it is agreed on all hands that there is a wide difference between the obligations which a person or a corporation owes to a mere licensee and the duty which the same person or corporation owes to one who comes upon his premises by an invitation, either express or implied. In the first case it is generally admitted that the party comes at his own risk, and enjoys the license subject to its concomitant risks or perils, and that in such case no duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee."

Numerous authorities have been cited by counsel for the plaintiff in error seeking to show that the defendant in this case under consideration owed some duty to the plaintiff; but, having arrived at the conclusion that the plain-

tiff in error stood upon the footing of a mere licensee, we are of the opinion that the defendant owed no duty to the plaintiff other than that it was its duty not to willfully or wantonly injure the plaintiff, and that in going upon said premises under the circumstances of this

case he enjoyed the license, subject to the risks and perils attendant thereon, and for these reasons we are of the opinion that *there is no error in the judgment complained of, and the same must be affirmed*, with costs and damages to the defendant in error.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

GANDOLFO

v.

HARTMAN *et al.*

(49 Fed. Rep. 181.)

A covenant not to rent property to a Chinaman is void as against public policy, as violating the 14th Amendment to the United States Constitution providing for equal protection of the laws, and as an infraction of the treaty with China guaranteeing to Chinamen in the United States all the rights, privileges, and immunities accorded to citizens and subjects of the most favored nation.

(January 25, 1892.)

SUIT to enjoin the making of a lease in alleged violation of a covenant in the deed under which the property sought to be leased was held. On demurrer to the bill. *Sustained.*

The facts are stated in the opinion.

Messrs. Blackstock & Shepherd and *Bicknell & Denis* for complainant.

Messrs. J. Marion Brooks, J. Hamer and *E. S. Hall* for defendants.

Ross, District Judge, delivered the following opinion:

The amended bill in this case shows that on the 22d of March, 1886, one Steward, for a valuable consideration, conveyed to the complainant a portion of lot 2, block 47, fronting on East Main street in the town of San Buena Ventura, Ventura county, of this state, together with a perpetual right of way over an adjoining alley. The deed also contained the following: "It is also understood and agreed by and between the parties hereto, their heirs and assigns, that the party of the first part shall never, without the consent of the party of the second part, his heirs or assigns, rent any of the buildings or ground owned by said party of the first part, and fronting on said East Main street, to a Chinaman or Chinamen. This agreement shall only apply to that part

of lot 2, block 47, aforesaid, lying north of the alleyway hereinbefore described, and fronting on said East Main street. And said party of the second part agrees for himself and heirs that he will never rent any of the property hereby conveyed to a Chinaman or Chinamen."

The deed was duly recorded in the county in which the property is situate, and subsequently the portion of the lot retained by Steward was purchased of him by the defendant Hartman, who was thereafter about to lease it to the defendants Fong Yet and Sam Choy, who are Chinamen, when the present suit was commenced to enjoin him from so doing.

The Federal courts have had frequent occasion to declare null and void hostile and discriminating state and municipal legislation aimed at Chinese residents of this country. But it is urged on behalf of the complainant that, as the present does not present a case of legislation at all, it is not reached by the decisions referred to, and that it does not come within any of the inhibitions of the 14th Amendment to the Constitution of the United States, which, among other things, declares that no state shall "deny to any person the equal protection of the laws." This inhibition upon the state, as said by *Mr. Justice Field*, in the case of *Ah Kow v. Nunan*, 5 Sawy. 552, "applies to all the instrumentalities and agencies employed in the administration of its government to its executive, legislative, and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may come, or of whatever race or color he may be, implies that not only the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others. . . ."

It would be a very narrow construction of

NOTE.—Treaty guaranties to aliens.

The guaranty by treaty to aliens of a certain nation of all the "rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation" is properly construed in the light of the decisions on the constitutional guaranty of equal privileges and immunities to citizens, although this does not itself extend to aliens. Such treaty guaranty would likewise seem to be equally effective as against a denial of such rights, privileges, and immunities by citizens, states or any other party or body except Congress.

As a protection against a denial of rights or a discrimination by Congress it is of no efficacy. 16 L. R. A.

Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068; *Edye v. Robertson*, 112 U. S. 580, 28 L. ed. 708; *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. Rep. 17; *Thingvalla Lane v. United States*, 5 L. R. A. 185, 24 Ct. Cl. 265.

But a state law contrary to a treaty is void. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Ware v. Hylton*, 3 U. S. 8 Dall. 199, 1 L. ed. 668.

That aliens are within the constitutional guaranty of the equal protection of the laws, see *note* to *Louisville, S. V. & T. Co. v. Louisville & N. R. Co. (Ky.)* 14 L. R. A. 579, which *note* includes also the constitutional equality of citizens in respect to equal privileges and immunities.

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the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.

Moreover, it is by the treaty between the United States and China of November 17, 1880, provided that, "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Article 2, Treaty Nov. 1880, (22 U. S. Stat. at L. p. 18.)

"The intercourse of this country with foreign nations and its policy in regard to them," said the Supreme Court, speaking through Chief Justice Taney, in *Kennett v. Chambers*, 55 U. S. 14 How. 49, 14 L. ed. 821, "are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which

they may enter, within the scope of their delegated authority. And, when that authority has pledged its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And, if he does so, he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limit of its constitutional power."

This was said in a case where it was sought to enforce a contract made in this country after Texas declared itself independent, but before its independence had been acknowledged by the United States, whereby the complainants agreed to furnish, and under which they did furnish, money to a general in the Texan army, to enable him to raise and equip troops to be employed against Mexico. But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States.

For the reasons stated an order will be entered sustaining the demurrer, and dismissing the bill, as amended, at complainant's cost, without reference to other points made and argued by counsel.

LOUISIANA SUPREME COURT.

STATE of Louisiana, *ex rel.* H. N. MIZE,

J. P. McELROY, *Appt.*

(.....La.....)

*1. The language of the statute rela-

*Head notes by BREAU, J.

tive to printed ballots expresses the legislative will. It is mandatory.

2. The legislative intent must be taken as expressed by the words which the Legislature has used.

3. The name of a candidate written on the face of an election ticket in lieu of the name of another candidate printed in the

NOTE.—The denial of the right of an elector to vote for any person whose name is not on the official ballot may be more or less of a practical disfranchisement of voters according to the liberality 16 L. R. A.

of the provisions for allowing names to be placed on the official ballot. What those provisions are in the Louisiana statute does not appear from the above case, but in the nature of things there must

ticket should not be counted in ascertaining the result of the election.

4. **The Legislature has imposed a positive and absolute duty** on the voter to cast a printed ballot.
5. **The statute in that respect is not subject to liberal construction.**
6. **Where the meaning of the statute is clear**, those upon whom compliance devolves have no right to ingraft exceptions, or make modifications, or depart from its plain letter.
7. **A fair consideration of the statute leads to the conclusion** that the Legislature intended compliance with the provisions in relation to printed ballots.

(May 18, 1892.)

A PPEAL by defendant from a judgment of the District Court for the Parish of De Soto in favor of plaintiff in a proceeding by mandamus to compel respondent, returning officer of DeSoto Parish, to exclude from his return certain votes cast at an election for relator's opponent as candidate for the office of justice of the peace. *Affirmed.*

The facts are stated in the opinion.

Mr. William Goss, for appellant:

The purpose of voting is to ascertain the intention of the voter and the will of the majority, and where this is done without violating any prohibitory law, the votes must be counted.

Cooley, Const. Lim. 5th ed. pp. 769, 770.

Statutes being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statutes provide that a ballot varying from the requirements of the law shall not be counted; but if this provision is lacking, they should not be rejected if the variations are but trifling.

6 Am. & Eng. Encyclop. Law, pp. 848, 849, § 8, note 1; McCrary, Elections, §§ 190-198.

A ballot may be defined as "a paper ticket, upon which the voter expresses his preference upon the question submitted at the election, by printing, writing, or signs, or a combination of these methods of expression."

6 Am. & Eng. Encyclop. Law, p. 842, § 12, note 2.

Where the Constitution provides that all ballots should be fairly written, the term "written" means expressed by means of letters, and printed ballots come within this definition.

6 Am. & Eng. Encyclop. Law, p. 844, note

1; Cooley, Const. Lim. 5th ed. pp. 960, 761; McCrary, Elections, § 512.

A ballot cast by an elector, in good faith, should not be rejected for failure to comply with the law in matters over which the elector had no control.

McCrary, Elections, §§ 508-511; *Augustin v. Eggleston*, 12 La. Ann. 886; *Andrews v. Saucier*, 18 La. Ann. 301; *Burton v. Hicks*, 27 La. Ann. 507; *Webre v. Wilton*, 29 La. Ann. 614.

Messrs E. W. Sutherland and Charles W. Elan, for appellee:

All the names of persons voted for shall be printed on one ticket of white paper of uniform size and quality.

La. Act 101 of 1852, § 4.

The state has the legislative power to prescribe the mode of its exercise; and when a specific mode is so prescribed, the right must be exercised pursuant to that mode, and not otherwise. Written ballots are without legal effect, and should not be counted.

6 Am. & Eng. Encyclop. Law, p. 849, notes, and cases cited.

Breaux, J., delivered the opinion of the court:

The relator sued out a mandamus against the returning officer of the parish of De Soto to compel him to exclude sixty-seven votes cast for his opponent from his return to be made to the secretary of state of the result of the election held on April 19, 1892; also from his count and compilation; and he prays that the said votes be decreed illegal and void. The facts admitted are that the relator, Mize, was a candidate for the office of justice of the peace of ward 8 of De Soto parish at the said election; that his name was printed, as a candidate for said office, on all the ballots cast in said ward, and he received fifty-nine votes; that his name as printed was erased from sixty-seven other ballots cast, and the name of W. R. Crosby was written across the face of these ballots where his (relator's) name was printed; that the relator, at the time, objected to the counting of these written votes for Crosby, and that, notwithstanding his written protest filed with the commissioners, these written votes were counted for Crosby, and count thereof was kept on the tally sheets, and returns thereof were made to the returning officer. It is also admitted that the office of justice of the peace of said ward involved in this suit is worth \$2,000.

be some restriction on the right to place names thereon else the size of the ballot might become too great for practical use. It seems doubtful in the light of the above decisions whether or not printed pasters could be regarded as "printed on one ticket or ballot of white paper of uniform size and quality to be furnished by the secretary of state." Unless such pasters are allowable it would seem that some voters are actually denied the right to vote and that the law in Louisiana, while it does not add to the constitutional qualification of the voter, does deny to small minorities the right to vote at all unless they vote for candidates who are not their choice.

In Pennsylvania where an express provision is made for "inserting" names in official ballots, it is held that the name need not be written but that a

"sticker" may be used. *De Walt v. Bartley* (Pa.) 15 L. R. A. 771.

For note as to marks or devices to distinguish ballots, see *Rutledge v. Crawford* (Cal.) 18 L. R. A. 761.

For other recent cases concerning official ballots, see *Re Ballot Act*, 6 L. R. A. 773, 16 R. I. 708; *Price v. Lush*, 9 L. R. A. 487, 10 Mont. 61; *Talcott v. Philbrick*, 10 L. R. A. 150, 59 Conn. 472; *Detroit v. Rush*, 10 L. R. A. 171, 82 Mich. 532; *Fields v. Osborne*, 12 L. R. A. 551, 60 Conn. 544; *Fisher v. Dudley* (Md.) 12 L. R. A. 588; *Cook v. State* (Tenn.) 18 L. R. A. 188; *Shields v. Jacob*, 13 L. R. A. 760, 88 Mich. 184; *People v. Onondaga County Canvassers* (N. Y.) 14 L. R. A. 624; *State v. Russell* (Neb.) 15 L. R. A. 740; *Allen v. Glynn* (Colo.) 15 L. R. A. 743; *Parvin v. Wimberg* (Ind.) 15 L. R. A. 775.

B. A. R.

The question for our determination is, Should a ballot cast be counted, in ascertaining the result of an election, on the face of which the printed name of a candidate was erased, and the name of another candidate substituted in writing? Under the Act of 1877, to regulate and maintain the freedom and purity of elections, and to punish persons for false, fraudulent, or illegal voting, the names of persons voted for were required to be written or printed on one ticket.

The statute applying: Section 23 of the said Act was amended by Act 101 of 1882, as follows: "That all the names of persons voted for shall be printed on one ticket or ballot of white paper, of uniform size and quality, to be furnished by the secretary of state."

Legislative power over the forms of the ballot and manner of voting: The right of suffrage being a political, and not a natural, right, it is within the power of the state to prescribe how it shall be exercised. The manner of voting provided by statute is one of the reasonable regulations. The limitations imposed for the purpose of guarding against fraud, undue influence, and oppression, and of maintaining a secrecy of the ballot, are within the legislative and police powers. That the ballot shall be printed does not add to the constitutional qualification of the voter, and therefore falls within the general authority of legislative laws.

The legislative intent is clearly expressed. In the first Act, that of 1877, the words were, "the ballot shall be written or printed;" in the amending Act, "it shall be printed." The legislative will cannot be misunderstood. The intention of the Legislature should control absolutely. When that intention is clearly ascertained, those upon whom it devolves to execute the statute have no other duty to perform than to follow the legislative will. While all the minute details of the statutes relating to elections are not mandatory, they are mandatory in requiring that the ballot shall be printed. The positive requirement of the statute does not admit of its being treated as merely directory. By qualifying a statute as directory, its requirement is avoided; the intention of the Legislature, however plain, is defeated. It is desirable that the Legislature should declare in what respect they mean any particular provision to be void, in event of noncompliance with its terms, and what consequence they intend shall result from noncompliance. In the absence of this, great difficulties arise. We are not willing, however, in the absence of such a declaration, to hold a law as directory in cases in which the intention of the Legislature is clearly and emphatically expressed. We prefer a strict construction to the "extensive and comprehensive;" each has able advocates and many authorities in its support. The grounds of objection urged on the part of the respondent, such as

that the purpose of voting is to ascertain the intention of the voter and the will of the majority, and that a ballot cast by an elector, in good faith, should not be rejected, for failure to comply with the law in matters over which he had no control, if broadly and liberally applied, would defeat the object of the statute relating to the printing of the tickets on a ballot of white paper furnished by the secretary of state, and would render ineffectual the provisions applying to the throwing out and not counting folded tickets, and even those relative to the required certificate of registration, although the purpose of the law is well defined and clear.

Authorities: Constitutional and statutory provisions for the conduct of elections are either mandatory or directory, and a violation of mandatory provisions will avoid the election, without regard to the nature or the person guilty of the violation and without reference to the result. 6 Am. & Eng. Encyclop. Law, p. 325. In Rhode Island the law required that each ballot shall be so printed as to give each voter a clear opportunity to designate by cross mark, in a sufficient margin, at the right of the name of each candidate, his choice of candidates, and that each voter shall prepare his ballot by marking in the appropriate margin or place a cross opposite the name of the candidates of his choice, and that no voter shall place any mark upon his ballot by which it may be afterwards identified. The court decided that no mark other than the cross can be used; that it must be placed in the margin opposite the name of the candidate. Am. Dig. 1891, p. 1419. In many of the states there are statutes prescribing the form of the ballots, the kind of paper, and prohibiting any marks, figures or devices by which one can be distinguished from the other. These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory. 6 Am. & Eng. Encyclop. Law, p. 349. Directions given by a sovereign in regard to a matter over which his power is conceded would, according to the ordinary use of language, be held to involve, as its correlative, obedience. Sedgw. Stat. & Const. Law, p. 318, *note*. These decisions maintain the principle that mandatory provisions, not complied with in an election, will result in its avoidance without reference to motive or person; that in those states in which the ballots must be printed and the name of the candidate designated by a cross mark the required marginal notes must be placed as required by statute; that the voter should readily comply with the legislative will clearly expressed. The voters who cast the sixty-seven ballots did not comply with the statute. In an organized state of society, the majority binds the minority by complying with mandatory laws in expressing the popular will.

Judgment affirmed, at appellant's cost.

MINNESOTA SUPREME COURT.

Elizabeth L. WILLIS, *Recept.*,
v.
ST. PAUL SANITATION CO. *et al.*, and
E. L. MABON, *Appls.*

(.....Minn.....)

1. Article 10, § 3, of the Constitution, providing that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is self-executing, and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him.
2. The subject of chapter 30, Laws 1889, amending the Insolvent Law of 1881, is sufficiently expressed in its title.
3. The provision in section 1 of this Amending Act, "that the release of any debtor under this Act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation.
4. This provision is not unconstitutional, as applied to cases where the liability of the stockholder was incurred before, but the proceedings under the Insolvent Act were had and the corporation discharged subsequent to, its passage.

(January 18, 1892.)

*Head notes by MITCHELL, J.

APPEAL by defendant, Mabon, from an order of the District Court for Ramsey County overruling a motion for a new trial after verdict in favor of plaintiff in an action brought to enforce the alleged personal liability of the stockholders in defendant corporation for its debts. *Affirmed.*

The facts are stated in the opinion.

Mr. James H. Foote for appellant.

Mr. Horace G. Stone, for appellants in the *Meagher Case*, made the following contentions:

As to affirmative provisions of a Constitution, *i. e.*, those which say what "shall be" as distinguished from those which say what shall not be, the presumption is that the Legislature, instead of the courts, is to carry them out by proper laws which shall cover the details and which shall change as to such details as the best interests of the people of the state shall, from time to time, require.

I am aware of the fact that this court has, in three cases, assumed that section 3, article 10, of the Constitution, was self-executing.

But it is a universal and a familiar rule in all courts of appeal, that all action of the lower courts will be assumed to be correct, except only as to those points about which the appealing party claims there has been error.

State v. Brachvogel, 38 Minn. 265; *Meyer v. Berlandi*, 39 Minn. 438; *Pond Mach. Tool Co. v. Robinson*, 38 Minn. 272; *Jordan v. Board of Education of Taylor's Falls*, 39 Minn. 298.

NOTE.—Self-executing constitutional provisions.

A constitutional provision that any city of more than 100,000 inhabitants "may frame a charter for its own government" is self-executing. *People v. Hoge*, 55 Cal. 612.

A constitutional provision that the secretary of state and auditor of state shall indorse on bonds issued for railroads or other internal improvements, the words "issued pursuant to law" requires no legislation in order to permit such indorsement in a proper case. *State v. Babcock*, 19 Neb. 230.

A constitutional provision that a shareholder of a corporation may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer" takes effect without the aid of legislation. *Pierce v. Com.* 104 Pa. 150.

A constitutional provision that the recorder's court of Chicago shall be continued and called the "criminal court of Cook county" defining its jurisdiction and making the judges of another court *ex officio* its judges, is self-executing. *People v. Bradley*, 60 Ill. 368.

A constitutional provision that "all other courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges" virtually repeals an Act attempting to substitute another court in place of a court of common pleas before the expiration of the terms of such judges. *Ex parte Snyder*, 64 Mo. 58.

In *Rothermel v. Ziegler*, decided in the Pennsylvania court of common pleas and reported in the statement of the case in *Rothermel v. Meyerle*, 9 L. R. A. 366, 126 Pa. 260, it is said that the 14th Amendment of the Federal Constitution is not retrospective and has no self-executing efficacy as against a prior statute and therefore a state statute cannot be held to be repealed by it, but that it simply es-

tablished a principle which no state Legislature would thereafter be at liberty to disregard or violate.

The 15th Amendment to the Constitution of the United States which prevents discrimination in respect to the right of suffrage between citizens of the United States on account of race, color, or previous condition of servitude, does not confer the right of suffrage upon any one, but does invest citizens with a new constitutional right of exemption from discrimination as to the elective franchise. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 583. This decision however does not deny that the amendment is self-executing so far as to prevent the prohibited discrimination.

A constitutional provision which enjoins upon the Legislature to "encourage internal improvements by passing liberal general laws of incorporation for that purpose" is a command to the Legislature which cannot be enforced by a court. *Gillinwater v. Mississippi & A. R. Co.* 13 Ill. 1.

A constitutional provision that "the Legislature shall provide by law for determining contested elections" is addressed solely to the Legislature and the failure of the Legislature to provide for contesting an election, will not make a statute authorizing an election invalid. *Schulherr v. Bordeaux*, 64 Miss. 59.

A constitutional provision that "suits may be brought against the state in such courts as may by law be provided" does not give a right to sue which cannot be defeated by the Legislature, but gives a mere discretionary power. *Ex parte State*, 52 Ala. 231.

A constitutional provision that public printing shall be performed under a contract given to the lowest responsible bidder below a maximum price and under such regulations as shall be prescribed by law, is not self-executing but requires legisla-

To make section 8, article 10, self-executing it must be shown—

1st. That the constitutional convention put into it all the details of legislation necessary to define its exact limit and extent, through all the various changes and circumstances which might arise in all future time.

2d. That the people who ratified the Constitution understood that all these details were incorporated in this article and that by their votes they were fixing an inflexible rule for all time to come.

3d. That by this article not only the members of the convention but the people who ratified the Constitution understood that they were entirely ignoring the Legislature and that they were giving a direct command to the courts to enforce a double liability in all cases and under all circumstances.

4th. That by this article they were creating *de novo* a debt from one private individual to another.

5th. That this creation of a private debt was not to take effect until some future time.

Section 36 of the Constitution of California provides that each stockholder of a corporation "shall be liable" for his "proportion" of its debts.

The court, in an elaborate opinion covering the question in nearly all its bearings, decided that the Constitution was not self-executing.

French v. Teschemaker, 24 Cal. 518. See also *Fusz v. Spaunhorst*, 67 Mo. 256; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.*, 39 Mo. 485; *Jerman v. Benton*, 79 Mo. 148; *Groves v. Slaughter*, 40 U. S. 15 Pet. 499, 10 L. ed. 819;

Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; *Mississippi Mills v. Cook*, 56 Miss. 40; *Bowie v. Lott*, 24 La. Ann. 214; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476; *Lehigh Iron Co. v. Lower Macungie Twp.*, 81 Pa. 482; *Cairo & F. R. Co. v. Trout*, 82 Ark. 17; *Lamb v. Lane*, 4 Ohio St. 167; *Chahoon v. Com.*, 20 Gratt. 738; *Doddridge Supra. v. Stout*, 9 W. Va. 708; *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 10 Fed. Rep. 508; *Steacey v. Little Rock & Ft. S. R. Co.*, 5 Dill. 848; *Morley v. Thayer*, 8 Fed. Rep. 789.

The framers of the Constitution did not intend to make section 8, article 10, self-executing.

Minnesota Constitutional Debates; Democratic Wing, pp. 175, 176; Republican Wing, pp. 815, 816.

Double liability did not exist at common law. *Johnson v. Fischer*, 30 Minn. 175.

The Constitution did not repeal the common law except in certain cases.

Dutcher v. Culoer, 24 Minn. 584.

There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it.

Ochiltree v. Iowa R. Contract Co., 88 U. S. 21 Wall. 249, 22 L. ed. 546.

Courts cannot enforce laws which the Legislature ought to make, but does not make.

Gillwater v. Mississippi & A. R. Co., 13 Ill. 1.

Embodying the details of legislation into a Constitution would defeat the Constitution.

tion to carry it into effect. *Brown v. Seay*, 86 Ala. 122.

A constitutional provision that "it shall be a crime the nature and punishment of which shall be prescribed by law" for a bank officer to receive deposits knowing the bank to be insolvent, and that he "shall be individually responsible for such deposits," is not self-enforcing so as to make such officer civilly liable to a depositor in such a case, since legislation is necessary to prescribe the particular details of the crime and of the civil liability. *Fusz v. Spaunhorst*, 67 Mo. 256.

A constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres" is not self-executing and needs legislative action to make it operative. *Bowie v. Lott*, 24 La. Ann. 214.

A constitutional provision that the general assembly shall not authorize municipal loans or subscriptions to corporations without a two-thirds vote of the inhabitants, does not take effect so as to permit such a vote without further regulations by the Legislature. *St. Joseph & D. C. R. Co. v. Buchanan County Ct.*, 39 Mo. 485. But this does not decide that the prohibitory part is not self-executing.

The constitutional provision that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad" is not self-executing. *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 10 Fed. Rep. 497.

Prohibitions generally.

In *Law v. People*, 87 Ill. 385, it is said that the doctrine must be regarded as settled that all negative or prohibitory clauses in a Constitution are self-executing. In that case it was decided that a constitutional limitation of the amount of muni-

cipal indebtedness that may be incurred is self-executing.

A constitutional limitation on the amount of taxation in school districts is self-executing although there is a provision for a larger amount in some cases by vote of the people. *St. Joseph Bd. of Public Schools v. Patten*, 62 Mo. 444.

A constitutional provision that there shall be no sale of property for taxes except by certain officers upon an order and judgment of a court of record, takes effect immediately and annuls all laws conferring power on other officers to make such sales. *Hills v. Chicago*, 60 Ill. 86.

A provision that no public work or improvement shall be done or made in a city street unless an estimate is made and an assessment levied and collected before the work is commenced or the contract let therefor, is self-executing. *Oakland Pav. Co. v. Hilton*, 69 Cal. 478; *McDonald v. Patterson*, 54 Cal. 245; *Donahue v. Graham*, 61 Cal. 276.

A constitutional provision that no corporation shall issue stock except for certain purposes is prohibitory, but a provision that stock and bonded indebtedness of corporations shall not be increased except in pursuance of a general law, or without consent of the meeting called on sixty days' notice, as may be provided by law, is not self-executing as it does not itself form a complete mode of proceeding. *Ewing v. Oroville Min. Co.*, 55 Cal. 649.

A constitutional prohibition against any officer of the United States holding a state office, is self-operative and may be enforced without legislative aid. *DeTurk v. Com.*, 129 Pa. 151.

A constitutional provision that the Legislature "shall pass laws to prohibit the sale of lottery tickets" is itself a prohibition of lotteries. *Bass v. Nashville, Meigs (Tenn.)*, 421.

So a constitutional declaration that "no lottery shall be authorized nor shall the sale of lottery

The Federalist, Jan. 25, 1788.

A legal right does not exist without a remedy.

Section 3, article 10, either created a right to be enforced under the rules of the common law, or else no right was created at that time.

Broom, Legal Maxims, p. 192; *Edwards v. Kearney*, 96 U. S. 595, 24 L. ed. 798; *United States v. Quinoy*, 71 U. S. 4 Wall. 535, 18 L. ed. 408.

If section 3, article 10, created the right, then we have the startling novelty of a constitutional right without force or life, unless the Legislature subsequently created the remedy. It would be idle to argue any such proposition.

The question at bar is not as to whether this court could guess the meaning of section 3, article 10, if it was a statute, but whether, in the distribution of power, section 3, article 10, directed the Legislature to enforce a double liability, or whether it directed the courts to do so, to the exclusion of the Legislature. Admitting for the sake of argument that the courts could carry out section 3, article 10, if commanded to do so, so could the Legislature. The question is, To whom was this command directed?

St. Joseph Board of Public Schools v. Patten, 62 Mo. 444; *Bass v. Nashville*, Meigs (Tenn.) 421; *People v. Bradley*, 60 Ill. 390; *Miller v. Marx*, 55 Ala. 322; *Pierce v. Com.* 104 Pa. 150; *State v. Weston*, 4 Neb. 216; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *People v. Hoge*, 55 Cal. 612; *Rowan v. Runnels*, 46 U. S. 5 How. 183, 12 L. ed. 85; *Rothermel v. Meyerle*, 9 L. R. A. 366, 136 Pa. 250; *Oakland*

tickets be allowed" is self-executing so far as to take away any pre-existing right of authority to conduct a lottery or sell lottery tickets. *State v. Woodward*, 89 Ind. 110, 46 Am. Rep. 160.

The United States Supreme Court in two early cases set it itself against the whole current of authorities on this question of the effect of a prohibitory clause in a Constitution. It decided that a provision in the Constitution of Mississippi that "the introduction of slaves into this state as merchandise or for sale shall be prohibited from and after the 1st day of May, 1868," with a certain exception, does not become operative without legislation but was addressed to the Legislature. *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *Bowan v. Runnels*, 46 U. S. 5 How. 184, 12 L. ed. 85.

The temptation to comment on these decisions is almost irresistible but might seem out of place in this connection. Considering that they stand alone among decisions on constitutional prohibitions, and that they were made in opposition to the decisions of the Supreme Court of Mississippi in interpreting its own Constitution they are at least remarkable. But it must be noticed further that the opinion of the court in the first of the cases did not even refer to one of the Mississippi cases which were cited in argument while it referred to the other at some length in an attempt to show that it had not actually decided the question. The Mississippi cases which had decided that the constitutional prohibitions were self-operative were *Green v. Robinson*, 5 How. (Miss.) 80; *Glidewell v. Hite*, Id. 114.

These decisions were re-affirmed in *Brien v. Williamson*, 7 How. (Miss.) 14, in which the court refused to follow the decision of the United States Supreme Court.

The Supreme Court of Tennessee followed these Mississippi decisions as against that of the United 16 L. R. A.

Pav. Co. v. Hilton, 69 Cal. 479; *French v. Teschemaker*, 24 Cal. 518.

Messrs. J. C. Michael and W. H. Michael for respondent.

Mitchell, J., delivered the opinion of the court:

1. This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts, under what is commonly called "the double liability clause" of the Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Article 10, § 8. The principal question in the case is whether this provision of the Constitution is self-executing or whether it requires legislation to carry it into effect. The same question is also involved in the cases of *McKusick v. Seymour and Meagher* (Minn.) 50 N. W. Rep. 1114, (submitted at a later day of the present term,) and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be considered in both, we shall endeavor to fully determine the question in the present opinion. In addition to this main question, counsel for the appel-

States Supreme Court in *Yerger v. Raina*, 4 Humph. 280.

Cases as to taking property for public use.

A constitutional provision that private property shall not be taken or damaged for public use without compensation, becomes operative without any further legislation although the Constitution also provides that compensation shall be ascertained in such manner as may be prescribed by general law. *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Householder v. Kansas City*, 38 Mo. 438; *McElroy v. Kansas City*, 21 Fed. Rep. 257.

The same rule applies to a provision that property taken for public use shall not be distributed or the proprietary rights of the owner therein divested until compensation shall be paid to the owner or into court for him. *Blanchard v. Kansas City*, 16 Fed. Rep. 444.

An injunction was based in *Chambers v. Cincinnati & G. R. Co.* 69 Ga. 320, on a constitutional prohibition against taking private property without compensation. It did not appear that any statute had been enacted in aid of the constitutional provision.

As to jury.

In Ohio it is held that a constitutional requirement that compensation shall be assessed by a jury when private property is taken for public use is not self-executing, but provision must be made by law for a jury before property can be condemned. *Lamb v. Lane*, 4 Ohio St. 187; *Watson v. Pleasant Twp.* 21 Ohio St. 636.

So in West Virginia a constitutional provision that compensation for land condemned for public use shall be ascertained "as may be prescribed by general law provided that when required by either of the parties such compensation shall be ascer-

lants in the *Meagher Case*, *supra*, urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock once its "face amount," any device or agreement to the contrary notwithstanding, and that having once paid for their stock in full they are not further liable. Except for the eminence of the counsel who have advanced this view we would not deem it entitled to serious consideration. While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into Constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts in addition to this risk of losing the amount of their stock. This is the meaning which has been invariably attached to this provision of our Constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision; and we do not believe that the construction now sought to be placed upon it ever occurred to, or was ever advanced by, any one until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless for all that would be accomplished by it was already fully covered by the law. If a person had subscribed for stock and had not paid for it the amount agreed of course he was liable to the corporation and through it to its creditors; and if the stock had been issued to him as paid-up stock when not in fact paid for under such circumstances as to

operate as a fraud upon creditors he was upon well-settled principles liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of November 5, 1872, inclosed in parentheses; for then the whole section would mean that, while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so. The obvious intention of the provision was to add to the ordinary liability of a corporation for its debts the individual liability of the stockholders to a limited amount, and that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the subject of the liability, but the measure of it; in other words, the stockholders are liable, not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

2. This brings us to the main question, viz., whether this provision of the Constitution is self-executing. That such has been the general understanding of the bench, bar, and business men in this state is conceded. This court has, in a long line of cases, assumed that such was the fact. *Dodge v. Minnesota P. S. Roof Co.* 16 Minn. 873, (Gil. 327); *Allen v. Walsh*, 25 Minn. 543; *State v. Minnesota Thresher Mfg. Co.* 40 Minn. 213; *Mohr v. Minnesota Elevator Co.* 40 Minn. 343; *Arthur v. Willius*, 44 Minn. 409; *Densmore v. Red Wing L. & S. Co.* (Minn.) 48 N.

tained by an impartial jury of twelve free-holders," is held to be inoperative until statutory provisions are made to give it effect, and that until that time the prior statute on the subject must govern. *Doddridge Supra. v. Stout*, 9 W. Va. 703.

So in Arkansas a constitutional provision that compensation for a right of way "shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law" is not self-executing and does not repeal a statute providing for a commission of five men. *Cairo & F. R. Co. v. Trout*, 32 Ark. 17.

But in Illinois, on the other hand, it is decided that a constitutional prohibition against taking or damaging private property for public use without just compensation to be ascertained by a jury "as shall be prescribed by law" is self-executing and annuls a statute providing for commissioners in such cases. *People v. McKoberts*, 62 Ill. 36; *Kine v. Defenbaugh*, 64 Ill. 291.

And that it also annuls an act authorizing the entry upon land in such cases before trial by jury. *Mitchell v. Illinois & St. L. R. & Coal Co.* 68 Ill. 236.

So in Alabama a clause in a Constitution expressly prohibiting the General Assembly from depriving any person of an appeal from any preliminary assessment of damages in condemnation proceedings and declaring that the amount of damages in all cases of appeal "shall on demand of either party be determined by a jury according to law," is so far self-executing as to entitle an appellant on demand to a trial by jury on appeal. *Woodward Iron Co. v. Cabanis*, 37 Ala. 323.

A constitutional provision that "all persons entitled to vote and hold office and none others shall be eligible to sit as jurors" is not self-executing so 16 L. R. A.

as to prevent a valid jury from being summoned under a prior law making free-holders only eligible in the absence of any new statute. *Chahoon v. Com.* 20 Gratt. 733.

Exemptions may be regarded as prohibitions.

The constitutional exemption of a homestead not exceeding a certain value is effective without legislation. *Beecher v. Baldy*, 7 Mich. 468.

So a constitutional provision that "every homestead not exceeding eighty acres . . . shall be exempted from sale . . . for any debt" is self-executing. *Miller v. Marx*, 55 Ala. 322.

And a constitutional exemption of merchants from taxation on capital used in the purchase of goods sold to nonresidents and sent out of the state, is self-executing. *Friedman v. Mathea*, 8 Helsk. 488.

Taxation.

See also *St. Joseph Board of Public Schools v. Patten and Hills v. Chicago*, *supra*.

A constitutional provision that "all taxes shall be uniform upon the same class of subjects . . . and collected under general laws is not self-executing, but simply mandatory to the Legislature. *Erie County v. Erie*, 4 Cent. Rep. 305, 113 Pa. 380.

A constitutional requirement that the Legislature shall provide a uniform rule of taxation is not operative without legislation. *Williams v. Detroit*, 2 Mich. 561.

So a constitutional provision that all taxes shall be uniform in the same class of subjects is mandatory on the Legislature, but does not itself repeal an inconsistent statute. In this case the conclu-

W. Rep. 528. And, so far as we are aware, the correctness of this view has never been questioned or doubted in any court, until one of the counsel in this case interposed a brief in *Arthur v. Willis, supra*, in which he took the position for which he now contends. Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly discovered one, suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it. Moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed, unless clearly wrong. But if the question was entirely one of first impression, we have no doubt as to how it should be determined. A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibi-

tory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern Constitution. For instances of this, see *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *Reynolds v. Taylor*, 48 Ala. 420; *Miller v. Marx*, 55 Ala. 322; *People v. Hoge*, 55 Cal. 612.

Without stopping to specify, it will be found on examination that our own Constitution abounds in provisions that are unquestionably self-executing, and require no legislation to put them into operation. The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature,—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts. In almost every case cited by appellants in which a constitutional provision has been held not self-executing, it will be found either that its language indicated an intention that legislation should be had to carry

sion was aided by the context in which there was an express declaration that laws exempting property otherwise than as therein provided shall be void. *Lehigh Iron Co. v. Lower Macungie Twp.* 81 Pa. 482; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476.

Appropriations.

A constitutional provision that an officer "shall receive" a certain salary is a sufficient appropriation without legislative action. *Thomas v. Owens*, 4 Md. 189.

A Constitution fixing the salary of an officer and providing that the "auditor shall draw warrants of the state quarterly therefor" is self-executing. *State v. Weston*, 4 Neb. 216.

But a constitutional provision that judges shall "severally during their continuance in office receive for their services compensation to be paid out of the treasury" does not dispense with the necessity of a legislative appropriation in order to permit payment. *Myers v. English*, 9 Cal. 341.

A constitutional provision that no money shall be paid out of the treasury of the state except in pursuance of "an appropriation by law" annuls a statute by which money is "appropriated annually" for the salary of an officer, especially when the schedule of the Constitution provides that all laws inconsistent with it shall cease at its adoption. Under a provision that the Legislature shall meet once in two years there must be an appropriation at least once in two years in order to permit the payment of the salary. *State v. Holladay*, 64 Mo. 533; *State v. Holladay*, 66 Mo. 385.

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Stockholders' liability.

The decision in the main case is a departure from other decisions as to the effect of constitutional provisions as to the liability of stockholders. But the provisions construed differ.

A constitutional provision that "dues from a corporation shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law" is not operative without the aid of legislation and statutes passed in fulfillment of it furnish the only basis of judicial action. *Morley v. Thayer*, 3 Fed. Rep. 737.

So in *Jerman v. Benton*, 79 Mo. 143, it was held that the double liability clause of a Constitution did not take effect until the enactment of appropriate legislation. That clause was as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law, but in all cases each stockholder shall be individually liable over and above the stock by him or her owned and any amount unpaid thereon in a further sum at least equal in amount to such stock."

A constitutional provision that "dues from corporations shall be secured by such individual liability of the corporation and other means as may be prescribed by law," and another that "each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities," must be construed together, and the latter cannot be held self-executing, as in that case the former would have no meaning. *French v. Teschemaker*, 24 Cal. 513.

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it into effect, or that the nature of the provision itself was such as to render such legislation necessary. To the first class may be referred the provision in the Constitution of Missouri (quite different from that in ours) considered in the case of *Morley v. Thayer*, 8 Fed. Rep. 739, although that case really only decided that the plaintiff could not recover because he had not followed the remedy provided by statute. To the same class belongs the case of *Jerman v. Benton*, 79 Mo. 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect.

To the second class belongs *Bowie v. Lott*, 24 La. Ann. 214, in which it was held that a constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres," required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom the land was to be divided, nor determine the exact size of the tract. It was evidently a mere general direction to the Legislature. To the same class may be referred the case of *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 10 Fed. Rep. 503, involving a provision in the Constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," although all that was decided in that case was that the defendant railway company could not, on its own motion, make the crossing without the consent of the defendant, or without resort to legal proceedings in which the conditions and limitations under which such rights should be exercised should be judicially fixed and determined. *Groves v. Slaughter*, 40 U. S. 15 Pet. 499, 10 L. ed. 819, cited by appellant, perhaps goes further than any other case in holding a constitutional provision not self-executing; but its weight as an authority is much weakened from the facts that it was not considered by a full bench, and was decided by a divided court, *Justice Story* being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that anything done in violation of them is void; or the further rule, which that court has always professed to follow, that it would adopt the construction given to the Constitution and laws of a state, not conflicting with those of the Union, by the highest court of that state.

Of all the cases cited by appellant, the one most relied on is that of *French v. Teschemaker*, 24 Cal. 518. The Constitution of California provided: "Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." "Sec. 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities." The court held that section 36 was not self-executing. But the

decision was mainly based upon two considerations. The first was that, while this section provided that each stockholder should be liable for his proportion of the corporate debts, yet it did not determine what that proportion should be, nor prescribe any rule by which it should be ascertained. The second was that section 36 was to be read in connection with section 32, which was evidently addressed to the Legislature. No such considerations exist here, and hence we do not think that the case is in point. The language used in our Constitution is positive and mandatory. There is nothing in it indicative of an intention that ancillary legislation should be had to carry it into effect; neither is there anything in the nature of the liability imposed such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability, and to whom the liability is incurred. As remarked in *Allen v. Walsh*, *supra*, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted, or the one who holds it when the action is brought, or any one who held it at any time while the debt existed, that is liable. But this is a mere question of construction, which would exist if the same or similar language were used in a statute, as has sometimes been the case. But questions of construction, whether of a Constitution or a statute, are for the courts, and not for the Legislature. In fact, all the criticisms of the appellant upon this article of the Constitution refer merely to supposed obscurities in its meaning, or doubts as to its construction; and the logic of their argument is that it is for the Legislature to construe it, and determine its true meaning. According to their view, it means anything or nothing, according as the Legislature sees fit to construe it. But the people meant something by this provision, and, when that meaning is judicially determined by legitimate rules of construction, it is as obligatory on the Legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability, as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim *ubi jus ibi remedium*, is as old as the law itself. As was said by *Lord Holt*: "If a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an in-

jury, mischief, or grievance impliedly gives a remedy, for, if no remedy be expressly given, a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie." 2 Dwar. Stat. 677. So where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured shall have an action; for, where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. *Ashby v. White*, 2 Ld. Raym. 938. Hence in the present case it was not necessary that the Constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it. Of course, the remedy is always within the control of the Legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive, if they see fit. An inference in favor of appellant's contention is sought to be drawn from the history of this provision in the constitutional convention. In the form in which it is now found, this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed to the Legislature, and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole, and then referred to the committee on phraseology and revision, who reported it back in its present form, ("every stockholder shall be liable," etc.) when it was adopted by the convention. To our minds, the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the Legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable, and not uniformly consistent either with the theory that the Constitution itself created such a liability or that it did not. Upon the theory that it did, it must be confessed that some of this legislation was superfluous, and its repeal unavailing. On the other hand, it may be said that, in pass-

ing chapter 56, Laws 1878, making stockholders in manufacturing or mechanical corporations liable for corporate debts to the amount of stock held or owned by them, the Legislature must have assumed that the Constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability should exist. Moreover, the Legislature in submitting, and the people in adopting, the amendment of 1872, excepting corporations organized for a manufacturing or mechanical business from the operation of section 8, art. 10, of the Constitution, must have supposed that this section *ex propria vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary, unless it was to relieve the Legislature from a sort of moral obligation to legislate on the subject.

3. The answer in this case alleges that in July, 1889, the defendant corporation was, upon petition of creditors under the Insolvent Law of 1881, adjudged insolvent, and a receiver of its property appointed by the court, who had fully administered the corporate assets, and distributed the proceeds among those creditors who executed releases to the corporation as required by statute; that plaintiff in January, 1890, executed and filed such a release, and accepted her dividend from the receiver. It is claimed, under the doctrine of *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343, that this release of the corporation had the effect of also releasing the stockholders. The plaintiff, on the other hand, claims that the rule of that case was changed by chapter 30, Laws 1889, entitled "An Act to Amend an Act Entitled 'An Act to Prevent Debtors from Giving Preference to Creditors, and to Secure the Equal Distribution of the Property of Debtors among Their Creditors, and for the Release of Debts against Debtors,'" section 2 of the Amendment Act providing "that the release of any debtor under this Act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt." The point is made that this Amendment Act is invalid, because the subject is not sufficiently expressed in its title. There is nothing in this. It recites *verbatim* the title of the original Act, which sufficiently expresses the subject of that Act. It is true that the title of the Amendment Act does not refer to the chapter or year when the original Act was passed, but this is unimportant, especially as there was no other Act of the same title. Similar titles have been invariably sustained in this and other jurisdictions having the same constitutional provision. The title of this Act is not materially different from that sustained by this court in *Winona v. Winona County School Dist. No. 82*, 40 Minn. 13.

It is further claimed that the amendment is inapplicable because its terms will not include the liability of stockholders for corporate debts; the argument being that, where words of specific import are followed by a general term, the general term is to be taken

to apply only to persons or things *ejusdem generis* with the specific terms; that the words "or otherwise" must therefore be limited to those whose liability for the debt is of the same kind as that of surety or guarantor; and that the liability of a stockholder for the debts of a corporation is different from that of either a surety or a guarantor, and therefore not within the terms of the Act. The Act of 1889 was passed about two weeks after the decision of the *Mohr Case*, and the proviso referred to was doubtless enacted for the very purpose of changing the rule laid down in that case. That it had that effect was assumed in *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400, (decided August 12, 1899). Even under the strict doctrine of *ejusdem generis*, we have no doubt that the term "or otherwise" would embrace those liable as stockholders for corporate debts; for, while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class. But the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an Act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors. Thus the expression, "any bond or other specialty," has been held to comprehend every kind of specialty including a statute. The evident intention was that this amendment should embrace all cases where some one else was liable, in whatever capacity, for the same debt with the insolvent debtor.

The insolvency proceedings against the corporation were instituted and its discharge granted after the passage of the Act of 1889, but the debt for which plaintiff sues was contracted prior to that date; and it is claimed that the Act is, as to stockholders whose liability had been already incurred, unconstitutional, because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and measured by the Constitution alone. The Insolvent Law neither increases nor affects that liability, but has reference solely to the remedy of the creditor against the insolvent debtor. An existing creditor would have as much right to object to the passage of a Bankrupt Act, or a debtor to its subsequent repeal, as would this appellant to object to the amendment of this Insolvent Law. Bankrupt laws, either by express provision or by construction, generally provide that the discharge of the bankrupt shall not release another person who is liable for the same debt. This has been held indiscriminately in cases where the debt was contracted before, as well as where it was contracted after, the passage of the Bankrupt Act, and it was never suggested that as to such other person the Act was invalid, as impairing the obligation of his contract. The discharge of the insolvent or bankrupt in such cases, as we have repeatedly held, is not the vol-

untary act of the creditor, but purely by operation of law, which, like the act of God, hurts nobody.

Order affirmed.

William MILLER *et al.*, *Respts.*,

v.

James STODDARD *et al.*, *Defts.*,
and

Henry M. LITTLE & Wife, *Appts.*

(.....Minn.....)

*1. The owner of a lot which was subject to an unrecorded mortgage contracted for the construction of a building upon the premises. After materials had been furnished for the construction of the building, but before the claims for liens therefor had been filed, the mortgage was placed on record. *Held*, that the Recording Act (Gen. Stat. chap. 40, § 21), imposes no obligation upon a mortgagor to record his mortgage, as against mechanics' liens.

2. But even if that statute could be held to apply to such cases, the lien claimants in this case would not come within the protection of its provisions, because—*First*, their liens were not filed until after the mortgage was recorded; and, *second*, there was no evidence that they did not have actual notice of the mortgage when they furnished the material. *Held, also*, that, in the absence of any provision to that effect in the Lien Law, a mechanics' lien cannot be preferred to a prior unrecorded mortgage, unless in cases where, upon general equitable principles, the mortgages would be estopped by his conduct from asserting the lien of his mortgage, as against the other lien claimants.

(June 22, 1902.)

APPEAL by defendants, Henry M. Little and wife, from an order of the District Court for Hennepin County overruling a motion for new trial in an action brought to foreclose a mechanics' lien, in which the order of priority of several claims against the same property was determined, and a mortgage held by the female appellant postponed to certain mechanics' liens. *Reversed.*

The material portions of *Miller v. Shepard*, referred to in the opinion are as follows:

Defendant Shepard and one Little were severally the owners of contiguous lots. Each contracted with one Stoddard for the erection of a dwelling-house on his lot, and about the same time the two agreed to jointly erect a barn on the line between the lots, so that part of it would be on each lot, and appurtenant to the dwelling-house being erected thereon. Pursuant to this arrangement, they contracted with Stoddard for the erection of the barn. Stoddard built the two houses, and also the barn, the latter being so located that five feet more of it was on one lot than on the

*Head notes by MITCHELL, J.

NOTE—For note on the question of superiority between mechanic's liens and earlier mortgages, see *Wimberly v. Mayberry* (Ala.) 14 L. R. A. 305.

other, and one end of it better finished inside than the other; but on which lot the larger part of the barn was situated, or which end was the better finished, does not appear. Neither does it appear what the dimensions of the barn were. The defendants Smith & Co. furnished to Stoddard material for the construction of each house, and also of the barn. Shepard and Little paid Stoddard in full, but the latter failed to pay Smith & Co. Thereupon Smith & Co. filed separate claims for liens on the two houses, and also a claim for a lien on the barn and both lots jointly for the material furnished for the barn. The plaintiffs, who had furnished material to Stoddard for Shepard's house, having commenced this action to enforce their lien on his house and lot, and having made Smith & Co. defendants, the latter interposed an answer alleging the foregoing facts, and also that the amount due them for material for Shepard's house was \$559.42, and for material for the whole barn \$424.03. They further alleged that the matter as to the material for the barn was set up "so as to protect their rights in the premises on the said claim, and that they intended to bring a separate action to enforce said lien if the same cannot be fully enforced herein." They then asked for judgment against Stoddard for \$559.42, and that said judgment be declared a lien on Shepard's house and lot, and that, if the court could not give full relief upon the last claim, (material for the barn), it may make such order and decree as may protect their rights in the premises, and that they might have such other and further relief as to the court might seem proper. Shepard appeared and answered, but Stoddard, the original contractor, failed to appear. The court ordered personal judgment in favor of Smith & Co. against Stoddard for the full amount due for material furnished for Shepard's house, and one half of the amount due for material furnished for the barn, and adjudged the same to be a lien on Shepard's house and lot, and directed the premises to be sold to satisfy the same. Shepard, the appellant, concedes the correctness of this decision, so far as it relates to the material for his house, but contests it in so far as it allows a lien on his premises for half (\$212) the material for the barn. . . . Smith & Co. had a right to file a single claim for a lien on the barn and both lots. But we are also of opinion that, notwithstanding their having done so, they might sever their claim so as to obtain judgment against each lot for the amount of material which went into the part of the barn situated thereon, provided they were able to show, and did show, what part or proportion of the material entered into the construction of each part of the building, and provided the rights of third parties are not thereby prejudiced. . . . But while Smith & Co. had the right to sever the lien for material for the barn, yet, if they did so, it was incumbent on them to show affirmatively what part or proportion of the material entered into Shepard's part of the building; that is, the part which stood on his lot. Had it appeared that both parts of the barn were built and finished alike, and that half stood on each lot, then the court would have been fully justified in adjudging

one half the amount of Smith & Co's claim to be a lien on Shepard's premises. But it appears not only that the two parts were finished differently, but also that five feet more of the building (which for anything that appears might have been a very considerable part of it) stood on one lot than on the other, and there is no evidence as to what part or portion of the material went into either. Consequently there was no basis whatever furnished by the evidence for the court's apportionment. It was mere guess work.

Mr. C. J. Cahaley, for appellants:

Charging the property owned by one individual, for the improvements made on the property of another, when he receives no benefit from it, is so unjust that nothing less than very clear expressions would warrant it.

Gorgas v. Douglas, 6 Serg. & R. 512; *Kerbaugh v. Henderson*, 8 Phila. 17; *Davis v. Farr*, 13 Pa. 167; *Skyrms v. Occidental Mill & Min. Co.* 8 Nev. 219; *Butler v. Rivers*, 4 R. I. 38; *Edwards v. Edwards*, 24 Ohio St. 402; Phillips, *Mechanics' Liens*, 703.

The Mechanics' Lien Act only gives a lien to the extent of the interest of the owner at the time the materials were furnished. At that time the property was subject to the purchase-money mortgage of this appellant. It was in effect the continuation of her vendors' lien. The principle that an unrecorded purchase-money mortgage is a lien prior to that of a mechanic or judgment creditor is so well established that it may be said to be elementary.

Oliver v. Davy, 34 Minn. 292; *Rees v. Ludington*, 18 Wis. 308; *Spring v. Short*, 90 N. Y. 588; *Guy v. Carriere*, 5 Cal. 511; *Campbell's App.* 86 Pa. 247; *Rose v. Munie*, 4 Cal. 178; *Banning v. Edes*, 6 Minn. 402; *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719.

Mr. Willis McDowell, for respondents, Miller et al.:

Conceding that mechanics' liens are not within the Recording Act and that an unrecorded purchase-money mortgage has precedence over a lien, of what avail would it be to these appellants, as against these respondents. She has voluntarily allowed another mortgage to be placed upon the property, which is a lien ahead of her mortgage and the lien of these respondents is ahead of this other mortgage. She has selected her place in the procession and cannot now hope to change it.

Reilly v. Williams (Minn.), Dec. 28, 1891.

Messrs. Reed & Kerr, for respondents, Frazer & Shepard:

Time was, perhaps, when under certain circumstances, as, for instance, those which exist in the case of *Oliver v. Davy*, 34 Minn. 292, the claims of laborers and materialmen would be postponed to the right of the holder of an unrecorded purchase-money mortgage, but the facts in this case, taken in connection with the Lien Law of 1889, do not lead to such a conclusion.

By allowing the intervention of the mortgage of the North Side Building & Loan Association she has brought herself clearly within the rule established in *Reilly v. Williams* (Minn.) Dec. 28, 1891. She has taken her place in the procession and must abide by her choice.

Messrs. Ueland & Holt for respondents,
C. A. Smith & Co.

Mitchell, J., delivered the opinion of the court:

This may be termed the companion case of that of the same plaintiffs against Shepard and others (just decided), to the statement of facts in which, as far as it goes, reference may be made for the facts in this case. This action was brought to enforce a lien for labor and material performed and furnished to the contractor, Stoddard, for the erection of the Little house. The defendants Esther B. Little and the North Side Building & Loan Association were mortgagees of the premises. The other defendants, Frazer & Shepard and Smith & Co., were lien claimants for material also furnished to Stoddard,—the former for the house, and the latter for both the house and the barn. As the building and loan association took no appeal, and is not made a party to this appeal, the correctness of the decision of the trial court as to the rank or position of the lien of its mortgage is not before us, and cannot be considered. The answer of Smith & Co., and the evidence in support of their claims, is substantially the same as in the *Shepard Case*, and what was said there is equally applicable here. There is the same failure to show what part or proportion of the material furnished for the barn entered into the construction of that part of it situated on the Little lot.

2. The principal question in the case is as to the rights of Esther B. Little under her mortgage. The lot on which the buildings are situated formerly belonged to her. On May 18, 1890, before any contract was made with Stoddard, and before any work had been done or materials furnished for the buildings, and consequently before any of the liens of the respondents had attached, she conveyed the lot to Henry B. Little, and at the same time took back a mortgage from him on the premises. It does not appear whether the deed to Henry B. Little has ever been recorded, but it does appear, and is so found, that the mortgage to Esther B. Little was not recorded until November 22, 1890, which was after all of the respondents had furnished the material for the buildings, but before any of them had filed their claims for liens. The trial court held that the liens of the respondents were superior to that of Mrs. Little's mortgage, on the ground, as we presume, that it was not recorded until after respondents had furnished the material, and consequently after their liens therefor had attached.

Appellants' counsel rests the claim of priority for the mortgage mainly on the ground that as appears, or at least as they offered to prove, it was given for the purchase money of the lot. Under the facts, we do not see that this, even if true, is at all material. What counsel has in mind, and all that the cases cited by him hold, is that where the interest of a vendee, in possession under an executory contract of sale, has become subject to a lien for material or labor furnished or performed for him for the construction of a building thereon, and subsequently the vendor, in perform-

ance of the executory contract, executes a conveyance to the vendee, and at the same time takes back a mortgage for the unpaid purchase money, the mechanics' lien will not displace or take precedence of the mortgage, which is but a continuation in another form of the vendors' lien. But in the present case Mrs. Little's mortgage, in point of time, in fact antedated the liens of the respondents. Hence the only question is whether, notwithstanding that mortgage was first in time, the liens of the materialmen should be given precedence, because at the time they attached the mortgage had not been recorded. We have approached this question with a desire, in the interests of apparent justice, to give the mechanics' liens the precedence, if it could be done consistently with legal principles; but we have been unable to find anything, in the Lien Law or elsewhere, that would justify us in doing so. It cannot be done by virtue of the statute relating to the registration of conveyances, for two reasons: First, under that statute (Gen. Stat. chap. 40, § 21) there is no obligation resting on a mortgagee to record his mortgage as against mechanics' liens. Its provisions do not apply to or extend to such liens. In the absence of any statute on the subject, we are relegated to the common law, by which a registry was not required, and would be unavailing for any purpose; the law imposing upon every one the burden of ascertaining, at his peril, the actual condition of the title. *Oliver v. Davy*, 34 Minn. 293; *Rose v. Munie*, 4 Cal. 173. But even if the Recording Act could be held to apply to mechanics' liens, the facts of this case would not bring the respondents within the protection of its provisions—*first*, because their claims for liens were not filed until after the recording of Mrs. Little's mortgage; and, *second*, because there is neither evidence nor finding that the respondents did not have notice of the mortgage when they furnished the material for the buildings. The Lien Law is equally defective in not making any provision for such cases. Had the statute contained the provisions, found in many of the lien laws of other states, to the effect that mechanics' liens shall be preferred to any mortgage or other incumbrance, of which the lien-holder had no notice, and which was unrecorded at the time such liens attached, all difficulty would have been avoided. But our statute contains no such provision. It merely provides that the claim of the laborer or materialman shall be a lien "on the right, title, and interest of the owner in the land." There is no chance for giving respondents' liens a preference, under section 5 of the Act, for that section expressly excepts bona fide prior mortgages. Under this state of the law, we see no way by which the decision of the trial court can be sustained giving the respondents' liens a preference over the Little mortgage. Of course, there may be cases where the holder of the unrecorded mortgage might be estopped by his conduct from asserting it as against lien claimants, but no such state of facts appears here. It is surprising, in view of all that has been said by the real or pretended friends of labor as to the importance of a lien law, that a carefully prepared statute on the subject has never been gotten up. Most of the enactments

have been crude and imperfect affairs, often including some drastic provisions in utter disregard of the rights of owners and mortgagees, but at the same time lacking some very important provisions necessary for the proper protection of mechanics and materialmen. Many of their provisions have also often been so obscure and ambiguous that their construction involved much litigation, the cost of which usually falls on the very class for whose benefit such statutes are designed. The result has been that the courts have been often blamed for not doing what they have no power to do, but what the Legislature ought to have done, viz., to enact a better law. Inasmuch as the case was evidently tried and decided upon a wrong theory of the law, we shall merely order a new trial of the issues between respondents and Esther B. Little, instead of directing judgment in her favor upon the present findings.

3. The court below held that plaintiffs' lien was superior, and the liens of the other respondents inferior, to the mortgage of the building and loan association, and ordered two sales of the property,—one subject to the lien of that mortgage, and the other free of all incumbrances, including that mortgage. This is assigned as error. As the building and loan association is not a party to this appeal, of

course nothing can be done that would affect its rights under the decision of the trial court; but inasmuch as in any event there has to be a sale of the entire property free of the lien of the mortgage, its rights will not be affected by a modification of the order of the court directing two sales. Two sales of the property are wholly unnecessary, and will only lead to confusion worse confounded. There should be but one sale, and that of the entire property, and the proceeds distributed among all lienholders, including the building and loan association, according to their priority. For the reason already suggested, the correctness of the decision of the district court as to order of priority of respondents' liens, either as between themselves or as to the building and loan association, is not involved in this appeal. It may be remarked, however, that if our statute contained a provision similar to that found in many other states, as, for example, California (Code Civ. Proc. § 1186), it would obviate a very embarrassing question, which might have been raised in this case, and which was somewhat discussed in *Finlayson v. Crooks* (Minn.) 49 N. W. Rep. 898, 845.

Order reversed, and new trial ordered as to the second claim of Smith & Co., (material for the barn), and also as to the issues between the respondents and the appellant Esther B. Little.

ALABAMA SUPREME COURT

GERMAN AMERICAN INSURANCE
CO., *Appt.*,

v.

COMMERCIAL FIRE INSURANCE CO.

(.....Ala.....)

1. **The existence of brick partitions extending above the roof and dividing a building into stores or sections will not constitute each section a separate building** or the goods therein a separate risk within the meaning of a reinsurance contract limiting the amount of insurance to be placed on any one "building or risk," if all the sections are inclosed by a common exterior wall and are all under one management and devoted to the same use while the floors of the different stories are on the same level and connected by large doors through the partitions.

2. **There is no presumption of knowledge on the part of an insurance company** doing a general business throughout the United States of a custom or usage as to what constitutes a "building" or "risk" which is peculiar to a city in a state foreign to its domicile, so as to make the custom an element of its contracts relating to property in such city without proof that it had such knowledge.

3. **Failure of one insurance company to object to risks contained in schedules sent to it by another company, a certain amount of whose risks it has made a**

NOTE.—For notes on custom as part of contract, see *Newhall v. Appleton* (N. Y.) 3 L. R. A. 859; *Smith v. Clews* (N. Y.) 4 L. R. A. 302; *MacCluskey v. Klosterman* (Or.) 10 L. R. A. 755; *Conestoga Cigar Co. v. Finke* (Pa.) 13 L. R. A. 438, 16 L. R. A.

compact to reinsure, will not amount to an acquiescence on which the latter can rely in case they are not covered by the compact, since reliance may be placed on the good faith of the other company and its acting within the contract without the necessity of making a personal investigation of the property covered by each schedule.

4. **Notice that three stores belonging to the same person are all located at the foot of the same street** is not notice that they are all in the same building.

5. **Claiming exemption from liability for a loss on one ground** will not prevent an insurance company from subsequently setting up another defense based upon facts of which, solely through the negligence of the insured, it was ignorant at the time of making its first defense.

(May 17, 1892.)

APPEAL by plaintiff from a judgment of the Montgomery City Court in favor of defendant in an action brought to recover the amount alleged to be due upon a contract reinsuring certain fire risks which had been taken by the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Watts & Son for appellant.

Messrs. Tompkins & Troy, for appellee:

The agent for placing the liability upon the principal owed to that principal the highest degree of good faith. It was the duty of appellant to disclose all of the facts affecting the risk.

Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 27 L. ed. 337; *Morgan v. Hardy*, 16 Neb. 427.

Storerooms situate as these were constitute one and the same risk.

Hochstadler v. State, 73 Ala. 24; *Carr v. Hibernia Ins. Co.* 2 Mo. App. 466; *Sampson v. Security Ins. Co.* 188 Mass. 49; *Cargill v. Millers & Mfra. Mut. Ins. Co.* 33 Minn. 90; *Blake v. Exchange Mut. Ins. Co. of Philadelphia*, 12 Gray, 265; *Fair v. Manhattan Ins. Co.* 112 Mass. 320.

The evidence wholly fails to make out a case in which a custom changes the meaning of the word "warehouse" from its ordinary and legal signification:

1st. It does not show how long the alleged custom had existed.

2d. It shows a custom confined to the city of New York.

3d. The intention of the parties to the contract in limiting the risk of appellee to a maximum line of \$5,000 on goods in any one warehouse is clear and not indeterminate, therefore there is no need to introduce evidence of such a custom to explain that intention; and

4th. No custom can be established to vary or explain the terms of a contract the effect of which would be to tempt parties to acts of dishonesty, wrong, or bad faith as this would in such a case as the one at bar.

Montgomery & E. R. Co. v. Kolb, 73 Ala. 396; *Wilkinson v. Williamson*, 76 Ala. 163; *East Tennessee, V. & G. R. Co. v. Johnston*, 75 Ala. 506, 51 Am. Rep. 489; *Smith v. Rice*, 56 Ala. 417; *Herring v. Skaggs*, 78 Ala. 446; *Reager v. Atlas Ins. Co.* 14 Pick. 141, 25 Am. Dec. 363; *Susquehanna F. Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Higgins v. Moore*, 34 N. Y. 417; *Walls v. Bailey*, 49 N. Y. 464; *Fuller v. Robinson*, 86 N. Y. 806; *Bradley v. Wheeler*, 44 N. Y. 495; *Paine v. Howells*, 90 N. Y. 660.

The burden of proving notice was on appellant.

Robinson v. Levi, 81 Ala. 184.

McClellan, J., delivered the opinion of the court:

This is an action by the German American Insurance Company against the Commercial Fire Insurance Company on a contract by which, it is alleged, the defendant reinsured certain risks taken by plaintiff on property in New York city. The property was destroyed by fire, the loss paid by plaintiff, and reimbursement to the *pro rata* extent of reinsurance is now sought to be enforced from defendant. Trial below was had by agreement without jury, the issues of fact were found for defendant, and judgment went accordingly. This appeal presents for review the conclusions of the city judge on the evidence and the judgment rendered. There is no material controversy as to what the facts are. The contracts of reinsurance sued on were made in this way: The Commercial Fire Insurance Company, on May 26, 1887, signed, and mailed to the German American Insurance Company what is known as a "reinsurance compact," which was duly received and acknowledged by the latter. This compact, with its attached lists and schedules, authorized the German American Company to reinsure itself in the Commercial Company, within certain limitations as to classes and amounts of risks, by

entries thereon or therein, followed by certain *ad interim* and final reports to the reinsuring company, setting forth the term, amount, and class of risk, rate of premium, and location of property insured. Among other risks which the compact, as modified by subsequent correspondence, authorized the German American Company to reinsure in or "cede" to the Commercial Company were nonfiber goods in brick stores or warehouses, in amounts not to exceed \$5,000 in any one building or risk. Claiming to proceed under this authorization, and within its limitations, the German American Company made and reported entries on the compact aggregating \$12,500 on nonfiber goods stored in Rossiter's stores Nos. 1, 2, and 3, severally. The first entry and report was of \$2,000 of reinsurance on goods in "Rossiter's store No. 2, foot W. 60th St., N. Y. city;" the next, of \$3,000 on goods in "Rossiter's store No. 1, N. Y. city;" third, of \$2,000 on goods in "Rossiter's store No. 1, N. Y. city;" fourth, of \$3,000 on goods to "Rossiter's store No. 2, N. Y. city;" and last, of \$2,500 on goods in "Rossiter's store No. 3, N. Y. city." Previous to these entries and reports, plaintiff, for the purpose of inducing defendant to increase its maximum limit on amount of reinsurance on storage stores, had sent the latter a schedule showing the amounts of net risks it carried on a number of such stores in New York city and elsewhere, and among the other items in this list is the following: "Rossiter's stores, ft. 60th St., N. Y. city, \$30,000."

On proof of loss, defendant paid plaintiff about \$5,000, and refused to pay the balance claimed under the reinsurance contracts, amounting to something over \$6,000, on the ground that, as it insisted, Rossiter's stores Nos. 1, 2, and 3 constituted but one building or risk, within the meaning of the said reinsurance compact, and, in consequence, plaintiff was without authority to bind defendant beyond the maximum limit of \$5,000 on goods stored in said stores, and its entries and reports as to and of all reinsurance in excess of this limitation were abortive and invalid. It cannot be doubted, on the evidence found in this record, consisting of minute descriptions and diagrams of Rossiter's stores Nos. 1, 2, and 3, that they, in the ordinary sense of the term, constituted "one building." It appears that the building was five stories in height; that the outer wall was common to each of the stores; that the several floors were, respectively, on the same level; that, while two partition walls divided the building into three rooms or compartments on each floor, there were doors about eight feet square in each of these walls between the several compartments in each of the five stories; that the whole structure was under one management, and devoted to the same uses, the storage of nonfibrous merchandise; and that the partition doors were used for the purposes of the passage of persons and the removal of goods from one store to another or others on each floor. It was also shown that double iron shutters were provided for closing these apertures in the partition walls; that these were generally closed; and that the partition walls extended five feet above the roof. It is not seriously, and cannot be successfully, contended that, upon this

showing the three stores in question were distinct buildings, or that they did not constitute "one" and the same building, as that word is commonly understood. *Fair v. Manhattan Ins. Co.* 112 Mass. 820; *Blake v. Exchange Mut. Ins. Co.* 12 Gray, 265; *Cargill v. Millers & Mfrs. Mut. Ins. Co.* 38 Minn. 90; *Sampson v. Security Ins. Co.* 138 Mass. 49; *Carr v. Hibernia Ins. Co.* 2 Mo. App. 466; *Hochstadler v. State*, 73 Ala. 24.

It is equally manifest, we think, that these stores, or the goods stored therein, constituted but "one" risk, in the sense of the compact under consideration, unless the word is to take on a different significance from the usage and custom proved in this case, and to be presently considered. It is most clear from the record before us that the Commercial Company conceived it to be of the utmost importance to it that its exposure to loss under the reinsurance compact should in no case exceed \$5,000. When the German American Company advised and requested it to raise its maximum list from \$2,500 to \$7,500 or \$10,000 on nonfibrous storage, it replied that "we think that the line suggested by you is rather too large for us. We have, however, concluded to authorize an increase on the 'nonfiber' stores to \$5,000; that on 'fiber' to remain \$2,500, as heretofore." And the purpose of the company evidently was to guard against the possibility or probability, in case of any loss, of losing in any one fire more than it could afford to lose, having in view its relatively small capitalization and assets. The means adopted to effectuate this purpose was the stipulation of the compact against being bound beyond a stated sum on any one building or risk. How this means could accomplish the end to which it was addressed, if the stipulation be construed so as to admit of reinsurance to three times the maximum limit, upon the mere circumstance that there are three rooms, stores, or compartments in the building proposed to be insured, while the probable consequence of a fire in any one of these stores would be the destruction of the contents of all three of them, and where the risks arising from the possibility of misconduct on the part of the insured would, of course, be equally incident to the goods in all and each one of the stores, it is difficult to perceive. With the probability that a fire starting in either of the stores would consume the contents of the others, and the certainty that incendiarianism by the owner for the purpose of collecting insurance money—a risk which must be reckoned in all fire insurance—would go to the destruction of all the property kept by him in the building, there is every reason for the conclusion that the Commercial Fire Insurance Company intended the limitation to \$5,000 to obtain with respect to property stored in different compartments, rooms, or stores in the same building, as in the case at bar; and we accordingly hold that plaintiff was without authority to reinsure itself in the defendant corporation on merchandise stored in Rositter's stores in any sum beyond \$5,000, if the reinsurance compact is to be interpreted according to the ordinary significance of the term "building or risk."

It is proved in this case, however, that, according to an established and universal usage 16 L. R. A.

or custom of the business of insurance in the city of New York, each one of Rositter's stores, numbered 1, 2, and 3, was a distinct building for all the purposes of insurance, and that risks taken upon goods in them severally are distinct and separate risks. So that, if this usage is to obtain in respect of the compact of reinsurance involved here, as claimed for plaintiff, the several contracts of reinsurance entered and reported to the defendant, being each within the latter's maximum list when measured separately as to each store, are within the limitation of \$5,000 stipulated for, and therefore valid and binding on the Commercial Company. While it is well settled at this day that the existence of a usage in respect of the subject-matter of a contract may have the effect of giving to its terms definitions which would not otherwise attach to them, the doctrine rests, except in particular instances, solely upon the theory that the parties in entering into the compact had such usage in mind, stipulated with reference to it, and hence made it a part of their contract; and whether a usage, in a given case, is thus to be taken as a part of the contract, whether the parties had it in view in their negotiations, and intended that their agreement should be read and construed with reference to and in the light of such usage, is always a question of fact. And as, in the nature of things, no man can be said to have contracted with reference to a fact—to have had a fact in mind—of which he was ignorant, usage relied on by one party to give color to the obligations of another, or to impose a liability which does not arise on the ordinary meaning of the terms of their contract, must be shown to have been known to such other party. This is usually done by proof of an established usage, certain, uniform, and reasonable in character, and of such general acceptance, and consequent notoriety, as that a *prima facie* presumption of knowledge of it on the part of him who is sought to be affected by it arises, and, unrebutted, affords the predicate for the further presumption, of a conclusive nature, that he considered it in the particular dealing to which it is incident, and made it as much a part of his contract as if it had therein been specifically referred to. In the case at bar the *onus* was on plaintiff to prove, not only that the usage relied on had been established and existed at the time of the contract, but also that the defendant had knowledge of it, and therefore is to be held to have contracted with reference to it. There is no direct evidence of such knowledge. The inference of knowledge is sought to be rested alone on proof of the establishment, existence, and prevalence of the usage in the city of New York. Had both contracting parties been domiciled in that city, and entered into a reinsurance compact solely with reference to risks located there, there would be some ground to say that defendant would be held *prima facie* to a knowledge of the usage. But the domicile of defendant was in Alabama, and the reinsurance compact contemplated and provided for the taking of risks, not only in the city of New York, but throughout the country. Not only so, but the correspondence between the parties demonstrates that risks were actually incurred under the compact in a number of other towns

and cities. It cannot be supposed that the Commercial Company had knowledge of the local usages incident to the business of insurance in each of these numerous localities, and so contracted with reference to them that its obligations, expressed in clear and unambiguous terms, imported a liability for one sum on a given state of facts in New York city, another sum on the same facts in Brooklyn, another in Litchfield, Conn., yet another in Chicago, and so on *ad infinitum*. The law to the contrary is well settled that proof of such local usages will not raise up a presumption of a knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicile of the party sought to be charged is elsewhere; or, in other words, that, in order to create even a prima facie presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it. This plaintiff has failed to do. No general usage is proved, or attempted to be proved, and the defendant cannot be held beyond the terms of its compact dissociated from any effect the alleged usage is claimed to have upon those terms. *Cobb v. Lime Rock F. & M. Ins. Co.* 58 Me. 326; *Lawson, Usages & Customs*, §§ 17, 25-27; *Hill v. Hibernia Ins. Co. of Ohio*, 10 Hun, 26; *East Tennessee V. & G. R. Co. v. Johnston*, 75 Ala. 598, 51 Am. Rep. 489; *Smith v. Rice*, 56 Ala. 417; *Herring v. Skaggs*, 73 Ala. 446; *Bradley v. Wheeler*, 44 N. Y. 495; *Child v. Sun Mut. Ins. Co.* 3 Sandf. 26; *Walls v. Bailey*, 49 N. Y. 464; *Higgins v. Moore*, 34 N. Y. 417.

The presumption of knowledge of an established usage, which arises upon proof of its generality in the business or trade to which it is incident, is, as we have indicated, generally speaking, only prima facie, and hence rebuttable by direct evidence of a want of such knowledge. *Walls v. Bailey*, *supra*. With reference to contracts of insurance, there is this exception to the doctrine just stated: that insurance companies are under such a duty to inform themselves of the usages of the particular business insured as that they will not be heard to deny such knowledge. This only means, however, that where a general usage in business is proved, a usage of the character that raises up the prima facie presumption of knowledge in ordinary cases, the insurer, in view of the duty resting on him to acquaint himself with the general usages of the business, will not be let in to rebut the presumption, which, in consequence, becomes a conclusive one as to him. But an insurer is no more bound than any other party by proof of usages obtaining to a greater or less extent, territorially or otherwise, in respect of the business insured, which are not general in their nature, but obtain only in certain localities, or not substantially in all instances of the particular business. So that if it were conceded here that, had the proof established the New York City usage in question as incident to the insurance business generally throughout the territory contemplated in this reinsurance compact, the defendant would not be heard to as-

sert its ignorance of it, or to deny that it contracted with reference to it, yet the predicate for this quasi estoppel is wholly lacking, in that the proof adduced is not of such general usage, but only of one that is local and peculiar to the city of New York,—a particular usage or custom, the existence of which raises no presumption at all that defendant had knowledge of it. *Lawson, Usages & Customs*, §§ 17, 19, 26.

It is further contended for plaintiff that, conceding the reinsurance compact did not authorize more than \$5,000 of insurance on Rossiter's stores, yet the defendant acquiesced in, and thus ratified, plaintiff's entries, involving a risk of \$12,500, and thereby validated these entries. Of course, this contention must be rested on the assumption that defendant was advised of the location and character of Rossiter's three stores, and knew or must be held to have known, that they in fact constituted but one building, since acquiescence from which ratification may be inferred can only be predicated of a failure to disaffirm a transaction after the party is advised or put on notice in respect of the facts which entitled him to repudiate it. We do not find from this record that the Commercial Fire Insurance Company had knowledge or notice of the fact that these several stores constituted one and the same building until after the loss had occurred and demand had been made on it for its *pro rata* of the insurance. The relations existing between the two companies were of a fiduciary character. The German American Company was, in a sense, the agent of the Commercial Company for the purpose of re-insuring itself in the latter. The utmost candor and good faith on the part of the former were of the essence of the relations created by the compact. The Commercial Company was justified in the assumption that the German American Company, in fixing liabilities on the former to insure to its own benefit, would not abuse the confidence incident to the relation existing between them, but would strictly adhere to and be guided by the terms of the compact, and not exceed the limits of liability thereby imposed. It had a right, therefore, to assume that it would not be entered in a sum greater than \$5,000 on any one building or risk, and to act upon this assumption until it was advised to the contrary. It was not incumbent on the insurer to seize upon pretexts or slight indications to indulge suspicions leading to inquiries as to the good faith of its quasi agent; and it does not lie in the mouth of the German American Company to say that, "notwithstanding the trust and confidence inherent in our contractual relations, you should have been on the alert, as if anticipating malversation on our part, to institute minute inquiry into the transactions between us, with a view to discovering that we had violated the instructions you had laid down for our guidance." Conceding, therefore, that the Commercial Company must be held to notice that Rossiter's stores Nos. 1, 2, and 3 were located at the foot of Sixtieth street, from the casual mention of them as being there situated in the list of July 31, 1888, (which was forwarded to defendant for a purpose entirely distinct from that of giving advice of the location of any

one of the numerous buildings mentioned therein,) and this notwithstanding there is what seems to be a pregnant omission from the reports of reinsurance of all specification as to the location of two of these stores, yet we do not conceive that, under the circumstances, this notice that these stores were at the foot of a certain street carried either constructive or actual knowledge to defendant that the stores were in and constituted a single building. They might well have been the three stores next the end of the street, and yet have also been distinct buildings; and the defendant, in view of the stipulations of the compact which it had a right to suppose plaintiff would observe, was justified in assuming that they

were in fact separate buildings and risks, although it may have known they were all at the foot of Sixtieth street. On the same considerations, our further conclusion is that defendant is not prejudiced in this case by the fact that it at first placed its exemption in part from the asserted liability on another ground. This could not have been a waiver of the defense now relied on, because the Commercial Company, at the time of advancing the other defense, was not advised of the facts on which this one depended, and its ignorance of them was due, not to its own negligence, but to that of the plaintiff. We find no error in the record, and *the judgment of the City Court is affirmed.*

VERMONT SUPREME COURT

MT. MANSFIELD HOTEL CO.

v.

William P. BAILEY.

(.....Vt.....)

The liability of the indorser of a note for annual interest which becomes due before the maturity of the note, is dependent upon a prior demand of the maker.

(March 5, 1892.)

EXCEPTIONS by plaintiff to rulings of the Lamolille County Court in favor of defendant in an action brought to compel defendant as indorser of a promissory note to pay annual interest which had accrued and remained unpaid upon the note. *Overruled.*

The facts are stated in the opinion.

Mr. P. K. Gleed for plaintiff.

Mr. George Wilkins for defendant.

Tyler, J., delivered the opinion of the court:

It appears by the statement of facts that George Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, \$5,000, as their five promissory notes should respectively become due, and the interest thereon annually. The notes are dated April 1, 1886, are for \$1,000 each, and payable 16, 17, 18, 19, and 20 years from their date. The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon them, without demand of the makers, and notice to the defendant of the makers' default of payment. The defendant's counsel contends (1) that the indorser cannot in any event be compelled to pay the interest as it annually falls due; that his conditional liability does not become absolute until the notes respectively mature, and then only after demand and notice; (2) that, if the interest is collectible of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable. The general rule of law relative to the

respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder. It seems clear that the indorser is not liable for the annual payment of the interest without performance of the conditions by the holder. If he were thus liable, his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not coprincipals. Their contracts are separate, and they must be sued separately, at common law. *Randolph, Com. Paper, § 789.* The maker has received the money of the indorser, and in consideration thereof promises to repay it according to the terms of the note; and, if he fails to pay, his contract is broken, and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal. It is held that, though the annual interest upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal, so that the recovery of it is barred by the Statute of Limitations, until the recovery of the principal is thus barred. *Grafton Bank v. Doe, 19 Vt. 463, 47*

NOTE.—The above decision of an important question in the law of negotiable paper seems to be the first adjudication upon it notwithstanding the *16 L. R. A.*

numerable indorsements of negotiable instruments which are annually made. The case must be regarded accordingly as one of leading importance.

See also 35 L. R. A. 381.

Am. Dec. 697. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest; and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. *National Bank of North America v. Kirby*, 108 Mass. 497. But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate, and remain as a part of the debt until the note matures. *Catlin v. Lyman*, 16 Vt. 44. In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. *Rules of the Court*, 1 Aiken, 410; *Austin v. Imus*, 23 Vt. 286. It was said by the court in *Taliaferro v. King*, 9 Dana, 331: "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised, and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or nonpayment." "It is true that at the maturity of the notes the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in *National Bank of North America v. Kirby*, *supra*. In *Hove v. Bradley*, 19 Me. 81, it is held that when a note is made payable at some future period, with interest annually till its maturity, and no demand is made for the annual interest as it becomes due, or, if made, no notice thereof is given, the indorser, if duly notified of the demand and nonpayment when the note falls due is liable for the whole amount due, both principal and interest, that the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law-merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him annual notice of such default. A note is not dishonored by a failure of the maker to pay interest. *First Nat. Bank of St. Paul v. Scott County Comrs.* 14 Minn. 77 (Gil. 59), 100 Am. Dec. 196, *note*.

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defenses to the note at its maturity which will release the maker, and

consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the maker should be compelled to pay interest before his liability has been fixed to pay the principal; but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt, so that, as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal. The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the maker to pay the principal when it becomes due, and the interest thereon annually. His promise is twofold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now, what is the nature of the contract which the indorser makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and, in effect, represents that the maker has promised to pay certain sums of money according to the terms of the note,—that is, the principal at maturity and the interest annually; that, if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay interest and principal, as each respectively falls due, arises from his contract. It is his contract that he will make payment whenever the maker is in default, and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures, and then collect it with the principal. He may, however, by the contract, collect it as it falls due of the maker, and, upon the latter's default, of the indorser. The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen. VIII. chap. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of *De Havilland v. Bowerbank*, 1 Campb. 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract, interest stands like the principal in respect to the rights and liabilities of an indorser. Sedgw. Damages, 233; *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185, *note*. In *Jennings v. Brush Co.*, reported in 20 Can. L. J. 361, in a learned opinion by McDowall, J., it was held that, where there was an express contract to pay interest, annually or semi-annually, it was not different from a contract

to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly installments of interest for want of demand and notice. While we adhere to the doctrine laid down in *Grafton Bank v. Doe, supra*, that interest is, in general, an incident of the debt, it is consistent to hold that, where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract. The case of *Codman v. Vermont & C. R. Co.*, 16 Blatchf. 165, has been brought to our attention. The trustees and managers of the Vermont Central Railroad Company and the Vermont & Canada Railroad Company issued notes to the amount of \$1,000,000, in sums of \$1,000 each, payable to the defendant company in twenty years from their date, with interest semi-annually, on presentation of the interest coupons, made payable to bearer and attached to the notes. On each note was this indorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guaranty the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market, and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff as a remote holder, Wheeler, J., among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that demand, notice and protest fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons. The Supreme Court of the United States has repeatedly held that the Statute of Limitations begins to run upon interest coupons payable annually or semi-annually from the time they respectively mature, although they remain attached to the bonds which represent the principal debt. *Amy v. Dubuque*, 68 U. S. 470, 25 L. ed. 228. Where the indorser is the payee on the note, there would seem to be no difference in his liability in respect to interest, whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here. Upon the facts found by the county court this action cannot be maintained, for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was brought; therefore nothing is due from the defendant to the plaintiff.

Judgment affirmed.

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Ross, Ch. J.:

I concur in the disposal made of this case, and in most of the grounds and reasoning of the opinion. But I do not see my way clear to concur in holding that an indorser upon a promissory note, payable on time, with the interest annually, can be made chargeable for the payment of the interest before he can be and is charged with the payment of the principal. By placing his name on the back of the note as an indorser, without making any limitation upon his indorsement, he guarantees its payment upon condition that the indorsee, when the time named in the note for its payment arrives, shall present it to the maker and demand its payment, and, if the maker fails to make payment, shall seasonably notify him of such failure. When this is done, the indorser promises to pay whatever of principal and interest is then due upon the note. This condition attaches primarily to the principal of the note. I think it attaches to the interest only as it becomes a part of the principal. It seems to me to be illogical, and pressing the indorser's conditional undertaking beyond its proper scope and office, to hold that he can have his liability fixed to pay for the use or legal rental of the principal before his liability to pay the principal is fixed. Interest is legal damage, fixed usually by statute, for the detention and use of money. As soon as the money is due and payable the law implies damage for its detention and use. It may also arise from the contract for the detention and use of the principal before it is payable by the terms of the contract. When stipulated to be paid annually, it may be collected from the maker of the note at the end of each year, because such is his contract. It is an incident and outgrowth from the principal. The promise to pay it, whether implied or expressed, is a dependent promise. It is attached to and arises from the promise to pay the principal. When the interest is stipulated to be paid annually, and before the principal is payable, the maker, when sued for the annual interest, because his promise to pay it is dependent upon his promise to pay the interest, may set up any defense to the suit for recovering the annual interest which he could if the suit were for the recovery of the principal, such as fraud in the inception of the note, or want or failure of consideration, or duress, or that his liability for the principal is conditional, the terms of which have not been complied with. If he defeats the action, it will estop the holder from recovering the principal when due, and *vice versa*. In 1 *Herman, Estoppel*, 231, it is said: "So, in an action for interest due on a bond, a judgment for the plaintiff for the amount of interest claimed will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defense which was available in the former suit and the presumption is that it was so used."—citing *French v. Howard*, 14 Ind. 455; *Van Dolsen v. Abendroth*, 11 Jones & S. 470; *Preble v. Portage County Suprs.* 8 Biss. 358; *Edgell v. Sigerson*, 26 Mo. 533; *Cleveland v. Croviston*, 93 Ind. 31, 47 Am. Rep. 367.

The opinion recognizes this intimate, attached, and dependent relation of the promise to pay the interest annually to the promise to

pay the principal, from which the interest springs. It recognizes that the Statute of Limitations does not begin to run on such promise to pay interest annually until the principal falls due, in accordance with *Grafton Bank v. Doe*, 19 Vt. 468. This must be because, until severed by enforced collection or payment, interest is but an incident and dependent of the principal. It also recognizes this relation in holding that the indorsee may allow the interest to accumulate, and may fix the indorser's liability to pay it, by a proper demand, default, and notice in regard to the principal when that falls due. This is because liability for the principal carries its dependencies. I concur in these holdings. They are supported by the decisions cited in the opinion. But they rest, and, in my judgment, can rest, only on the basis that the promise to pay the interest annually, both for its consideration and enforcement, is dependent upon the promise to pay the principal. The opinion also holds that the liability incurred by the indorsement is conditional; that that condition attaches to the entire note; and that the liability of the indorser must be fixed by demand, default, and notice in regard to the interest payable from the maker yearly, as well as in regard to the principal. It then seems to conclude that, because the indorsee can lawfully demand and collect of the maker, whose promise to pay the principal is absolute, upon his dependent but yet absolute promise to pay the interest annually, he can, by proper demand, default, and notice, collect such annual interest of the indorser whose promise and liability to pay the principal is conditional, and cannot as yet be made absolute, and whose promise to pay the annual interest it has already held is dependent upon his promise to pay the principal, and, therefore, in my judgment, takes the condition attached to his liability to pay the principal. It is at this point that I fail to follow the reasoning of my associates. Here they assume—as I think—and proceed upon the basis that the indorser's implied promise to pay the annual interest is not dependent, but independent, like what it would be if it were an installment of the principal. The holdings in the opinion that the indorser's liability for the accrued annual interest may be made absolute by a proper demand, default, and notice in regard to the principal when it falls due, and that it may also be made absolute by a proper demand, default, and notice yearly, result in holding that the maker's promise to pay the interest annually which he indorses is both dependent upon and independent of his promise to pay the principal. I do not think that it has this double and inconsistent character, but only the former. If it be independent, must not demand and default be made, and notice given yearly, or the indorser become discharged? And if demand and default be made, and notice given annually, must not the Statute of Limitations begin to run from date of such demand? I think so. The result of giving this double character to the promise to pay interest annually will lead, I think, to some difficult legal problems. If the note is to mature at the end of twenty years, and the payee holds it, and allows the interest to accumulate for ten years, and then,

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having indorsed it, sells it, the indorsee must wait for the accumulated interest until the note falls due, because the maker's promise and the indorser's liability in regard to that interest is dependent upon the indorser's liability for the maker's promise to pay the principal, which is still conditional, and for that reason the indorser's liability to pay the accumulated interest is conditional, and will remain so until it is made absolute for the principal; but when the eleventh year's annual interest falls due, the indorsee may at once, by due demand, default, and notice, fix the indorser's liability to pay that year's interest, and may enforce its payment by suit, while the indorser's liability for the payment of the principal from which the year's interest springs, cannot for years be made absolute, and may never be. After the indorser's liability for the payment of the year's interest has thus become fixed by suit, on what legal principles governing *res judicata* could the indorser defend, in a suit brought, without further demand, default, and notice, at the maturity of the note, for the enforcement of the payment of the principal and the ten years' accumulated interest? The only decision relied upon for the holding of my associates is from 16 Blatchf. *supra*. I do not regard that in point. The guaranty was written, instead of implied. The relation of the indorser to the obligation was exceptional, it having been given by its receivers and managers. The interest was expressed in separate coupons, which, for some purposes, are treated as independent obligations. The Statute of Limitations runs on them generally from their maturity. *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 223. In this respect they are unlike the promise in the note to pay the interest annually, as held in *Grafton Bank v. Doe*, 19 Vt. 468. I do not think that the indorsee has the election to fix the indorser's liability for and recover of him annually such yearly interest, or to wait and fix it by proper demand, default, and notice in regard to the principal. I think his liability can only become absolute for the payment of the incident or outgrowth of the debt, when it becomes absolute for the payment of the principal from which that incident or outgrowth springs. The opinion on this branch of the case is made to rest upon the ground that the indorser's undertaking, on due demand and notice, is to make good to the indorsee any failure of the maker to perform the contract, and in that the maker has promised to pay the interest at the end of each year the indorser has likewise so undertaken upon proper demand and notice. But his implied contract, being conditional in regard to the payment of the principal, I think is conditional also as to any incident or outgrowth of the principal, so long as it is conditional in regard to the payment of the principal; and that he only becomes absolutely bound to pay the interest at the end of each year when he becomes bound absolutely to pay the principal. When so bound for the payment of the principal, then his obligation to pay the interest at the end of each year attaches, in respect both to the interest then accrued and the interest which may thereafter accrue. I would modify the opinion in the particular indicated.

PENNSYLVANIA SUPREME COURT.

HENDERSON, HULL & CO., Limited,
v.
PHILADELPHIA & READING R. CO.,
Appt.

(....., Pa.)

Evidence that fires were repeatedly set out by sparks of unusual size from defendant's engines on that part of the line where the property was situated is admissible in an action to recover the value of property alleged to have been destroyed by fire set out by engines which cannot be identified, as tending to show general carelessness on the part of the company, when it has been shown that from the location of the destroyed property and the circumstances of the case the fire probably originated as alleged; but such proof must be confined to conditions existing at or about the time of the loss.

(October 26, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of plaintiff in an action brought to recover damages for the loss of some of plaintiffs' property which was alleged to have been destroyed by fire negligently set out by defendant's engines. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Gavin W. Hart, for appellant:

In order that the case may be given to the jury, there must appear affirmatively at least one of the following facts: (a) that the engine attacked as the cause of the fire threw unusual sparks at the time of passing; (b) such a state of facts in the absence of direct evidence as to its action when passing, that the only reasonable conclusion is that the engine caused the fire; (c) that the engine in fact had no spark-arrester, or one that was defective, such defect causing the fire; (d) there must be evidence, not only of a fire, but that the fire was caused by some negligent act, which act must be shown affirmatively, or be the only reasonable inference from the facts so shown.

Huyett v. Philadelphia & R. R. Co. 23 Pa. 373; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. 379, 91 Am. Dec. 166; *Frankford & B. Turnp. Co. v. Philadelphia T. R. Co.* 54 Pa. 345; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97; *Pennsylvania Co. v. Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co. v. Lacey*, 89 Pa. 458; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644; *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 341; *Albert v. Northern Cent. R. Co.* 98 Pa. 316; *Gowen v. Glaser* (Pa.) 8 Cent. Rep. 109.

When the engines alleged to be in fault are seen, the inquiry is limited to them and them alone. If seen, their actions at any other time are immaterial, and the testimony must be confined to the time in question. Even evi-

NOTE.—The extensive review in the opinion of the court of the authorities on the question involved in the above case makes any further examination of them by annotation seem wholly superfluous.

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dence that the spark arresters are defective is immaterial, if there be no evidence that their action caused the fire.

Philadelphia & R. R. Co. v. Yeiser, 8 Pa. 386; *Philadelphia & R. R. Co. v. Yerger*, 73 Pa. 121; *Erie R. Co. v. Decker*, 78 Pa. 293; *Jennings v. Pennsylvania R. Co.* 93 Pa. 337; *Reading & C. R. Co. v. Latham*, 93 Pa. 449; *Albert v. Northern Cent. R. Co.* 98 Pa. 318; *Pennsylvania R. Co. v. Page*, 21 W. N. C. 52.

The engines in the present case were identified.

Erie R. Co. v. Decker, *supra*.

Mr. P. F. Rothermel, Jr., for appellee: Negligence in the use of defective spark-arresters may be shown by evidence that the sparks thrown or emitted by the engine or engines were unusually large in size, or were the cause of unusual and frequent fires along the line of the road.

Huyett v. Philadelphia & R. R. Co. 23 Pa. 373; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97; *Pennsylvania Co. v. Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co. v. Lacey*, 89 Pa. 458; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644; *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 341; *Gowen v. Glaser* (Pa.) 8 Cent. Rep. 109.

When the identity of the engine which caused the fire is known to the plaintiff, such evidence of negligent construction or management must be confined to the particular engine in question, and no evidence is admissible as to the construction or management of other engines.

Erie R. Co. v. Decker, 78 Pa. 293; *Jennings v. Pennsylvania R. Co.* 93 Pa. 337; *Albert v. Northern Cent. R. Co.* 98 Pa. 316.

When the identity of the engine which caused the fire is not known to the plaintiff, and he cannot therefore prove it defective by direct evidence, the negligence of the defendant and inferentially the defect of the locomotive causing the fire may be shown by evidence tending to prove the habitual use of defective spark-arresters on the engines of the defendant road.

Pennsylvania R. Co. v. Stranahan and *Gowen v. Glaser*, *supra*.

These last two cases are sustained by rulings in every state of the Union, where the subject has come before the courts for consideration.

Shearm. & Redf. Neg. § 675; *Wharton, Neg.* § 871; *Thomp. Neg.* p. 169; *Grand Trunk R. Co. of Canada v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Piggot v. Eastern Counties R. Co.* 3 C. B. 229; *Sheldon v. Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Field v. New York Cent. R. Co.* 32 N. Y. 389; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 889; *Cleveland v. Grand Trunk R. Co. of Canada*, 42 Vt. 449; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 358; *Smith v. Old Colony & N. R. Co.* 10 R. I. 22; *Longabaugh v. Virginia City & T. R. Co.* 9 Nev. 271.

Clark, J., delivered the opinion of the court:

This action was brought to recover dam-

ages for the destruction by fire of the plaintiff's sash and door mill at Montgomery, in Lycoming county. The mill was situate between the Pennsylvania and Philadelphia & Reading Railroads; the former passing in front, and the latter in the rear, of the mill. The plaintiff alleges that the fire, which occurred on the 10th day of August, 1888, was communicated from sparks emitted by the defendant's engines. The fire was discovered about 6:15 o'clock P. M., in the upper part of the ventilator in the side next the defendant's road. The ventilator was about thirty feet high, and was within twenty-two feet of defendant's road. The watchman testifies that he came on duty that evening about fifteen minutes before shutting down time, and that the mill shut down at about 5:30 P. M. mill time, or 5:15 railroad time; that after he came on duty, and before the fire, two trains passed,—the first a coal train, going north, drawn by an engine which he could not identify; and, about fifteen minutes later, a freight train, drawn by engine No. 72. The defendant's evidence, however, showed that two other engines, drawing passenger trains, passed this point, one at 5:21 and the other at 5:22 P. M., neither of which engines was identified; indeed, it would seem that the plaintiff did not know they had passed the mill until the fact was developed in the defendant's testimony. The watchman testifies, further, that it was his duty to take notice of the engines as they passed, to see whether they threw fire from the stacks; that he did watch the engine in front of the coal train, and also engine No. 72, and that he saw no sparks; but that, as it was only 6 o'clock, and the sun was shining brightly, there may have been sparks emitted which he did not see. The only engine known and identified was No. 72. The defendant's contention was that the fire occurred in the pit containing the shavings and *débris* of the mill, which was immediately underneath the ventilator, and from which the shavings, etc., were supplied as fuel to the furnace. There is a large volume of testimony bearing upon the origin and cause of the fire, upon consideration of which the jury found the fire to have been caused by sparks from the defendant's locomotive engines.

The Philadelphia & Reading Railroad Company, at the time of the injury complained of, was an incorporated company, entitled to the right of way for its engines, etc., upon its track, as located in the rear of the plaintiff's mill. The company, in the proper use of its road, was therefore in the lawful pursuit of a legitimate business, and, if injury resulted to the plaintiff, it is *damnum absque injuria*. The company cannot be mulcted in damages except upon proof of negligence. *Frankfort & B. Turnp. Co. v. Philadelphia & T. R. Co.* 54 Pa. 345; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97. No person is answerable in damages for the reasonable exercise of a right, when the act is done with a cautious regard for the rights of others, and where there is no ground for the charge of negligence, unskillfulness, or mal-

ice. For the ordinary risks the land-owner is compensated in the damages for right of way. Negligence therefore, is the gist of the action, and the burden of proof is upon the plaintiff to establish it. And as all engines, whether provided with spark-arresters or not, emit sparks, the mere existence of a fire along the line of the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge either of negligence or want of skill. *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 366.

In *Jennings v. Pennsylvania R. Co.*, 93 Pa. 340, this court, in a *per curiam* opinion, said: "To hold that the fact of the fire having taken place was *prima facie* evidence that the spark-arrester was defective, and therefore that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-arrester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a large one, it depending very much on the dryness or humidity of the atmosphere whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to be easily ignited." See also *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 344; *Reading & O. R. Co. v. Latshaw*, 93 Pa. 449. While any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvements in its management in general use shall be applied to it. *Frankfort & B. Turnp. Co. v. Philadelphia & T. R. Co.* 54 Pa. 345.

It is the duty of the railroad company in the use of an engine, to use such reasonable precaution as may prevent damage to the property of others. Hence in *Lackawanna & B. R. Co. v. Doak*, 52 Pa. 379, 91 Am. Dec. 166, where, although there was no direct evidence that the building was fired by the engine, or that sparks were emitted from it at the time, yet the building was near the railroad, and was discovered to be on fire when the train passed and it was shown that the engine had no spark-arrester, it was held the question of negligence was properly submitted to the jury. The effect of this ruling was to establish the principle in Pennsylvania that in case of loss by fire, fairly attributable to sparks from a railroad company's locomotive engine, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company. It is the duty of railroad companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard or generally approved invention to lessen the danger. But mechanical invention and skill have all provided a merely partial protection against the emission of sparks. The mere fact that sparks are thrown from the stack of an engine is not, therefore, evidence in itself of negligence. Where, however, sparks of large size are emitted, which carried to a long distance set fire to fields, fences, or buildings, it may, in the present condition

of this branch of mechanical invention, well be inferred that the engine is not provided with a sufficient spark-arrester. *Philadelphia & R. R. Co. v. Hendrickson, supra; Pennsylvania Co. v. Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co. v. Lacey*, 39 Pa. 458; *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 341. Therefore, in an action for the recovery of damages for the destruction of a dwelling seventy-seven feet distant from the railroad, where it was shown that sparks were seen flying from engines to a distance of more than fifty yards, and fences and fields were set on fire in several places about the same time, and at considerable distance from the road, the question of negligence, it was held, should have been submitted to the jury. Although the company gave evidence to the effect that their engines were in good order, and were all provided with good spark-arresters, the unusual distance to which the sparks were borne and the numerous fires they created, were held to be such evidence to the contrary effect as to have carried the case to the jury. *Huyett v. Philadelphia & R. R. Co.* 23 Pa. 373.

Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified the evidence should be confined to the condition of that engine, its management and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. *Erie R. Co. v. Decker*, 78 Pa. 293. In the case cited, the house of the plaintiff, which stood near the track of the defendants' railroad, was destroyed by fire on the 6th of March, 1872. The plaintiff alleged that the fire originated from sparks thrown from locomotive engine No. 458, belonging to the defendants, which passed his house about the time the fire commenced, and that the throwing of the sparks was from the negligence of the defendants in not having their apparatus in proper order.

Mr. Justice Gordon, in the opinion of the court, says: "It appears from the evidence, and it was conceded in the argument, that the only locomotive that could have fired the premises in question was that numbered 458, in charge of Alfred Carpenter as engineer. It follows, therefore, that the condition of this engine and its management were all that were legitimately before the court. If it was properly constructed as to its furnace and smoke-stack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though the building were burned by fire accidentally issuing from it. *Lackawanna & B. R. Co. v. Doak*, 52 Pa. 379, 91 Am. Dec. 166. If, then, this engine was in a proper condition, it mattered not that every other engine owned by the company was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if this engine was dangerous in this respect, it was of no consequence that all others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging

to this company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending, and should have been excluded."

So, in *Albert v. Northern Cent. R. Co.*, 98 Pa. 316, where it appeared that the plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, both of which were identified, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. "The evidence below," said our Brother Paxson in that case, "established the fact that, if the plaintiff's property was destroyed by fire communicated by defendant's locomotive, it was done by engine No. 21 or engine No. 126, and by no others. Hence it is entirely clear that evidence that other engines, upon some other day, threw out an unusual amount of large sparks and live coals, was immaterial, and, if received, could only have confused, and might have misled, the jury; nor would it have been evidence to show that the spark-arresters on engines 21 and 126 were out of order." That is to say,—for the last sentence is, perhaps, a little obscure,—the fact that other engines, at other times, threw out an unusual amount of large sparks and live coals, would not have been evidence to show that the spark-arresters on engines 21 and 126 were out of order. To the same effect is *Jennings v. Pennsylvania R. Co., supra; Annapolis & E. R. Co. v. Gantt*, 89 Md. 124; and other cases that might be cited.

Of course, the inquiry in all such cases is as to the existence or condition of the spark-arrester at the precise time of the injury; but, in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence. In *Philadelphia & R. R. Co. v. Schultz, supra*, it was shown that every day for two weeks a particular engine had been observed to throw out quantities of unusually large sparks, and had fired property along the line of the railroad. In *Albert v. Northern Cent. R. Co., supra*, it was shown that both engines then in question had done this for some time before the occurrence. To the same effect, also, is *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644. Testimony tending to show that other fires were set by the same engine about the same time, however, is the proper rule, and is undoubtedly competent. *Boyce v. Cheshire R. Co.* 48 N. H. 627; *Grand Trunk R. Co. of Canada v. Richardson*, 91 U. S. 454, 23 L. ed. 356. But when the loss or injury is shown to have been caused, or, according to the proof, may have been caused, by sparks from an engine unknown and unidentified, or by one of several engines, some of which are unknown and unidentified, then the rule

of evidence is necessarily somewhat enlarged. The burden of proof in all such cases, in the first instance, is upon the plaintiff to show that the fire in question was communicated from the defendant's engines. "It devolves upon the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over defendant's railway, and the evidence may be wholly circumstantial; as—*First*, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and, *second*, facts tending to show that it probably originated from that cause, and from no other." 8 Am. & Eng. Encyclop. Law, 7. And, although the rule is otherwise in England and in many of the states, in Pennsylvania, as we have said, the additional burden is upon the plaintiff to prove negligence in the construction or management of the engine. It is not required that the fact be established by direct or positive proof. It, like any other fact, may be established by circumstantial evidence; and, on account of the great difficulty in proving negligence in such cases, any proper evidence from which negligence may be inferred is sufficient to throw the burden on the defendant. "A slight presumption of negligence, however, raised by the plaintiff's case," says Mr. Wharton in his Law of Evidence, (sec. 871,) "is sufficient to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive and affirmatory evidence. There may be no direct proofs of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained; and when this is so, the defendant must disprove negligence by showing that he exercised care."

In Thompson on Negligence (p. 159) it is said: "The business of running railroad trains suggests a unity of management, and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. The rule is adopted in England, and prevails in all the states, with one, or possibly two, exceptions. More particularly, it may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the trains which the company were running past the location of the fire were so managed, in respect to their furnaces, as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage

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occurred, without showing that they were under the charge of the same driver, or were of the same construction as the one occasioning the damage."

The rule is more precisely stated in Shearman & Redfield on Negligence, (sec. 675,) as follows: "When the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. If the engine which emitted the fire is identified, then evidence on either side as to the condition of other engines, and of their causing fires, has been held irrelevant, but not so if it is not fully identified."

In our own case of *Pennsylvania R. Co. v. Stronahan*, 79 Pa. 405, the evidence was that, between 2 and 3 o'clock in the afternoon, the plaintiff's barn, which was about 150 feet from the railroad, was discovered to be on fire. Two trains had passed about noon. The fire appeared to have commenced at the fence on the road, and burned over the field to the barn. The sparks falling set fire in many other places along the road. The engine from which the sparks were alleged to have been thrown was unknown and unidentified, and the plaintiff proposed to show by a witness, who lived nineteen miles distant on the line of the railroad, the extent to which the locomotives on that road going east, on or about the time of the occurrence, threw sparks from the smokestacks. The testimony was admitted. The witness testified that it was "a common occurrence for the engines to throw sparks, and set fire, for rods from the railroad track. They were from a pea to a walnut in size. It appeared worse sometimes than others. They were usually freight trains; sometimes passenger trains," etc. The admission of this testimony was assigned for error here. In a *per curiam* opinion, this court said: "This was not a case where a certain engine had thrown out the sparks which set fire to plaintiff's barn; but it was where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire. It therefore became necessary to establish the fact by such proof as rendered the belief a certain fact. This could be done, not by the proof that a certain engine emitted the sparks incessantly; for *non constat* that this particular engine had passed the plaintiff's premises that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent, and permitted to be done by a number of engines."

In *Goren v. Glaser* (Pa.) 3 Cent. Rep. 109, the action was for damages for the destruction by fire of the plaintiff's rags, which were scattered in a field adjoining the defendant's road. The allegation was that they were set on fire by sparks from the defendant's engines, but it was not known by

what engine. The offer made was as follows: To show that several engines on this road had insufficient sparks-catchers; that the engines of this road had repeatedly set fire to property and to vegetation along that part of the track very shortly before and very shortly after this occurrence; that sparks as large as a hickory nut escaped in large quantities from the engines, causing these fires; that, after this fire, what remained of the rags, and what was saved, were spread on the field, and watched day and night, and that they were set on fire repeatedly by the engines passing on this road. This offer was received to show by circumstantial evidence that the damage was done by some engine with an insufficient spark-arrester. The jury were to infer from the fact that many of the company's engines, about the time of this occurrence, shortly before and shortly after, emitted sparks of unusual size and quantity; that they were without sufficient spark-arresters; and that, upon consideration of all the evidence, the injury complained of resulted from some one of the engines thus imperfectly constructed. The offer was subsequently enlarged by adding to it a proposition to prove, not that the whole number of defendant's engines were defective, but that the defendant habitually used engines with defective spark-arresters. The offer, as a whole, was admitted, and in this court was assigned for error. In a *per curiam* opinion, this court held that there was no error in the admission of this offer.

In *Pennsylvania R. Co. v. Page* (Pa.) 11 Cent. Rep. 424, the action was for burning the plaintiff's barn, 150 feet distant from the track. The evidence was that the company's trains had passed the barn shortly before the fire broke out, emitting cinders, smoke, and small sparks about the size of a pea. There was no evidence, direct or circumstantial, to justify the jury in finding that the sparks were of any larger size. It was further shown that the wind was blowing from the track towards the barn and that sparks had been known to have been blown that distance. It was not shown that any spark-arrester in use would effectually prevent the emission of sparks of this size. While the evidence was, perhaps, sufficient to satisfy the jury that sparks from the engine had caused the fire, there was no proof of any defect in the spark-arresters; on the contrary, it was shown they were in perfect condition. There was therefore no proof of negligence or mismanagement; and it was upon this ground that we said it would have been the duty of the court below, if a proper request had been made, to have instructed the jury to find a verdict for the defendant.

The same rule of evidence is announced in *Grand Trunk R. Co. of Canada v. Richardson*, 91 U. S. 454, 23 L. ed. 356. The saw-mill, etc., of Richardson, the plaintiff, was burned on the 7th of June, 1870. The evidence tended to show that the fire was communicated from one of two engine belonging to the company,—the first, drawing a passenger train westerly, passing the mill about half past 1 o'clock in the afternoon;

the other drawing a freight train easterly, passing it about 4 o'clock the same afternoon. One half to three fourths of an hour after the last mentioned train passed by the mill, the fire was discovered burning on the westerly end of a covered railroad bridge from which it was communicated to the saw-mill. The evidence of the plaintiff in error tended to show that the fire was not communicated by either of the engines complained of, but, on the contrary, from a constant fire at the end of their tram-way, about 163 feet down the stream, on the same bank of the river, maintained at the westerly end of the railroad bridge for the purpose of burning edgings, sticking, slabs, and other waste material from the saw-mill. After the company had rested its case, Richardson was allowed to prove that at various times during the same summer, before this fire occurred, some of the company's locomotives in an unusual manner scattered fire in passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question were among the number, or that they were similar in their make, state of repair, or management to said locomotives. The engines were unknown and unidentified. Mr. Justice Strong, in ruling upon this question, said: "The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that at various times during the same summer, before the fire occurred some of defendant's locomotives scattered fire when coming past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission, as rebutting, was within the discretion of the court below, and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were caused by any of defendant's locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility and the consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company;" citing *Piggot v. Eastern Counties R. Co.* 3 C. B. 229; *Sheldon v. Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 389; *Cleeland v. Grand Trunk R. Co. of Canada*, 42 Vt. 449; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 358; *Smith v. Old Colony & N. R. Co.* 10 R. I. 22; *Longabaugh v. Virginia City & T. R. Co.* 9 Nev. 271.

In *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155, the plaintiff gave

evidence which tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus; that shortly before the fire, sparks and fire had been thrown from the engines used by the defendants, in running their trains through the witness's premises, a greater distance than this building stood from the track of the railroad; and that he had picked up from the track, after the passage of trains, lighted coals more than two inches in length. It was argued by the defendants' counsel that the evidence was too remote and indefinite; that it did not refer to any particular engine, etc. *Chief Justice Denio*, in delivering the opinion of the court, said: "This argument is not without force, but at the same time I think is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will therefore generally happen that when the property of a person is set on fire by an engine the owner, though he may be perfectly satisfied that it was caused by an engine and may be able to show facts sufficient, legitimately, to establish it, yet may be utterly ignorant what particular engine did the mischief. It would be practically quite impossible, by any inquiries, to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of operation. I think, therefore, it is competent *prima facie* evidence for a person, seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. It is presumed to be in the power of the company which is intimately related with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place at a particular time before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company, and that, under the circumstances of this case, seems to me to be unavoidable."

We may also refer to the case of *Koontz v. Oregon R. & Nav. Co.*, 20 Or. 3, which was an action to recover damages for the destruction of plaintiff's mill by fire falling from one of defendant's locomotives. What particular engine this was the evidence did not disclose, nor was the plaintiff able to ascer-

tain or make proof of its identification from other engines of the company; but, to strengthen the inference that the burning of the mill originated in sparks from this engine, and to show habitual negligence of the officers and agents of the railroad company, he introduced evidence to show that other engines, of like appearance and construction, frequently scattered fire in large quantities, and set other fires along the track, prior and subsequent to the burning complained of. *Mr. Justice Lord*, in delivering the opinion of the court, said: "On account of this difficulty of identifying a passing engine, especially at night-time, so as to make direct proof of such negligence, and also for the reason, as stated by *Mr. Thompson*, that the business of running railroad trains supposes a unity of management, and a general similarity in the construction of engines, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. Nor is it requisite that the testimony must also show that the engine which it is claimed caused the fire was one of those which had previously or subsequently scattered fire along defendant's track, but it is enough, as was shown, that it is similar in appearance and construction, and under the same general management. Hence it is quite generally held that evidence that sparks were frequently ejected from passing engines, causing fire along its track, on other occasions, is relevant and competent to show habitual negligence, and to strengthen and sustain the inference that the fire originated from the cause alleged. As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine cannot have the effect to make the admission of such evidence error."

In *Field v. New York Cent. R. Co.*, 32 N. Y. 339, the court in speaking of this quality of evidence, says: "At all events, it showed that a practice was indulged in on the part of the company, about the time and near the place, which would have injured the plaintiff's property, rendering it probable, to a certain degree, that the injury was attributable to that cause."

We have quoted extensively from these authorities to show that the rule of evidence referred to, although, perhaps, comparatively new in its application in Pennsylvania, is the rule generally recognized in this country, not only by the text-writers, but by the courts. It may therefore be considered as settled in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as, in the case at bar, it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how

testimony of this character could be excluded. But the objective point of the inquiry is the condition of the passing engines at the time of the occurrence. It is a matter of little consequence what may have been their condition ten years or two years before that; for their precautions against fire, and the management of their engines, may have been greatly changed within that period. It does not follow because the company, in its official management, may have been negligent in this respect at a time so remote that it still remains so. The habits of individuals may, in some sense, be spoken of as fixed habits; but the official control and management of the affairs of a railroad company, as well as the various devices used as precautions against danger, are liable to frequent and radical changes. The line must be drawn somewhere. This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of its kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters. Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. In *Stranahan's Case* the court admitted proof of the extent to which the various locomotives of the company threw sparks on or about the 9th (8th) of November, 1867, when the fire occurred. In *Gowen v. Glaser* the inquiry was as to sparks thrown

and fires set very shortly before and very shortly after the occurrence. In *Sheldon v. Hudson River R. Co.*, *supra*, the inquiry was restricted to matters occurring about the time and near the place of the fire. In *Koontz v. Oregon R. & Nav. Co.* the offer was somewhat more extended in its effects, but we are of opinion that the rule should not be given greater latitude than we have given it.

In the case at bar, the first offer received, and which is the ground of the first specification of error, was as follows: "Plaintiff offers to prove that the property of persons along the line of defendant's road, which passed the property of plaintiff, destroyed by the fire in question on August 10, 1888, and within twelve miles of plaintiff's said property, was repeatedly set on fire by unknown and unidentified engines of the defendant, and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size, to be accompanied by evidence of experts showing that engines throwing sparks of the size of a hickory nut either did not use the most approved spark-arresters in general use, or if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them." This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. The second offer was: "To prove that many of the locomotive engines of the defendant, which it cannot identify, and which passed the plaintiff's mill frequently during a period of six months preceding the fire, habitually threw sparks of the size of a hickory nut, or larger," etc. We are of opinion that the admission of these offers was error. The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable. What has been said disposes of the first, second, and third assignments of error. The remaining assignments are without merit and are dismissed.

The judgment is reversed, and a venire facias de novo awarded.

NEW YORK COURT OF APPEALS.

Bowers H. LEONARD, *Appt.*,

v.

Roble CLOUGH *et al.*, *Resp'ts.*

(.....N. Y.....)

1. A parol reservation of a barn when conveying the real estate of which it is a part by

absolute warranty deed, is ineffectual to retain title in the grantor.

2. A parol gift is ineffectual to transfer title to a barn which is part of the real estate.

3. A remote grantee connected with the immediate grantee by an unbroken chain of warranty deeds has all the rights of the latter to sue the original grantor

NOTE.—In addition to the authorities shown in the report of the above case, we call attention to 16 L. R. A.

the following notes on the general subject of the nature of the fixtures. *Binkley v. Forkner* (Ind.)

for the removal from the real estate of a barn which passed under the original deed.

4. A barn placed by its owner upon his own land becomes real estate although supported by stones resting upon the surface, and it will pass by any conveyance of the real estate.

(May 24, 1892.)

APPEAL by plaintiff from a judgment at the General Term of the Supreme Court, Fifth Department, denying his motion for new trial on case and exceptions heard at General Term in first instance after verdict in favor of defendants, at a Circuit Court for Cayuga County in an action brought to recover damages for the alleged wrongful removal of a barn from the plaintiff's real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Amasa J. Parker, for appellant:

The barn was real estate.

The barn was built by the person, who at the time of building the barn, owned the lot on which the whole of the barn stood; on its erection under such circumstances, it became and remained a part of realty.

1 Washb. Real Prop. 5; *Voorhees v. McGinnis*, 48 N. Y. 283; *Buckley v. Buckley*, 11 Barb. 63.

Between vendor and vendee the mode of annexation is not the controlling test.

McRea v. Central Nat. Bank of Troy, 66 N. Y. 495.

Everything annexed to the realty, whether by physical attachment, or by adaptation of the article to the proper use of the property, becomes a part of it, and cannot be removed without the consent of the owner.

Tyler, Fixtures, 104, 105; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Reil v. Kirk*, 12 Rich. L. 54; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Ombony v. Jones*, 19 N. Y. 239.

By the common-law whatever is affixed to the freehold becomes a part of it, and cannot be removed by the vendor.

Gardner v. Finley, 19 Barb. 320; *Snedeker v. Warring*, 12 N. Y. 170; 2 *Bouvier, Law Dict.* 508, 509.

Every building is an accessory to the soil and is therefore real estate.

1 *Cruise, Dig. title I*, § 46; 1 *Bouvier, Law Dict.* 268.

Every grant of land carries by necessary legal construction buildings, houses, and trees standing thereon.

McRea v. Central Nat. Bank of Troy, 66 N. Y. 489; *Boone*, Real Prop. 306, 307; 3 Washb. Real Prop. 391; 3 *Kent, Com.* 401; 2 *Bouvier, Law Dict.* 40; *Warren v. Leland*, 2 Barb. 618; *Ombony v. Jones*, 19 N. Y. 240.

Every grant shall be conclusive against a grantor.

4 N. Y. Rev. Stat. 8th ed. § 143.

A grantor cannot be permitted to limit the effects of his deed by a proof of parol reservation of the fixtures.

Ellies v. Mawc, 3 East, 38, 2 *Smith, Lead. Cas.* 9th Am. ed. p. 1463; *Noble v. Bostworth*, 19 *Pick*, 814.

A building or permanent fixture attached to the freehold is not the subject of conveyance as personality by the owner of the freehold.

1 Washb. Real Prop. 5, and cases cited.

The parol agreement of reservation was inconsistent with the warranty deed. It must be void.

Taylor v. Millard, 43 *Hun*, 364, aff'd 28 N. Y. S. R. 694; *Wiseman v. Lucksinger*, 84 N. Y. 81, 88 Am. Rep. 479; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652.

The terms of the deed could not be changed by parol.

Mott v. Palmer, 1 N. Y. 572.

A contract for the sale of any interest in lands is void unless in writing.

4 N. Y. Rev. Stat. 8th ed. p. 2589, § 8.

The word "land" is comprehensive in its import, and includes many things besides the earth we tread on, as water, grass, stones, buildings, fences, trees, and the like.

1 *Shep. Touch.* by Preston, 91; 1 *Inst.* 4; 1 *Preston, Estates*, 8; 2 *Bl. Com.* 17, 18; 4 N. Y. Rev. Stat. 8th ed. p. 2461, § 10; *Green v. Armstrong*, 1 *Denio*, 554.

A parol sale or gift of buildings is a mere license.

1 Washb. Real Prop. 632; *Cronkhite v. Cronkhite*, 94 N. Y. 328; *People v. Fields*, 1 *Lans.* 244; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Wiseman v. Lucksinger*, 84 N. Y. 81, 88 Am. Rep. 479.

A man will not be allowed to allege or prove a fact to be different from what he has asserted it to be in his own deed.

The Duchess of Kingston's Case, 8 *Smith. Lead. Cas.* 9th Am. ed. p. 2107; *Huxley v. Heferman*, 8 *New Eng. Rep.* 325, 148 *Mass.* 232; *Knight v. Thayer*, 125 *Mass.* 25; *Russ v. Alpaugh*, 118 *Mass.* 369, 19 *Am. Rep.* 464; *Gregory v. Peoples*, 80 *Va.* 355; 1 *Greenl. Ev.* § 275; *Stephen, Dig. Ev.* 260.

A reservation must be equal to a grant, that is, under the same form and solemnities.

3 Washb. Real Prop. 443.

A parol reservation of any part of the granted premises is void under the Statute of Frauds.

2 Washb. Real Prop. 441.

Messrs. Payne & O'Brien, for respondents:

Parties may, by agreement at the time of annexation, preserve the character of personality to chattels annexed to the land.

Mott v. Palmer, 1 N. Y. 564; *Tift v. Horton*, 53 N. Y. 377, 13 *Am. Rep.* 587; *Voorhees v. McGinnis*, 48 N. Y. 278.

The question whether property so annexed to the freehold or as under ordinary rules to a part of the realty, may be severed so as to become personality, depends upon the intention of the parties.

Chase, Bl. Com. p. 224, notes; *Sheldon v. Edwards*, 85 N. Y. 279.

The parties may by agreement at any time re-impress the character of personality on chattels already annexed to the land.

8 L. R. A. 33; *Hill v. Munday* (Ky.) 4 L. R. A. 674; *Collamore v. Gillis* (Mass.) 5 L. R. A. 150; *Hopewell Mills v. Taunton Sav. Bank* (Mass.) 6 L. R. A. 249; *Overman v. Sasser* (N. C.) 10 L. R. A. 722.
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As to the effect of an agreement between the parties, see especially the notes to *Collamore v. Gillis* and *Overman v. Sasser, supra*.

Such an agreement if executed is valid, although made by parol, and is binding upon all parties except the bona fide purchaser without notice.

8 Am. & Eng. Encyclop. Law, title *Vis-tures*, pp. 58-62.

In all cases where courts have held such an agreement void as against a subsequent purchaser the *bona fides* of such purchaser has clearly appeared.

Stevens v. Rose, 18 West. Rep. 765, 69 Mich. 259; *Tyson v. Post*, 10 Cent. Rep. 712, 108 N. Y. 217; *McLaughlin v. Lester*, 4 N. Y. S. R. 852.

Here was a completed gift by Mrs. Gilbert of her two thirds of the barn in question. The gift was executed because there was all the delivery of which the article was capable—a surrender of possession and dominion.

8 Am. & Eng. Encyclop. Law, title *Gift*, p. 1515; 2 Kent, Com. *439.

It was allowed to stand upon the lot in question, first by the license of Mrs. Gilbert and afterwards by the license of subsequent grantees. Under that license they could remove the barn.

Dubois v. Kelly, 10 Barb. 496.

The rule excluding parol evidence to contradict or vary a deed is only applied in controversies between the parties to the deed. It can have no application in suits by or against persons who are not parties to the deed, and in no way connected therewith.

1 Greenl. Ev. § 279, and cases cited; Abbott, Trial Ev. p. 464; *Austin v. Sawyer*, 9 Cow. 39; *McMaster v. North America Ins. Co.* 55 N. Y. 234; *Tyson v. Post*, 10 Cent. Rep. 712, 108 N. Y. 217.

† **Earl, Ch. J.**, delivered the opinion of the court:

The material facts in this case are as follows: Prior to March 29, 1884, Adeline Clough owned a lot of land in the city of Auburn, upon which there was a small barn, and on that day she conveyed the lot by an ordinary warranty deed to the defendant Robie Clough, who owned the adjoining lot on the northerly side of the lot thus conveyed. On the 1st day of April, 1884, Robie Clough, by an ordinary warranty deed, conveyed the same lot to her daughter, Mary Gilbert, with the exception of a strip six feet by twelve rods, reserved from the northerly side of the lot. About one third of the barn was upon the strip thus reserved, and thus the dividing line between the two lots after that conveyance ran through the barn, leaving about one third thereof upon the land of Robie Clough and two thirds thereof upon the land of Mary Gilbert. At the time of the execution of the deed by Robie Clough to Mrs. Gilbert, and immediately thereafter, she said to Mrs. Clough and her husband: "Now, pa and ma, the barn is yours. There can nobody interfere with you;" and Robie Clough and her husband have ever since been in the occupancy of the barn. On the 28th day of October, 1886, Mrs. Gilbert, by an ordinary warranty deed, conveyed the lot to Julia M. Sherwood, and at the time of that conveyance Mrs. Sherwood was informed that the barn belonged to Mrs. Clough, and there was a parol reservation of the same. On the 1st day of November,

1886, Mrs. Sherwood, by an ordinary warranty deed, conveyed the lot to Mrs. Eunice Nellis, and at the time of that conveyance Mrs. Nellis was informed by parol that Mrs. Clough owned the barn, and that it did not pass. On the 8th day of November, 1888, Mrs. Nellis, by an ordinary warranty deed, conveyed the lot to the plaintiff, and at the time of that conveyance he was informed by parol that the barn belonged to Mrs. Clough, and did not pass with the conveyance. After he had purchased the lot, Mrs. Clough informed him that she claimed the barn, and intended to move it from the lot, and he told her not to move it. After that the defendants moved the barn from the lot, and then the plaintiff brought this action to recover for the value of so much of the barn as stood upon his lot, and claimed to recover treble damages. The barn was a wooden structure, worth less than \$200, and rested upon four large stones at the corners, and smaller stones at other places. Upon the trial the plaintiff objected to the parol evidence given by the defendants to show the parol reservation of the barn at the times of the several conveyances of the lot. But the court overruled the objections, and received the evidence. The court below held that the evidence was competent; that the barn, after the conveyance by Mrs. Clough to her daughter, became and remained personal property, and that she had a lawful right to remove the same, and judgment was entered upon the verdict in favor of the defendants.

We think a few plain principles of law require a reversal of this judgment. This barn, at the time of the conveyance by Mrs. Clough to Mrs. Gilbert, was a part of the realty, and there could be no parol reservation of it. The grantor could no more reserve the barn by parol than she could reserve trees growing upon the land, or a ledge of rocks, or a mine, or a portion of the soil. As between the grantor and grantee, it is very clear that the grantor would not have been permitted to show that the barn was reserved by parol, as that evidence would have contradicted the deed, which was absolute in form. If the grantor had removed the barn, the grantee could have sued her for trespass, and she could not have defended by showing a parol reservation of the barn. If it had been claimed in such a suit that it was part of an oral agreement or reservation that the barn should not pass, that fact could not have been shown, as it would have contradicted the deed. The deed contained covenants of warranty which covered the entire title to the real estate, and the grantor could not in such a suit have shown by parol that any part of the real estate was not covered by the covenants. So, too, if it be claimed that what was said by Mrs. Gilbert to Mrs. Clough immediately after the deed was delivered constituted a parol gift of the barn to her father and mother, the gift could not be operative, because the barn at that time was a part of the realty. It had never been severed from the realty, and had never been, by any acts of the parties of the owners, made personal property; and the parol gift could not be upheld of a portion of the real estate without violating the Statute of Frauds. The one third of the barn which rested upon the lot owned by

Mrs. Clough was and remained realty, and it is impossible to perceive how by mere words the other two thirds could be converted into personality. Can trees and other portions of real estate be converted into personality by a mere parol gift, and without severance? It is clear that, after the conveyance from Mrs. Clough to Mrs. Gilbert, the barn remained a part of the realty, and was covered by the deed and the covenants of warranty therein contained; and so the barn passed to each successive purchaser, and no grantor could dispute that the grantee took title to the barn, and thus the title to so much of the barn as stood upon this lot was finally vested in the plaintiff. All the deeds contained covenants of warranty. Those covenants run with the land, and each successive grantee could have the benefit of all the prior covenants. The plaintiff is in privity of estate with Mrs. Clough, and his rights are the same as they would have been if he had been her immediate grantee. He holds under her deed, and in an action by him for a breach of her covenants she could not dispute that the barn was a part of the realty, and in this action against her for removing the barn she cannot dispute that it passed under her deed. His rights are the same as Mrs. Gilbert's would have been if she had disputed Mrs. Clough's right to the barn, and, before she conveyed, had sued her for removing it. A careful scrutiny of the cases cited on behalf of the defendants shows that there is absolutely no authority for their contention in a case like this. If

at the time of the conveyance of Mrs. Clough the barn had been personal property in the ownership of some other person, and the grantees had been notified of that fact, the title to it would not have passed by the successive conveyances. If this barn had been placed upon the lot by some third person with the consent of the owner, and with the understanding that such third person could at any time remove it, it would have remained personal property, and would not have passed to a purchaser under any form of conveyance, providing such purchaser had notice of the fact. But where the land and the buildings thereon belong to the same person, then the buildings are a part of the real estate, and pass with it upon any conveyance thereof. In such a case the grantor can retain title to the buildings only by some reservation in the deed, or by some agreement in writing which will answer the requirements of the Statute of Frauds. Any other rule would be exceedingly dangerous, and would enable a grantor, in derogation of his grant, upon oral evidence to reserve buildings and trees and other portions of his real estate, and thus, perhaps, defeat the main purpose of the grant. For these views the case of *Noble v. Bosworth*, 19 Pick. 314, is a very precise authority.

We are therefore of opinion that the judgment should be reversed, and a new trial granted, costs to abide event.

All concur.

FLORIDA SUPREME COURT.

Noble A. HULL, *Plff. in Err.*,
v.

STATE of Florida, *ex rel.* John F. ROL-
LINS.

(.....Fla.....)

The right of a purchaser other than a state or some governmental agency acting as such, at a sale of land for taxes under a statute which provides that the purchaser or his assignee shall have a conveyance of the land, unless the land shall be redeemed within one year next succeeding the sale, is a contract right; and a statute, passed subsequent to such sale, which proposes to extend the period allowed by the former Act for redeeming the land from the sale, is a violation of the contract, and of no effect as to such purchaser or his assignee.

(May 21, 1893.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of relator, in a proceeding by mandamus to compel the issuance of a tax-deed. *Affirmed.*

The facts are stated in the opinion.

*Head note by RANNEY, Ch. J.

NOTE.—The full and convincing discussion in the above opinion of the authorities on the question involved makes the case an eminently satisfactory one and leaves no need of annotation.

16 L. R. A.

Mr. William B. Lamar, Atty-Gen., for plaintiff in error.

Mr. William B. Owen for defendant in error.

Ranney, Ch. J., delivered the opinion of the court:

The 54th section of the General Revenue Act, approved June 13, 1887, chapter 3681, Laws of Florida, authorized any person claiming land sold for taxes, or any creditor of any such person, to redeem the land, on the terms and in the manner therein stated, "within one year next succeeding the sale;" and the 57th section of the same statute enacted that on the presentation of the certificate of sale to the clerk of the circuit court or his deputy, "after the expiration of time provided by law in this Act for the redemption of land sold as aforesaid, unless the same have been redeemed, he shall execute to the purchaser or his heirs or assigns a deed of the land therein described, unless it shall be shown that the taxes for that year have been paid before the sale."

In the case before us J. C. Greeley bought at a tax-sale made by D. P. Smith, as tax collector of Duval county, on the fifth day of August, 1890, the land mentioned in the proceedings, the same having been sold for the collection of unpaid state and county taxes assessed for the year 1889. Smith, as such collector, issued to Greeley the usual

certificate of sale, bearing date August 5, 1890, and afterwards Greeley assigned the certificate to Rollins, who, on the tenth day of November, 1891, presented the certificate to the plaintiff in error, clerk of the circuit court of Duval county, and demanded that he should execute and deliver to him a tax-deed for the land in accordance with law, he at the time tendering to the clerk his lawful fee for such deed. The clerk refused to issue the deed, and thereupon Rollins applied to the judge of the fourth circuit for a writ of mandamus to compel him to issue it.

The provisions of the 7th and 8th sections of a statute approved June 10, 1891, and entitled "An Act to Provide for Certifying Lands to the Comptroller, upon Which Taxes have not been Paid for the Redemption thereof, and for the Forfeiture and Sale of Land not Redeemed," chapter 4011 of the statutes, are the sole defense made by the clerk to the writ of mandamus issued by the judge.

The effect of preceding sections of this statute is: That after the first day of January, 1892, there should be no sales of lands for either state or county taxes; and that the tax collectors of the several counties should open their books for the collection of taxes on the first Monday in November, 1891, and close them on the first Monday in April, 1892, and do likewise for each succeeding year; and when they shall have closed their books "as now or herein provided," it shall not be lawful for them to receive further moneys remaining due for taxes on land. All lands upon which taxes have not been paid are then to be certified to the comptroller, and clerks of the circuit court, and the comptroller is required to make publication within one year of all lands so certified to him, except such as may have been redeemed before such publication or are not subject to taxation. Redemption in the offices of the comptroller and clerks of the circuit court is then provided for, and the state's title to all lands not redeemed at the expiration of two years from such certification becomes absolute, and the lands are to be placed on sale by the state, subject, however, to the right of redemption at any time after the expiration of the two years from the certification, if the land has not been sold by the state.

The 7th and 8th sections are as follows: "Sec. 7. No deeds, as now provided by law, shall issue upon any tax certificates now outstanding, for two years from the passage of this Act; and any person or persons whose lands may have heretofore been sold for taxes, and to which tax-deeds shall not have been issued at the time of the passage of this Act shall, at any time within two years from the passage of this Act, have the right to redeem said lands by taking the steps now provided by law for the redemption of lands from tax sales.

"Sec. 8. Tax deeds to all lands upon which tax certificates may be now outstanding, and which shall not have been redeemed, as provided in section 7, shall, at the expiration of two years from the passage of this

Act, issue as provided by law at the time of the passage of this Act."

The 9th section provides for the grading and pricing of all lands to which the state may acquire title under the Act; and the 10th section, for the sale of the same and the deed of conveyance of those sold. The 11th section repeals all laws and parts of laws in so far as they may be in conflict with the Act; and the 12th section is that the Act "shall be construed in connection with the General Revenue Law;" such a statute, chapter 4010, having been passed at the same session of the Legislature and approved on the same day.

The question presented for our decision is the validity of the Act of 1891, chapter 4011, in so far as it proposes to extend the time for redemption of the purchase made by Greeley at the tax sale of August 5, 1890. It is contended by the relator that the statute is, both as to himself and to Greeley, unconstitutional and void for the reason that it violates the contract of the sale.

The rights of Greeley and his assignee are contractual and not, as in *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. ed. 446, a matter of mere public regulation or policy, nor a mere matter of law. Greeley's rights arose in a contract of bargain and sale. The land was offered for sale by the state, through its official agent, the tax collector of Duval county, under a statute, the validity of which is not impeached, and a compliance with whose essential provisions as to assessment and sale is not questioned, even if it be that the appellant could raise both or either of such questions in this proceeding. The land was offered for sale under the terms and conditions prescribed by the Act of 1887, (chapter 8681,) and one of these was that he should have a deed of conveyance of the land unless the same should be redeemed within one year next succeeding the sale, by making the payments prescribed. Greeley, on this offer being made at public outcry, bid for the land, and his bid was accepted, and he having paid the amount by law, the formal certificate evidencing the sale to him, and stating that he would be entitled to a deed, if the land should not be redeemed within a year, was issued to him. The entry into the agreement was the act of the parties. The state offered the land for sale, Greeley voluntarily made a lawful bid, and the bid was accepted and then complied with. It was a contract between the state and Greeley, and its terms were embodied in the law then in force. *State v. Foley*, 30 Minn. 850. The terms of the contract, in so far as the rights of the purchaser, and the duties or obligations of the state are concerned, are to be found in the law authorizing the sale, or under which it was made. "But," says Judge Taney, speaking for the Supreme Court of the United States, in *Bronson v. Kinzie*, 42 U. S. 1 How. 811, 815, 11 L. ed. 143, 144, "the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words,

the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract;" and in *Cargill v. Power*, 1 Mich. 369, the decision was that the law in existence at the time a mortgage was executed and delivered was a part of the contract.

The obligation of a contract consists, observes the Supreme Court of the United States, in its binding force upon the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as a measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. *McCracken v. Haywood*, 43 U. S. 2 How. 608, 11 L. ed. 397.

In the case of the sale of land for taxes, which can be authorized only by the state, and to which the right of redemption is a customary, if not inseparable, feature, defining, if not limiting, the rights of the purchaser and continuing those of the defaulting owner, it is to the law existing at the time of the sale that one reasonably must, and to it only that one naturally would, look to ascertain the period of redemption and the rights of the purchaser as to title and possession. The right of redemption from a tax sale is governed by the law in force at the date of the sale. *Merrill v. Dearing*, 33 Minn. 479. That the obligation of a contract to which the state is a party is protected from violation by the state, is settled law. *Cooley*, Const. Lim. *274, 275, and note 2; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 8 L. ed. 162; *Davis v. Gray*, 88 U. S. 16 Wall. 208, 21 L. ed. 447.

That the extension of the time for redemption prescribed by the Act of 1887—one year next after the sale—to two years from the passage of the Act of 1891, or, in other words, from a day in August, 1891, to one in June, 1893, is a material impairment of essential rights guaranteed to Greeley by the contract of sale, and a positive diminution of the duty imposed by the contract upon the state, seems to our minds undeniable in the light of natural justice and common reason. By the contract right to a deed it was intended and implied that upon obtaining the deed he should have the immediate right to the ownership and exclusive possession and use of the land, with all the beneficial incidents of such ownership. This right to have a deed after the fifth day of August, 1891, and the rights incident thereto, were obligations of the contract, and to postpone against the will of the purchaser, or of his assignee, the enjoyment of such rights for even a day, or the shortest period, to say nothing of a period of nearly two years, and this too for the purpose of offering to the owner, or a creditor, during the time the privilege of redeeming,

if he shall see fit to exercise it, is a vital and patent impairment of such obligation. This view is fully sustained by satisfactory authority. Judge Cooley, in his *Constitutional Limitations*, *291, expresses himself as follows: "So a law is void which extends the time for the redemption of lands sold on execution or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for the payment of a promissory note." And the same author, in his work on Taxation, says, that "if the time to redeem has already expired before the passage of the new law, it is manifest such law can have no effect upon the sale; that, the title having become absolute, the Legislature can no more create rights in the land in favor of the former owner than it can in favor of any other person; but if the time for redemption has not expired, and redemption is still open to the owner, the want of power is not so entirely beyond dispute." Observing that in one case, *Gault's Appeal*, 38 Pa. 94, it has been held that the time for redemption might be extended from one to two years, its reasoning being based on the liberal construction which should be put upon redemption laws, he still holds that the decisions to the contrary are based on reasons which are conclusive. "They," he says, "plant themselves upon the principle that the obligation of the contract is inviolable. Now the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy." *Cooley*, Taxn. 2d ed. pp. 544, 545.

In *Robinson v. Howe*, 18 Wis. 841, the decision was that where land has been sold for taxes under a law which provided that the owner might redeem it within a specified time after the sale, it is not in the power of the Legislature by a subsequent Act, although passed before the expiration of that time, to extend the privilege of redemption for a longer period; that to extend it would impair the obligation of the contract; and that an Act proposing to extend the time of redemption does not affect the rights of an assignee of a tax certificate issued before the passage of the Act, although the assignment was made and the tax-deed was executed after the passage of the Extending Act and in the form which that Act prescribed.

In *State v. McDonald*, 26 Minn. 145, land was bought in by the state at a tax sale, and the comptroller, pursuant to the terms of the law under which the sale was made, sold and assigned the certificate of sale. After this assignment was made, the Legislature passed an Act requiring every person holding a tax certificate to present the same to the county auditor at least ninety days be-

fore the expiration of the time to redeem, and the auditor to notify the person in whose name the land was assessed of the time when the period of redemption would expire. Hitchings, the assignee of the certificate, did not comply with this Act, and the relator, the administrator of the owner of the land, claimed, as a consequence of this omission, the right to redeem. It was held that legislation could not by any Act subsequent to the assignment, impair to any extent the right acquired by the assignee to the fee simple of the land subject to the redemption provisions of the law under which the sale was made, and that the subsequent Act could not, without violating the Constitution, be applied to a case where the right under the sale had vested in any person other than the state prior to its passage. The doctrine announced in the case of *Merrill v. Dearing*, 32 Minn. 479, is that the period of redemption can neither be shortened nor extended by legislation subsequent to the sale.

In *Forqueran v. Donnelly*, 7 W. Va. 114, the decision was that a purchaser of a part of a tract of land at a sheriff's delinquent tax sale made in 1860, acquired by the purchase payment of the purchase money and delivery to the purchaser of the sheriff's receipt therefor, the right, if the land was not redeemed, in the manner prescribed by a designated section of the Virginia Code, within two years from the sale, to obtain a deed in the mode and manner prescribed by other sections, with the further privilege to the owner of redeeming after the expiration of one year from such two years if no deed had been made to the purchaser; that the right so acquired grew directly out of the contract of sale made in pursuance of the law under which it was made; that the right was an equitable right or interest entitled, on the failure to redeem, to ripen into a full legal title, and was secured by the provision of the Constitution securing contracts against violations by legislation.

In *Dikeman v. Dikeman*, 11 Paige, 484, 5 L. ed. 207, it was held that where lands have been sold for taxes or assessments during the existence of a law which entitled the purchaser to an absolute deed or to a lease for a limited term, in case the premises were not redeemed within a specified time, it is not competent for the Legislature to extend the time for redemption, and thus to deprive the purchaser of the right to the possession and enjoyment of the premises without providing an adequate compensation to the purchaser for his loss of the use of the premises during such extension. "When," says *Chancellor Walworth* in this case, "Storms became the purchaser of the premises in question, therefore, if these assessments were valid and the sale regular, his contract with the corporation, under the sanction of the law of the state, entitled him to an absolute lease of the premises at the end of the two years, and to the possession and use of the same for the full term mentioned in his certificate of sale; in case the owners of the land, or some person for them, should not redeem the same within two years, as required by the laws

then in force. The question then, which arises under the Act of the 25th of May, 1841, is whether it was competent for the Legislature to extend the time for redemption, for six months at least, beyond the two years; and thus to deprive the purchaser of the possession and use of the premises for a part of the term which he had purchased therein, without any compensation whatever. It is true the 5th section of the Act requires an additional percentage to be paid, in case the owners shall elect to redeem within six months after the service of notice upon the occupant. But such owners are under no obligations to redeem. And there is nothing in the Act requiring them to pay the purchaser the rent of the land, or any interest upon the purchase money, during the time he is kept out of possession, where they neglect or refuse to redeem the premises within the six months. It is perfectly evident, therefore, that the effect of such a law upon the rights of a prior purchaser, who had only purchased a term of one year in the land, would be to deprive him of the half of the value of his purchase, in case the land should not be redeemed at the end of six months. . . . But in deciding upon the constitutionality of a law which is general, and which in its operation may totally destroy the vested rights of other persons, I am not at liberty to declare the law to be constitutional, merely because the injury to one of the parties in the particular case under consideration is comparatively small. For if the law is constitutional in reference to this case it is also constitutional in reference to the purchase of a term of two or three years only: where the purchaser would probably lose the entire benefit of his purchase, and the whole amount paid for the term, by the expiration of such term before the termination of the chancery suit."

We do not understand *Chancellor Walworth* to decide that it would be competent for the Legislature to extend the time for redemption against a purchase made before the passage of the Extending Law, even if such law provided just compensation, but that he was merely pronouncing judgment upon the case before him, including that of the absence from the statute of the specified provision for interest and rental. We fail to perceive the principle upon which the vested right acquired in the property through the contract of purchase could be taken away from one private person and vested in another for his individual use or private purposes, even upon terms of the fullest compensation.

In addition to these tax-sale decisions there are others of convincing analogy. In *Bronson v. Kinzie*, *supra*, a mortgage contained a power to a creditor to sell on breach of the condition, and thereby pay the debt. This power when given was valid under the laws of the state, and it was held that laws subsequently passed, giving the mortgagor twelve months to redeem the property from the purchaser at such sale, and prohibiting the sale of the property for less than two thirds of its appraised value, so altered the remedy of the creditor as to impair the obligation of the

contract, and hence were void as to such mortgage and a sale and a purchase thereunder. See also *McCracken v. Hayward*, *supra*. *Greenfield v. Dorris*, 1 Sneed, 548, adjudged unconstitutional and void as to sales under prior deeds of trust, a statute which provided that "in all sales of real estate thereafter to be made under execution or deed of trust, which by existing laws is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, he shall not be liable for rent from the date of the sale to the time of redemption; and if the purchaser or assignee shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises during the time they were in possession of the purchaser." *Carroll v. Rossiter*, 10 Minn. 174, is a case where, in 1858, and where only one year was allowed to a mortgagor to redeem from a mortgage sale, the plaintiff's grantor mortgaged to the defendant, and in 1861, when a mortgagor was by law allowed three years to redeem from such a sale, the mortgage was foreclosed by advertisement. The sheriff who made the sale gave the mortgagee, who was the purchaser, a certificate stating that the purchaser would be entitled to a conveyance in three years from the date of sale. The court held that right of redemption was governed by the law in force when the mortgage was executed, and that the certificate, nor its acceptance, did not affect the rights of the parties. See also *Goenen v. Schroeder*, 8 Minn. 387.

In *Hillebert v. Porter*, 28 Minn. 496, it was held that an Act of 1878, so far as it applied to mortgages executed prior to its passage and required to be paid, for redemption from sales under the powers in such mortgages, a greater rate of interest than that required to be paid on such redemption by the laws in force at the time of the execution of such mortgages, impairs their obligation and is void. It is proper to note here a remark in the opinion of the court in this case as to certain earlier decisions in that state which might be relied on as conflicting with our views: "*Stone v. Bassett*, 4 Minn. 298, was upon a sale under a decree in an action to foreclose, and the court held the statute regulating redemptions from sales under decrees in force at the time of the sale controlled the right of redemption. . . . The distinction in respect to rights of redemption between sales under decrees and sales under powers are more fully and clearly made by the opinions in *Heyward v. Judd*, 4 Minn. 438. . . . The decision was followed—not because it was approved, but upon the rule of *stare decisis*—twice; in *Berthold v. Holman*, 12 Minn. 335, 98 Am. Dec. 233, and *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243. It is impossible that any property rights now depend on that decision, and for that reason we do not hesitate to express our disapproval of it."

16 L. R. A.

In *Gault's Appeal*, *supra*, which Judge Cooley refers to in his work on Taxation, as one sustaining the power of the Legislature to extend by subsequent legislation, the period of redemption, the passage of the Extending Act intervened the sale and the execution and acknowledgment of the deed. The sale was made by the sheriff under a *leva-ri facias* issuing out of a court in which the judgment had been entered for a municipal paving claim, and it was held that until the deed was made and delivered by the sheriff the sale—which was regarded to all intents as a judicial sale—was liable to be set aside by the court issuing the process, and to which it was returnable and in which the deed was to be recorded: and that so long as the sale was *in fieri*, it could not be called a perfected and completed sale. The court recognizing the rule that the obligation of no contract shall be impaired, whether it be for much or little, yet holds, even conceding there was a contract within the meaning of the Constitution, that the several Acts under consideration constituted a system of remedies for enforcing the taxation power and that the Legislature, whose power to regulate taxation was absolute and exclusive, and extended to seizing and selling to the highest bidder the citizen's property without notice to him, could, in the exercise of this power, and as a part and parcel of such system, pass the Redeeming Act as one of the necessary means to the constitutional end of enforcing the payment of taxes; that the several statutes were the legislative mode of attaining that object, and one of them was as constitutional as the other.

The reasoning of this decision is not satisfactory to our minds. If it be that the judicial feature of the statutory system should distinguish from those in which there is no such feature, then it is only necessary to say that this feature is not a characteristic of our system.

Our conclusion is that the contract rights acquired by Greeley under his purchase would be violated by the extension of the redemption period proposed by the subsequent statute, and that it is not within the power of the Legislature to thus impair them, either as against Greeley or against his assignee, whether such assignment was made before or after the extending statute. This is not a case in which the state was the purchaser at the tax sale and held the certificate at the time of the enactment of the extending statute, and subsequently transferred it. The rule, or the effect of the Statute of 1891, in such a case, or where any governmental agency, as such, holds the certificate at the passage of the statute, is not before us for adjudication. *Typpecanoe County Comrs. v. Lucas*, 98 U. S. 108, 23 L. ed. 822; *Lucas v. Typpecanoe County Comrs.*, 44 Ind. 524; *Essex Public Road Board v. Skinkle*, 140 U. S. 384, 35 L. ed. 446.

The judgment is affirmed.

Dave LOVETT, *Plff. in Err.*,
v.
STATE OF FLORIDA.

(.....Fla.....)

***1. The supreme court entered judgment, on writ of error, reversing a judgment of the circuit court in a capital case and issued its remittitur which was filed in the latter court. Subsequently during the same term of the supreme court it was shown that the transcript upon which it had acted was, on account of a mistake in making such transcript, an entire misrepresentation of the real record of the circuit court, as to the point upon which the judgment of reversal was based, and a motion was made in behalf of the state by the attorney-general, who had relied on the transcript as truthful, and had not participated in the trial in the circuit court, to vacate the entry of the judgment of reversal, and restore the case to the docket of the supreme court. Held, that the supreme court had not lost jurisdiction of the cause, and its entry of judgment should be vacated, and the cause recalled and restored to its docket.**

2. The counsel of appellant party is charged with the duty of bringing to the appellate court a correct transcript of the record of the inferior court, and no advantage can be gained from any action of the former court upon a false transcript, however ignorant the appellant party or his counsel may be of the real status of the record of the lower court, or of the incorrectness of the transcript, or however free from blame the clerk may have been as to the mistakes in the transcript.

(June 9, 1892.)

MOTION by the State for the vacation of a judgment heretofore rendered by this court reversing a judgment of conviction rendered by the Circuit Court for Duval County in a capital case, and for a rehearing upon the writ of error in the case on the ground of omissions from the transcript. *Motion granted.*

The case sufficiently appears in the opinion.
Mr. William B. Lamar, Atty-Gen., for the motion.

Raney, Ch. J., delivered the opinion of the court:

Upon the filing of the former opinion in this cause judgment was entered reversing the judgment of the circuit court of Duval county and remanding the case for a new trial; and our mandate issued, directed to the judge of that court, requiring that such further proceedings be had in the cause as, according to right and justice, the judgment of this court and the laws of the state, ought to be had, and this mandate was filed in the office of the clerk of the circuit court on the 18th day of April. On the 31st day of April, the attorney-general moved for a vacation of our judgment, and for a rehearing of the cause, for the reason

*Head notes by *RANEY, Ch. J.*

NOTE.—On the interesting and important question as to loss of the jurisdiction of an appellate court by issuing a remittitur which is filed in the lower court, the above opinion presents an array

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that what purports to be a transcript of the record of the circuit court on file in this court, and on which we have acted in rendering the preceding decision, is not a true and correct transcript of such record, and that the alleged defects of record upon which the judgment of conviction was reversed by us do not exist, but that the contrary is true; and suggesting a diminution of the record and moving for a certiorari for a return of the entries showing the presence of the accused at the time of the trial, and his arraignment and plea of not guilty. In support of the motion the attorney-general presented and filed a duly certified transcript from the record of the circuit court of Duval county, under the hand and seal of the clerk of that court, which, after showing the presentment of the indictment for murder in the first degree against Lovett in open court, on the 20th day of November, 1891, at the fall term, exhibits also the following entries, of the date indicated at the same term:

November 28, 1891.

State of Florida }
v. } Arraignment. Plea of not
Dave Lovett. } guilty.

Comes T. A. MacDonell, who prosecutes for the State of Florida, and the defendant, Dave Lovett, in his own proper person, and being solemnly arraigned, pleaded not guilty to the indictment, whereupon he was remanded to the custody of the sheriff to await the further action of the court.

December 10, 1891.

State of Florida }
v. }
Dave Lovett. }

Comes now T. A. MacDonell, who prosecutes for the State of Florida, and the defendant being present at the bar, attended by his counsel, [then follow, in the same entry, two orders: one for a special venire for twelve jurors, the regular venire having been exhausted, and after a recital that the special venire was exhausted, another for a venire for ten jurors].

The entry concludes as follows: "The three jurors necessary to complete the panel for the trial of this cause having been accepted, the following named jurors [their names being stated, and there being twelve of them] were accepted and duly sworn according to law for the trial of this cause. And the evidence having been submitted to the jury aforesaid, and having heard the argument of counsel and charge of the court, and returning into court in due form of law, upon their oaths do say: 'We, the jury, find the prisoner guilty as charged in the indictment. J. C. Andreu, foreman.' It is thereupon considered by the court that the defendant be remanded to the custody of the sheriff, to await the further action of the court."

Then follows the entry of sentence on December 14, in the form shown by the statement preceding the former opinion.

Upon the presentation of the motion we re-

of authorities, and a discussion of them which are of very great value, and no annotation on the subject will be attempted

called our mandate, and caused notice of the hearing of the motion to be given to the accused and to the attorney who represented him both in the circuit court and in this court. This attorney, disclaiming any representation of the accused, as his attorney in this proceeding, has volunteered to file, as *amicus curia*, a statement, with authorities, upon the motion, which authorities are reviewed, with others, in the subsequent pages of this opinion.

It is apparent that the state's motion is made during the term of court at which the judgment which it is sought to have revoked was pronounced and entered, and it is a general rule of the common law, that courts have power to either modify or vacate their judgments and decrees during the term at which they were rendered, or while they are *in fieri*. *Freem. Judgm.* 4th ed. § 90; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797. If our mandate had not reached the circuit court before the motion was made, and we had recalled it before it was filed with or received by the clerk, the question before us would be of easier solution (*Burke v. Luce*, 1 N. Y. 239; *Hoack v. Rogers*, 7 Paige, 108, 4 L. ed. 85; *Grogan v. Ruckle*, 1 Cal. 193); still in our judgment the consummation of the issue of the mandate, by its receipt by the court whose judgment has been under review, is not, under the circumstances of this case, a termination of our jurisdiction. It is true we find in some adjudications a statement, in general terms, that this juncture concludes the jurisdiction of the appellate court. In *Martin v. Wilson*, 1 N. Y. 240, a motion was made in the court of appeals to open a judgment of affirmance taken by default at a former term, and "the court held that it lost its jurisdiction of the cause when the remittitur was filed in the court below, and on that ground denied the motion;" and in *Grogan v. Ruckle*, *supra*, the doctrine announced was that the court may, after its judgment has been pronounced, direct a rehearing at any time before the remittitur has been sent to and filed in the clerk's office of the lower court, but after that has been done the jurisdiction of the appellate court to order a rehearing ceases; but the real fact in the case was that the remittitur was improperly sent down after the entry, at the same term, of the order for a rehearing, and it was held that so doing did not deprive the court of its jurisdiction. Again in *Leese v. Clark*, 20 Cal. 388, it is said that the supreme court has no appellate jurisdiction over its own judgments, and cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control, nor recall the cause and reverse its decision; but the court was speaking of the binding effect of a former decision in the same cause. *Martin v. Hunter*, 14 U. S. 1 Wheat. 355, 4 L. ed. 110. The same doctrine was enunciated in *Blanc v. Bowman*, 22 Cal. 23, where a motion was made to set aside an order, made at the same term, affirming a judgment, the ground of the motion being that one of the judges who participated in the decision had not heard the oral argument of the cause. In the decision of this motion, the court, after alluding to the reason of the rule of the court providing that remittitur shall not issue for ten days after judgment, as 16 L. R. A.

being to allow time for applications for rehearings or to modify or set aside the judgment, observes: No excuse is shown why this application was not made within the ten days allowed by the rules of this court, or before the court had lost control of the cause by filing the remittitur in the court below."

The facts of the preceding cases had not called for, it would seem, even an investigation, as to the power of the court to recall the cause under any circumstances after the mandate has been filed in the lower court.

In *Rouland v. Kreyenhagen*, 24 Cal. 53, appeals in two cases were dismissed, at the October Term, 1863, on motion of appellee, because transcripts had not been filed. The rules of the court provided that if the appeal transcript was not filed within the time prescribed, the appeal might be dismissed *ex parte* during the first week of the term, and that such dismissal should be final, and a bar to any other appeal in the same case, unless the appeal should be restored during the same term upon good cause shown and upon notice. An order, made as the court was about to adjourn in October, provided that all motions to reinstate causes dismissed under the rules referred to might be made on the first Tuesday in November following, and directed that remittiturs should not issue till after that time. About the last of November, no motion to reinstate having been made, remittiturs were issued in the two causes mentioned, and filed in the lower courts and judgments were entered thereon and executions issued. On December 20, two justices upon representations made by affidavits, signed an order directing a return of the remittiturs, and that the attorneys for respondents show cause before the supreme court why the orders of dismissal should not be vacated and the causes reinstated on the calendar, on the ground that the orders of dismissal were obtained upon false suggestion and mistake, and improvidently granted, and staying further proceedings in the lower court, and the court vacated the dismissals and reinstated the causes. A petition for rehearing was granted. In delivering the opinion of the court and after holding that the dismissal of the appeal, if not reinstated during the term, was, under the above rules, an affirmance of the judgment appealed from as conclusive and binding upon the parties and the court as a direct judgment of affirmance, and after referring to cases mentioned above, and recognizing the general rule to be that stated by them, it is said that this general rule rests upon the supposition that all the proceedings have been regular and that no fraud or imposition has been practiced upon the court or the opposite party; and that if it appears that such has been the case, the court will assert its jurisdiction and recall the case; that against judgments improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, the court will afford relief after the adjournment of the term, and, if necessary, recall the remittitur and stay proceedings in the court below. That this is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court has not been devested by an irregular or improvident order; that in contemplation of law an order ob-

tained upon a false suggestion is not the order of the court, and may be treated as a nullity; if, under color of such an order, the proceedings have in part (fact) found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and the law agree. The evidence was held, however, not to show that the dismissals were improvidently or irregularly granted, and the orders recalling the remittiturs were vacated, and a reinstatement of the appeals denied.

In *Vance v. Pena*, 36 Cal. 828, an order denying a rehearing was entered, through the mistake of the clerk, when in fact the court had granted a rehearing, and the court adjourned and the remittitur was sent down. At the next term a motion was made to recall the remittitur and reinstate the cause and vacate the order mistakenly entered, and for the entry of the order really announced. In affirming the doctrine of *Roland v. Kreyenhagen*, it is said: "This must be so or intolerable injustice might result. The principle here announced is broad enough to cover the present case. There has been a false order entered by mistake, . . . and upon this false order the remittitur issued. A mistake of this kind stands upon the same principle as a fraud, for it operates as a fraud upon the rights of the party injured by it." The motion was granted. See also *Swain v. Naglee*, 19 Cal. 127.

In *Lightstone v. Laurencel*, 2 Cal. 106, a judgment of affirmance was entered by the supreme court on motion of the appellee, the appellant not appearing; and at the subsequent term appellant moved to set aside the judgment and restore the cause to the calendar, for the reason that no notice of the argument had been served on him, and the court sustained the motion.

Legg v. Overbagh, 4 Wend. 188, 21 Am. Dec. 115, was a case where the decree appealed from was affirmed for default of counsel of appellants to appear and argue the appeal at the time it was duly set down and noticed for argument, such absence of counsel being attributable to sickness. The remittitur was regularly issued and filed in the lower court, and the court for the correction of errors held, on a motion to reinstate, that it had lost jurisdiction of the cause, and had no power to vacate its decree of affirmance; but the doctrine that jurisdiction is not lost, and the case may be recalled, where either the mandate was issued irregularly, or the order or judgment of the appellate court had been irregularly or improvidently obtained, or its judgment has been misconceived and entered erroneously by its clerk, is recognized in the opinions. "When issued irregularly," says Savage, *Ch. J.*, "in contemplation of law the proceedings remain here, and the order or decree made will of course be suspended; the remittitur issued not being considered the act of the court."

The same court previously, in *Waters v. Travis*, 8 Johns. 568, where a decree by default for not answering the petition of appeal had been entered reversing the decree appealed from, vacated its decree, after the record had been remitted to the lower court, and for the

reason that the required notice to answer the petition had not been served on the appellee; and in *Chamberlain v. Fitch*, 2 Cow. 248, it set aside a decree of reversal obtained, on default, in violation of verbal stipulations between counsel, and directed the papers in the cause to be returned by the court of chancery, to which they had been remitted.

In the case of *The Palmyra*, 25 U. S. 12 Wheat. 1, 6 L. ed. 531, there had been a decree in the district court acquitting the vessel and denying any damages for her capture or detention, and both parties had appealed to the circuit court, which court affirmed the acquittal of the vessel, but reversed so much of the decree appealed from as denied damages, and then proceeded to award damages to the complainant for a stated sum. From this decree the United States and the captors appealed to the supreme court, and the cause coming on to be heard, that court, upon an inspection of the record, dismissed the appeal because it did not appear that there has been an ascertainment of the amount of the damages, the court being of opinion that in the absence of a decree ascertaining the amount of damages there was no "final decree," within the meaning of the Act of Congress. At a subsequent term of the court it was made to appear that there had been a final award of damages, and that the error was a mere misprision of the clerk of the circuit court in transmitting an imperfect record, and the court, on motion of the appellants, ordered the cause to be reinstated on the docket. See also *Vicars v. Haydon*, 2 Cowp. 841.

In the case of *White v. Tommey*, 8 H. L. Cas. 49, there was a final judgment in the House of Lords in the year 1850, reversing a decree rendered by the Irish court of chancery in January, 1835, from which decree a former application to appeal had been refused by the house in 1839; and after such reversal, and at the same sitting of the house of lords there was a petition for rehearing, the ground thereof being that the respondents (petitioners) had been taken by surprise, and had not been heard. The judgment upon the petition was that respondents' failure to be heard in the house of lords was their own fault, and that after a final judgment of the house had been pronounced there could not be a rehearing, nor could its judgment be reversed, except by Act of parliament. Subsequently, however, in the same case in the year 1858 (4 H. L. Cas. 318), it was shown by the respondents, on a further petition, that the decree of January, 1835, had been before the house on an appeal taken in 1846, from an order sustaining a demurrer to a bill of review, calling in question the decree of 1835, and had then been specially complained of in the petition of appeal, and that, on such appeal, there had been in July, 1847, a general dismissal of the appeal, and also a special affirmance of the order on the demurrer, but no special mention of the decree of 1835 had been made in the order of dismissal. In the petition of appeal, upon which the decree of reversal was made in 1850, it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and that their lordships had not made any declaration with respect to it," and

that it "had never been adjudicated upon by their lordships." There had been no appearance by respondents since the refusal of an allowance of appeal in 1889, and since then appellant's proceedings had been *ex parte*. The decision of the house of lords in 1853 on the second petition was that the judgment of reversal of 1850 had been obtained by suppression and misrepresentation, and the order allowing the appeal upon which it was rendered, was vacated; and the *Lord Chancellor*, in advising the house of lords, makes the following observations: That the quoted words of the second petition of appeal were "a complete misrepresentation, . . . a fencing or quibbling in a way which your lordships will never permit to any suitor at your bar, . . . it is not in any sense true to say that it appears by the order that it,—the decree of 1835,—was not complained of. All that can be said is that the order is silent about it, if you can treat it as being silent when it dismisses in terms the appeal which did in fact include that decree as a subject-matter of complaint. It appears to me it was a statement well calculated to mislead your lordships. . . . Although in any question decided by this house on appeal the matter is finally settled by the litigant parties, it is always subject to this condition, that if one party has by any misrepresentation,—I will not put it so high as to say by fraud, for I do not wish to use harsh terms, but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the house into an error;—has led it to suppose that something is going on irregularly,—all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting fraud, or the machinery for effecting that which, if not done *per curiam*, would have been a fraud."

Where a case has been heard upon its merits in an appellate court according to its rules of practice, and the judgment of the court has been correctly entered, and the time, if any, allowed by statute or its rules for a rehearing having passed, and, no application for a rehearing having been made, the remittitur issues and is lodged in the lower court, it may well be said that the appellate court has lost its jurisdiction of the cause, and has not power to recall or reconsider it. Under these circumstances it has fairly and duly exercised its appellate functions and exhausted its powers as to the cause. There must be an end of litigation; public policy, as well as the interests of individual litigants, demands it, and the rule just announced is indispensable to such a consummation. There are many such cases: *King v. Ruckman*, 22 N. J. Eq. 551; *Putnam v. Clark*, 35 N. J. Eq. 145; *Browder v. McArthur*, 20 U. S. 7 Wheat. 58, 5 L. ed. 897; *Ex parte Story*, 37 U. S. 12 Pet. 339, 9 L. ed. 1108; *Martin v. Hunter*, *supra*; still they are not in conflict with those in which jurisdiction is held not to have been lost, nor do they fail to recognize this fact or the principles upon which the other decisions are founded.

Illustrative of this is *King v. Ruckman*, where, at a preceding term, the cause had been argued and decided and the remittitur sent down, and a motion for a rehearing was ap-

plied for at a subsequent term. The decision of the court was that after a cause has been heard upon the merits, and the judgment properly entered and the papers remitted to the court below, the court of errors has no further jurisdiction with respect to the case. "It is not pretended," says the opinion, "that the judgment has been taken through deception or mistake, . . ." and, referring to *White v. Tommey*, *supra*, as a case in which the final decree had been revoked by the house of lords on the ground that it had been procured by deception, it is said: "In the practice of this court, therefore, it seems clear that an error in a decree or judgment occurring from fraud or mistake will be rectified. . . . I have no doubt that this court has the power at any time to amend its judgment if it is erroneous by reason of a mis entry of the clerk, or by reason of any other mistake, or that such judgment may be set aside and treated as a nullity if it has been procured by fraud or is the result of misapprehension."

The case before us is one in which a judgment of reversal has been rendered, and improvidently, through mistake, and has been obtained upon a false suggestion; our decision of it is the result of misapprehension, and of an imposition upon the court. A false representation of the record of an inferior court has been brought here in the form of a transcript, duly certified as a true representation of the original, and we have exercised appellate jurisdiction upon it, believing that it was a correct representation of that record; or, in other words, of the case as it appears in the lower court, but now it is shown that, instead of speaking the truth, it is a falsification, and that no such case is or has been there for review by us. It is not pretended that the attorney-general had any suspicion of the falsehood. It is not required of him that he shall ordinarily regard the mere features of a transcript upon which questions of the legality of procedure may be raised, as grounds of suspicion of the correctness of the transcript, and, in response to such suspicion, to make inquiry of the clerk before submitting the cause. He does not participate, except upon the written request of the governor, in trials *à nisi prius*, and usually has no source of information except the transcript. It is also immaterial that the counsel for the prisoner is not charged with the duty of seeing that the records of conviction are correctly entered against his client; still where the record has been entered as showing the prisoner's personal presence at the trial, in the manner appearing from the new transcript before us, the prisoner and his attorney are charged with the duty of bringing to the appellate court a correct or truthful transcript of that record (*Horne v. Carter*, 20 Fla. 45; *Ormand v. Barnard*, 5 Fla. 528; *Bridger v. Thrasher*, 22 Fla. 383); and no advantage can be gained from any action of this tribunal upon an untruthful representation of that record, however ignorant the convict or the counsel may be of the real status of the record, or of the incorrectness of the transcript, and however free from blame the clerk may have been in the mistake characterizing his transcript and certificate. It is of no moment that, as is the case here, there has been between

the clerk and the prisoner, or the clerk and the prisoner's counsel, no fraud or collusion, nor suspicion, nor suggestion of either, in the preparation of the transcript, or in the certificate thereof; and that neither the prisoner, nor his attorney, nor any representative of the prisoner, had anything to do with the preparation of the transcript, other than to ask for it; and that the issuance of the remittitur was entirely regular. The fact still remains that a false record has been brought here on behalf of the convict and a reversal has been obtained in his behalf on it, such reversal being based solely upon its false feature; and this fact is not changed, nor its result modified, by the innocence of the prisoner, his counsel, and the attorney-general, but the extent of the imposition, and of the mistake, is only made the greater. To attempt to take any advantage from the judgment thus obtained would, in view of the innocence of the state, be an attempt at fraud upon the state, and we do not see that it would not be an imposition upon the court, and a fraud upon its jurisdiction, however innocent the mistake upon the part of each and every person connected with the cause, or the obtaining or preparing of the transcript. The appellate jurisdiction of this court is to be exercised over the tribunals subject thereto, only in the causes actually decided by them, and as such causes are shown by their records to be (*Peares v. Jordan*, 9 Fla. 526; *Darden v. Lines*, 2 Fla. 569; *Price v. Sanchez*, 8 Fla. 186; *Jacksonville v. Lawson*, 16 Fla. 321; *Irvin v. State*, 19 Fla. 872; *Zinn v. Dzialynski*, 14 Fla. 43); and it will never permit itself to be misled, by mistake or otherwise, into acting upon any of those tribunals except through the very cause as it may have been decided there and is shown by its records; and when it discovers, as here, that it has been thus misled it will not hesitate to undo the improvident work, however innocent all parties interested may be. The anomalous and mischievous conditions which would arise from a departure from this rule are palpable. The consideration, or reversal, or affirmance, of a judgment or decree upon a misrepresentation of the record of the cause, or upon anything else than the true record of that cause, is entirely outside of the functions or purposes of an appellate court.

This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. We have been misled into reversing a judgment on a false record, into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. In law, the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided, or the writ dismissed on legal grounds. Ostensibly it has passed from use, but only through the means of a misrepresentation, and by the decision of a case which is not shown by the real record, and does not exist; in the eyes of the law, however, decisions or judgments obtained in this manner are not binding on us.

In coming to the above conclusion we have not been unmindful that the state is the actor in the motion, nor failed to ask ourselves if there is in the fact that the cause is criminal in its character, anything which precludes the

Commonwealth from making such a motion. We are aware that this court has decided that the state is not entitled to a writ of error to reverse the judgment of the circuit court quashing an indictment and discharging the accused (*State v. Burns*, 18 Fla. 185); and that the current of authority, in the absence of legislative grant to the contrary, is that the state is not entitled to an appeal or writ of error to a judgment of acquittal in a criminal cause, for even the mere purpose of settling questions of law. The provision of our Constitution, that no person shall be twice put in jeopardy for the same offense, (Declaration of Rights, § 8), does not escape our attention, we also know that it is not the practice for the state to apply for a rehearing here in a criminal cause on account of any error of the court; if any such application has ever been made we are not aware of it; and we certainly assume for the purposes of this decision that such an application is not tenable. Still we find nothing in these considerations that seems to preclude the action now being taken by the state. It is not attempted even to review any judgment on account of an error of the court; for no error has been committed by it; the only thing attempted is to set aside that which, though in the form of a judgment, is, because of the circumstances under which it was obtained, in law, not the judgment of the court upon the true case of the plaintiff in error. It is an entry obtained under circumstances of misrepresentation, for which the plaintiff in error and those acting for him must, in so far as our powers and duties are concerned, be held responsible, and on which the law does not contemplate that we should ever act, and on which we would not have acted had we known of the misrepresentation; and for which blame or laches are not imputable to the state. The state's judgment in criminal causes cannot be the subject of review in this manner; they can be brought in review only upon the records of them, and not upon a falsification of such records; and the state is not prohibited by any principle of law known to us from arresting the reversal which has been made of her judgment upon such false representation. She is entitled to require the party seeking relief from such judgments to bring to the appellate court the record of the cause in which it was obtained, for without this, that cause is not before the appellate tribunal for consideration. Any other doctrine than this must result in the frequent consummation of fraud upon the courts, and its constant encouragement.

Our conclusion is, that the judgment of reversal should be vacated and the cause reinstated on our docket. Whether there may not be cases in which a party would be estopped by his conduct, or by that of his counsel, from claiming benefit from a mistake of this character, is not before us for decision. The circumstances of this case exclude any expression on such point.

The entry of the judgment of reversal heretofore rendered will be vacated, and the cause recalled and restored to our docket for further proceedings, including an application for a certiorari in accordance with the rule of practice governing in such cases.

TEXAS SUPREME COURT.

GULF, COLORADO & SANTA FE R.
CO., *Appl.*,
v.

Richard HENRY.

(.....Tex.....)

A ticket which is good for a continuous passage only does not entitle a passenger, who voluntarily takes passage upon a train which he must be held to have known would not convey him to his destination and who leaves that train at an intermediate point, to be carried the remainder of the journey on the train which he ought to have taken in the first instance.

(May 20, 1893)

A PPEAL by defendant from a judgment of the District Court for Runnels County, in favor of plaintiff, in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Reversed.*

The facts are stated in the opinion.

Mr. J. W. Terry, for appellant:

Even in the absence of any stipulation on the ticket it is good only for a continuous passage, and the passenger is not entitled to disembark from a train upon which he has taken passage at an intermediate point and afterwards resume it again upon another train, but he must inform himself as to what trains run through to his destination and take one of such trains, and hence it was certainly competent for the defendant to contract by stipulation on the ticket that it would only be good for continuous passage, and the plaintiff having traveled on the freight train as far as Brownwood, and disembarked there, and afterwards attempting to resume his journey on a regular passenger train, his ticket was properly refused by the conductor.

Thompson, Carr. 69, 70; *Hutchinson*, Carr. § 575; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 484, 10 Am. Rep. 711; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 20 Am. Rep. 458; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 450; *Wyman v. Northern Pac. R. Co.* 34 Minn. 210, 22 Am. & Eng. R. R. Cas. 402; *Hatten v. Railroad Co.* 89 Ohio St. 375, 13 Am. & Eng. R. R. Cas. 53, and cases cited in note, p. 55. See notes to *O'Brien v. New York Cent. & H. R. R. Co.* 1 Am. & Eng. R. R. Cas. 262; *Auerbach v. New York Cent. & H. R. R. Co.* 6 Am. & Eng. R. R. Cas. 337; *Walker v. Wabash, St. L. & P. R. Co.* 16 Am. & Eng. R. R. Cas. 886; *Texas & P. R. Co. v. McDonald*, 2 Will. C. C. § 168; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95, 18 Am. & Eng. R. R. Cas. 810, and cases cited in note, p. 812; *Little Rock & Ft. S. R.*

Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584; *Howard v. Chicago, St. L. & N. O. R. Co.* 61 Miss. 194; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

It is competent for a carrier, especially in case of an excursion ticket sold at reduced rates, to limit the time in which the ticket shall be used; and in this case it appears, both from the plaintiff's petition and the evidence, that the time limited for the use of his ticket had expired before he presented it for passage to the conductor of the train on leaving Brownwood, and hence the conductor rightfully refused to receive it for passage.

His ticket being invalid for passage upon its face, both on account of the expiration of the time in which it should have been used and the fact that the plaintiff had broken the condition requiring a continuous passage, he was properly expelled by the conductor, and, under such circumstances, it was not proper or competent for the conductor to hear excuses from the plaintiff for his failure to use the ticket in the proper time and in the proper manner.

Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249, 34 Am. & Eng. R. R. Cas. 339, 17 Fed. Rep. 880, 21 Am. & Eng. R. R. Cas. 283; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 43 Am. Rep. 481, 16 Am. & Eng. R. R. Cas. 336; *Hall v. Memphis & C. R. Co.* 9 Fed. Rep. 585, 9 Am. & Eng. R. R. Cas. 348; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277, 8 Am. & Eng. R. R. Cas. 340; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 6 Am. & Eng. R. R. Cas. 322; *Townsend v. New York Cent. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Frederick v. Marquette, H. & O. R. Co.* 87 Mich. 342, 26 Am. Rep. 531; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Downs v. New York & N. H. R. Co.* 86 Conn. 287, 4 Am. Rep. 77; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 490.

Nor was the action of any previous conductor in receiving the ticket for passage binding on the conductor who refused plaintiff's ticket.

Dietrich v. Pennsylvania R. Co. 71 Pa. 484, 10 Am. Rep. 711; *Beebe v. Ayres*, 28 Barb. 276; *Johnson v. Concord R. Corp.* 46 N. H. 213; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 20 Am. Rep. 458; *Keely v. Boston & M. R. Co.* 67 Me. 168, 24 Am. Rep. 19; *Wakesfield v. South Boston R. Co.* 117 Mass. 544; *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45; *Thorp v. Concord R. Co.* 61 Vt. 378; *Hill v. Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101.

Messrs. Powell & Smith, for appellee:

A passenger is "a person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, and whom the railway, in the course of the

NOTE.—For notes on expulsion of passenger generally, see *South Florida R. Co. v. Rhoads* (Fla.) 3 L. R. A. 733; *McGowen v. Morgan's L. & T. R. & S. S. Co.* (La.) 5 L. R. A. 817; *Carsten v. Northern Pac. R. Co.* (Minn.) 9 L. R. A. 688, 16 L. R. A.

For conditions in ticket as to the right to ride upon it, see portion of above note in *McGowen Case*, on page 819 of 5 L. R. A., also note to *Fonseca v. Cunard S. S. Co.* (Mass.) 12 L. R. A. 340.

performance of that contract, has received at its station, or under its care."

Patterson, *Railway Accident Law*, § 210, and cases cited.

The relation of carrier and passenger having been constituted, continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the railway's premises; thus, one who has been accepted as a passenger is entitled to protection as such while he is in the railway's station, journeying on its line, in transit from one means of conveyance to another provided by the railway, and while he is temporarily absent from the cars at a way station for a proper purpose.

Patterson, *Railway Accident Law*, § 220; *Clussman v. Long Island R. Co.* 73 N. Y. 606; *Jeffersonville, M. & I. R. Co. v. Riley*, 89 Ind. 668.

Appellee, on the morning of the 24th day of May, 1888, having been accepted as a passenger upon the proper cars by the agents of appellant, *en route* for the place of destination, specified on said ticket, and having prosecuted his journey as diligently, rapidly, and continuously as he was enabled to do by the means of conveyance furnished him by appellant, under its contract, it was compelled to carry him to the end of his said journey, although the time limited in the ticket may have expired long before said journey had been completed, and if appellant, in the operation of its trains, failed to make proper connections, or failed to run on time, or operated and run its cars, upon which passengers were permitted to be carried, from one intermediate point to another intermediate point, and appellee, a passenger thereon, was retarded in the progress of his journey by reason of such misconnections, delays or unusual short-line runs, it will not be heard to say that appellee's journey was not continuous, and arbitrarily eject him from its cars upon the pretext that the time limited in said ticket, meanwhile, had expired.

International & G. N. R. Co. v. Smith, 62 Tex. 252; *St. Louis, A. & T. R. Co. v. Macchie*, 1 L. R. A. 667, 71 Tex. 491; Patterson, *Railway Accident Law*, §§ 210-220.

Stayton, Ch. J., delivered the opinion of the court:

Appellee purchased from appellant a round-trip ticket from Ballinger to Austin and return, on May 18, 1888, limited until the expiration of May 24 following, on which he went to Austin by way of Brenham and the Houston & Texas Central Railway. On the morning of May 24, 1888, after having his ticket properly stamped, appellee went by the railway on which he came to Brenham, at which place it was necessary for him to take a train on appellant's road to reach Ballinger. He, however, did not leave Austin in time to make connection with appellant's train that would reach Ballinger on May 24, which left Brenham at 10:35 A. M. on that day, and in consequence of this he remained at Brenham until 11:50 on the night of that day, when he took a train on regular time for Temple, which place he reached at 8:20 on the morning of May 25, and there remained until 10:45 on the same

morning, when he boarded a mixed train, which was not going to Ballinger; and when he reached Brownwood, under instructions from the conductor of that train, he left it to wait for the regular train for Ballinger, which he boarded, but on failure to pay fare when demanded he was expelled from the car, and, being without money, had to walk to Ballinger. To have reached Ballinger before the expiration of the time to which his ticket was limited, appellee should have left Austin in time to have taken appellant's train No. 1, leaving Brenham at 10:35 A. M. on May 24, and by that train alone could he make continuous passage from Brenham to Ballinger. The movement of trains on appellant's road is thus stated by appellant's general passenger agent, and there seems to be no controversy as to the correctness of his statement: "May 24 and 25 defendant had trains 1, 8, and 47 between Brenham and Temple, and train 11 between Temple and Ballinger, all allowed to carry passengers. It had also train No. 49, a freight, that was permitted to carry passengers between Temple and Coleman, but between no other points. The schedule time was—No. 1, leave Brenham, 10:35 A. M.; arrive Temple, 2:30 P. M. No. 8, leave Brenham 11:50 P. M.; arrive Temple, 3:20 A. M. No. 47, leave Brenham, 1:05 P. M.; arrive Temple, 10 P. M. No. 11, leave Temple, 5:15 P. M.; arrive Ballinger, 12:55 A. M. On May 24 train No. 1 left Brenham 2 minutes late, and arrived at Temple 8 minutes late; train No. 8 left Brenham 5 minutes late, and arrived at Temple 10 minutes late; train 47 left Brenham 12 minutes late, and arrived in Temple 12 minutes late; train No. 11 left Temple 2 hours and 45 minutes late, and arrived at Ballinger 2 hours and 45 minutes late. On May 25, train No. 1 left Brenham on time, and arrived at Temple 12 minutes late; train No. 8 left Brenham on time and arrived at Temple 6 hours and 42 minutes late; train 47 left Brenham, and arrived at Temple, on time; train No. 11 left Temple 40 minutes late, and arrived at Ballinger 80 minutes late. In order to have made a continuous passage from Brenham to Temple, and from Temple to Ballinger, plaintiff should have taken train No. 1 from Brenham to Temple, and train No. 11 from Temple to Ballinger." It seems to be uncontroverted that the ticket on which appellee was traveling was one that entitled him only to a continuous passage from Brenham to Ballinger, and that it was limited to May 24 is conceded. After boarding the mixed train at Temple, appellee presented his ticket to the conductor of that train, who advised him that it was only good for a continuous passage, and prepared to put him off at Belton without punching his ticket, there to await the passenger train bound for Ballinger, but appellee refused to do this, and said he would remain on the train until it was overtaken by the passenger train bound for Ballinger, whereupon the conductor punched his ticket, and returned it to him, and he remained on that mixed train until it reached Brownwood, where he left it, and soon afterwards entered the train from which he was expelled.

The charge of the court, in effect, informed the jury that appellee was entitled to passage to Ballinger on the ticket held by him, notwithstanding the period limited for its use had expired before he was expelled from the train, unless he had lost that right by breaking the passage. The court, however, instructed the jury as follows: "If plaintiff, when he entered defendant's freight or mixed car at Temple, or soon thereafter, was informed by the conductor that said car did not run to Ballinger, and that said conductor offered to return plaintiff's ticket, and allow plaintiff to ride to Belton without canceling any part of said ticket, and that plaintiff voluntarily remained on said car, and offered his ticket to said conductor for cancellation for so much of said distance from Temple to Ballinger as should be made on said car, and, further, that said conductor punched said ticket, to indicate that said ticket had been used for a part of said distance, and that plaintiff, when said train arrived at Brownwood, voluntarily left said car, then said ticket would not be binding on defendant for any other train, and the conductor of such other train would have a right to eject plaintiff from such train unless plaintiff paid his fare; and if you find the above facts from the evidence you will find for the defendant."

Appellant asked an instruction to the effect that plaintiff was not entitled to passage on the train after the time had expired within which he, by terms of his ticket, was required to use it. The court refused this instruction. Appellant also asked an instruction in reference to the duty of appellee, under the contract, to make a continuous passage from Temple to Ballinger, which, in substance, contained the same matter as that contained in the charge of the court upon that subject, but it was more elaborate and informed the jury that it was the duty of plaintiff to inform himself as to the trains on which he could make continuous passage. That charge also informed the jury that the fact that the conductor on the mixed train between Temple and Brownwood permitted plaintiff to travel on his train from the one place to the other would not entitle him to passage on the train from which he was expelled, if otherwise not entitled. This charge was refused.

If the charge of the court before quoted be the law, a new trial should have been granted, for there was no conflict in the evidence, and every material fact made necessary by that charge to relieve defendant from liability was proved. It must be conceded that plaintiff was not entitled to recover if the facts enumerated in the charge given existed, but the inquiry arises whether that charge did not make the defense to depend too much upon information given by the conductor to plaintiff, and upon his voluntary action based on such information. There can be no pretense that plaintiff was induced to go upon the mixed train, which did not run to his place of destination, by reason of any invitation or representation made by any servant of the company, and we understand it to be the duty of a person, situated as was plaintiff, to inform himself whether or not

he could make that continuous passage from Temple to Ballinger, contemplated by his ticket, on any particular train, and the jury should have been so instructed. *Dietrich v. Pennsylvania R. Co.* 71 Pa. 483, 10 Am. Rep. 711. We understand the law, further, to be that the act of the conductor on the mixed train running between Temple and Coleman, in permitting plaintiff to have passage from Temple to Brownwood on that train did not confer any right whatever upon him to have passage on the through passenger train from Temple to Ballinger, and the jury should have been so instructed. *Ibid.*

It being conceded that plaintiff had a right, at most, only to continuous passage over appellant's road, we understand the law to be that he had no right to enter a through train, and thereon have passage for a part of the journey, and then leave it, and again have passage on a following train, by virtue of the original contract and payment. Nor had he any more the right, under the contract for continuous passage, to take a train that could not give him such passage, and this to leave at some intermediate point, and again to enter and have passage on another train that could take him to his destination, even though the latter train may be the one he should have taken in the first instance. *Ibid.*; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 85, 29 Am. Rep. 458; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 535, 6 Am. Rep. 845; *Johnson v. Philadelphia, W. & B. R. Co.* 68 Md. 107; *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 450; *Wyman v. Northern Pac. R. Co.* 34 Minn. 210; *Cleveland, O. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Oil Creek & A. R. R. Co. v. Clark*, 72 Pa. 231; *Drew v. Central Pac. R. Co.* 51 Cal. 425; *Cheney v. Boston & M. R. Co.* 11 Met. 121; *Hatten v. Railroad Co.* 39 Ohio St. 375, 18 Am. & Eng. R. R. Cas. 53.

The contract of the parties must fix their rights, and many reasons are suggested in the cases cited why, in the absence of express contract for continuous passage, such should be presumed to have been within the intent of the parties, and why substantial rights would be denied if such contracts be not enforced. No question arises in this case as to what, within the meaning of such a contract, is continuous passage, when the passenger holds coupon tickets evidencing his right to transit over several roads within the line of an entire journey. The right of plaintiff was to travel, by one continuous journey, from Brenham to Ballinger, on such trains on appellant's road as carried passengers and made connection between these places, and this continuity would not be broken by any delay or change of cars made necessary by the conduct of appellant's business; but when plaintiff voluntarily took passage on a train which he must be held to have known would not convey him to Ballinger, and at a point on the line broke the journey, he must be held to have lost his right to enter another train and to be carried to Ballinger on the original contract, as fully as would he, had he, on the 23d of the month,

come to Brownwood on the regular passenger train bound for Ballinger, and stopped over at Brownwood until the next day.

Cases may arise in which, by accident, misfortune, fault of the carrier, or the misconduct of employés of a carrier of passengers, continuous transit may be interrupted without fault on the part of the passenger, and in such cases the passenger may be entitled to resume his journey, and to be transported as though no interruption had occurred; but no such facts exist in this case. It is insisted that the time had expired, when plaintiff was expelled from the train, during which he was entitled to travel on the ticket, and that the jury should have been so instructed and if the continuity of the journey had not been broken it would be necessary to decide whether, if the journey was begun on appellant's road before the close of May 24, 1888, plaintiff was entitled to complete

it on the subsequent day. The ticket is not found in the transcript,—of its verbiage we are not advised; and, in view of the fact that the question already considered is decisive of this appeal, we do not now deem it necessary to determine whether the construction of such a contract as the petition describes ought to be as appellant contends, which would require the journey to be ended before the expiration of the day named in the contract as its limit, or whether, if the passage was commenced before the expiration of that day, it might be completed by continuous passage afterwards. There are decisions placing the latter construction on such contracts. *Lundy v. Central Pac. R. Co.* 66 Cal. 191, 56 Am. Rep. 100; *Auerbach v. New York Cent. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290.

For the errors noticed the judgment will be reversed, and the cause remanded.

ILLINOIS SUPREME COURT

Lizzie BINGEL, *Appt.*,
v.
Frederick H. VOLZ *et al.*

(.....III.....)

1. A court of equity has no jurisdiction to reform a will.
2. A devise of land in the "northwest"

NOTE.—*Parol evidence of mistake in description of land devised.*

The English authorities from a very early date have given sanction to the principle, that parol evidence is admissible to correct a mistake in the description of either land devised or personal property bequeathed. *Selwood v. Mildmay*, 3 Ves. Jr. 200; *Doe v. Huthwaite*, 3 Barn. & Ald. 632; *Mosley v. Massey*, 8 East, 149; *Thomas v. Thomas*, 6 T. R. 671; *Doe v. Oxenden*, 8 Taunt. 147; *Doe v. Hiscocks*, 5 Mee. & W. 303; *Miller v. Travers*, 8 Bing. 244; *Goodtitle v. Southern*, 1 Maule & S. 299; *Hodgson v. Hodgson*, 2 Vern. 594; *Lingren v. Lingren*, 9 Beav. 358; *Beaumont v. Fell*, 2 P. Wms. 140; *Day v. Trig*, 1 P. Wms. 236.

In the Federal courts it is an established canon of interpretation, applicable alike to deeds, written contracts, and testamentary devises, that extrinsic or parol evidence is competent for the purpose of applying the writing to its appropriate subject-matter; and all courts, in the construction of a will, are controlled, as to the admission of evidence, by liberal considerations. *Bradley v. Washington A. & G. Steam Packet Co.* 38 U. S. 18 Pet. 99, 10 L. ed. 77; *Doe v. Hiscocks*, 5 Mee. & W. 303; *Blake v. Hawkins*, 38 U. S. 325, 25 L. ed. 141; *Maryland v. Baltimore & O. R. Co.* 89 U. S. 22 Wall. 112, 22 L. ed. 714; *Blake v. Doherty*, 18 U. S. 5 Wheat. 362, 5 L. ed. 100; *Smith v. Bell*, 31 U. S. 6 Pet. 75, 8 L. ed. 323; *Clarke v. Johnston*, 85 U. S. 18 Wall. 502, 21 L. ed. 906; *Atkinson v. Cummins*, 50 U. S. 9 How. 485, 13 L. ed. 227; *Wilkins v. Allen*, 59 U. S. 18 How. 393, 15 L. ed. 396; *King v. Ackerman*, 67 U. S. 2 Black. 417, 17 L. ed. 298; *Reed v. Merchants Mut. Ins. Co. of Baltimore*, 95 U. S. 30, 24 L. ed. 349.

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quarter of a certain section of land cannot be shown by parol evidence to mean land in the southwest quarter, as such a change would amount to a reformation of the will.

(March 23, 1892.)

A PPEAL by defendant from a decree of the Circuit Court for Madison County dismissing her cross-bill and granting the relief prayed

Equity has jurisdiction to correct mistakes in wills, only where the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted either to show a mistake or to ascertain the correction. Mistakes which can be thus corrected may be in the names of legatees or devisees, in the description of property, or in other terms. 2 Pomeroy, Eq. Jur. § 871, citing *Re Aird's Estate*, L. R. 12 Ch. Div. 291; *Whitfield v. Langdale*, L. R. 1 Ch. Div. 61; *Barber v. Wood*, L. R. 4 Ch. Div. 885; *Newman v. Pierce*, L. R. 4 Ch. Div. 41; *Wilson v. Morley*, L. R. 5 Ch. Div. 776; *Travers v. Blundell*, L. R. 6 Ch. Div. 430; *Homer v. Homer*, L. R. 8 Ch. Div. 758; *Garland v. Beverley*, L. R. 9 Ch. Div. 213; *Re Nunn's Trusts*, L. R. 19 Eq. 331; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Hardwick v. Hardwick*, L. R. 16 Eq. 168; *McKechnie v. Vaughan*, L. R. 15 Eq. 289; *Re Ingle's Trusts*, L. R. 11 Eq. 578; *Hall v. Litch*, L. R. 9 Eq. 376; *Box v. Barrett*, L. R. 3 Eq. 244; *Hart v. Tulk*, 2 DeG. M. & G. 300; *Campbell v. Bouskell*, 27 Beav. 825; *Taylor v. Richardson*, 2 Drew. 16; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Wood v. White*, 32 Me. 840, 52 Am. Dec. 664; *Jackson v. Payne*, 2 Met. (Ky.) 567; *Goode v. Goode*, 22 Mo. 518, 66 Am. Dec. 630; *Trexler v. Miller*, 41 N. C. 248; *Johnson v. Hubbell*, 10 N. J. Eq. 362, 66 Am. Dec. 773; *Yates v. Cole*, 54 N. C. 110; *McAlister v. Butterfield*, 31 Ind. 25; *Erwin v. Hamner*, 27 Ala. 296; *Machem v. Machem*, 23 Ala. 374; *Nutt v. Nutt*, 1 Freem. Ch. 123.

A court may look beyond the face of the will

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for by the bill in a suit to obtain partition of certain land. *Affirmed.*

The facts are stated in the opinion.

Messrs. Happy & Travous, for appellant:

It is presumed that a testator, when he makes and publishes his will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions, or evidence to the contrary.

Higgins v. Duen, 100 Ill. 554; *Smith v. Smith*, 17 Gratt. 268; *Irwin v. Zane*, 15 W. Va. 646.

When it is shown that the description of the subject of the devise, as it appears on the face of the will, is false in part, courts may look beyond the words of the will,—may place themselves in the position occupied by the testator when he executed the will,—and with the aid of extrinsic evidence, view the testator's

where there is an ambiguity as to the person or property to which it is applicable, but not to enlarge or diminish the estate devised. *King v. Ackerman*, 87 U. S. 2 Black, 417, 17 L. ed. 298.

"As a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of the gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect. 1 Jarman, Wills, 370; Hawkins, 9, 10." *Patch v. White*, 117 U. S. 240, 29 L. ed. 880.

From the earliest period in the history of testamentary law, there has been manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments. Regret has sometimes been expressed at the disposition thus manifested, but the courts have nevertheless continued to countenance that line of judicial policy. It must therefore be accepted and acted upon as an established rule of construction at the present time. *Cleveland v. Spilman*, 25 Ind. 96; *Brownfield v. Brownfield*, 12 Pa. 138; *Wilkins v. Allen*, 59 U. S. 18 How. 385, 15 L. ed. 396.

O'Hara, in his work on the Interpretation of Wills, on page 374, concludes his review of void testamentary gifts as follows: "The question whether an uncertainty of the description of the subject or object of a gift by will can be cured or not by parol, resolves itself into the ulterior inquiry, Is the ambiguity so patent as that the testator shows that he was aware of it, and that he was leaving a part of his will undeclared in writing? As this is very rarely the case, it follows that at the present day hardly any case of uncertain or erroneous description in a will can occur which may not be remedied by parol."

Where the description of the subject-matter of the devise is mistaken, parol evidence has been admitted to aid the construction, by showing to what the testator must have referred. As where, on a devise of a house and lot in Fourth street, Philadelphia, it appeared the testator had no property in Fourth street, but did own a house and lot in Third street, in that city, it was held such property passed under the devise. And where the devise was of "thirty-six acres, more or less of lot 87 in the second division in Barnstead," and there was no such lot in the second division in that town, but the testator owned a portion of lot 87 in that division, it was held to pass under the devise. 1 Redfield, Wills, p. 584, citing *Allen v. Lyons*, 2 Wash. C. C. 475; *Riggs v. Myers*, 20 Mo. 289; *Cleveland v. Spilman*, 25 Ind. 96; *Winkley v. Kalme*, 32 N. H. 268; *Redfield, Am. Cases on Wills*, 547. See also *Jackson v. Goes*, 18 Johns. 518, 7 Am. Dec. 399; *Pritchard v. Hicks*, 1 Paige, 270, 2 L. ed. 643; *Pinson v. Ivey*, 1 Yerg. 236; *Wusthoff v. Dracourt*, 3 Watts, 243; *Gass v. Ross*, 8 Sneed, 211; *Doe v. Roe*, 1 Wend. 541; 16 L. R. A.

Storer v. Freeman, 6 Mass. 440, 4 Am. Dec. 155; *Watson v. Boylston*, 5 Mass. 417; *Tudor v. Terrel*, 2 Dana, 49; *Hand v. Hoffman*, 8 N. J. L. 86; *Breckenridge v. Duncan*, 2 A. K. Marsh. 61; *Haydon v. Ewing*, 1 R. Mon. 118; *Capel v. Roberts*, 8 Hagg. Eccl. 156.

Elsewhere the same author says: "The admission of parol evidence in regard to wills is essentially the same as that which prevails in regard to contracts generally. It can be received to show the intention of the testator, and especially to enable the court, where the question arises, to give his language such an interpretation as it is reasonable to presume, from the circumstances in which he was placed, he intended it should receive, or to put the court in the place of the testator." 1 Redfield, Wills, 496; *Scott v. Nevees*, 77 Wis. 305.

"The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." *Wigram, Wills*, p. 161; *Gilmer v. Stone*, 120 U. S. 588, 30 L. ed. 734.

The reasoning which sustains the admission of parol evidence to correct a misdescription as to the particular individual intended in a bequest would seem to apply with equal force when such evidence is introduced for the purpose of determining the particular piece of property devised. Thus a mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty. *Smith v. Smith*, 4 Paige, 271, 3 L. ed. 432.

In *Button v. American Tract Soc.*, 23 Vt. 336, neither of the claimants answered the description, and neither came any nearer to it than the other, but the will was construed with the aid of extrinsic circumstances. *St. Luke's Home for L. C. F. v. Aged Indigent Females Asso.* 52 N. Y. 191.

And it has been held that when the will contains two inconsistent descriptions extrinsic evidence may be resorted to to ascertain which is the true description; and where there is a latent ambiguity, as, if the object of the testator's bounty or subject of disposition is described in terms applicable indifferently to more than one person or thing evidence is admissible to prove which of the persons or things was intended, including declarations of the testator. *Gary's Probate Law*, § 645, citing *Case v. Young*, 8 Minn. 209; *Morgan v. Burrows*, 45 Wis. 211; *Sydnor v. Palmer*, 29 Wis. 226; 1 Redfield, Wills, chap. 9, § 4; 2 Williams, Exrs. pt. 3, bk. 3, chao. 2, § 1; 2 Jarman, Wills, 762.

The purpose for which extrinsic evidence may be legitimately admitted is not to add to or vary, or ordinarily to explain, the literal meaning of the terms of the will, or to give effect to what may be supposed to have been the unexpressed intention of the testator, but to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. *Dougherty v. Rogers*, 3 L. R. A. 847, 119 Ind. 254, citing *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 828, 336.

F. S. R.

affairs as he viewed them, in order to determine the intention of the testator from the language of the will, after excluding what is shown to be false.

Decker v. Decker, 10 West. Rep. 344, 121 Ill. 341; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717.

A latent ambiguity may arise when the will contains a misdescription of the subject, as where the subject as literally described does not belong to the testator; and as this ambiguity only appears from extrinsic evidence, it may likewise be removed by extrinsic evidence.

Patch v. White, 117 U. S. 210, 29 L. ed. 860; *Decker v. Decker*, 10 West. Rep. 344, 121 Ill. 341.

That the court, in construing the will, may occupy the testator's position when he made it, evidence of the state of testator's family; the state of his property; the relations of the testator with those claiming the property, whether friendly or otherwise; the state of his mind and feelings toward them; as to whether reasons existed for preferring some to others; and in short of all collateral facts and circumstances which will enable the court to see and feel as the testator then saw and felt in regard to his affairs and those now claiming his bounty, — is admissible.

Cotton v. Smithwick, 66 Me. 360; *Decker v. Decker*, 10 West. Rep. 344, 121 Ill. 341; *Smith v. Smith*, 4 Paige, 271, 8 L. ed. 482; *Allen v. Lyons*, 2 Wash. C. C. 475; *Winkley v. Kaime*, 32 N. H. 268; *Black v. Richards*, 95 Ind. 184; *Vernor v. Henry*, 3 Watts, 385; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581.

Where there is a latent ambiguity in the devise, the descriptive words of the subject of the devise being in part false, if, after striking so much of the description as is false enough remain in the will, interpreted in the light of surrounding circumstances when the will was made, to identify the premises, the devise will be good.

Merrick v. Merrick, 37 Ohio St. 126, 41 Am. Rep. 498; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860; *Decker v. Decker*, 10 West. Rep. 344, 121 Ill. 341, and authorities there cited.

Messrs. E. F. Springer and Wise & Davis for appellees.

Bailey, J., delivered the opinion of the court:

On the 19th day of August, 1887, John Volz died, leaving him surviving his widow and six children, five sons and one daughter, and also leaving a last will and testament, as follows:

"I, John Volz, of Alhambra, county of Madison, and state of Illinois, farmer, being of sound mind, memory, and understanding, do make and publish this, my last will and testament (hereby revoking and making void all former wills by me at any time heretofore made): (1) I wish my funeral expenses and debts, if any, paid at an early day. (2) I give, bequeath, and devise to my wife, Barbara Volz, all my personal estate, of every nature and kind, wherever situated, during her natural lifetime. (3) I give, bequeath, and devise to my oldest son, John Volz, four hundred

dollars (\$400.00), to him paid by my son Joseph Volz, as hereinafter mentioned. (4) I give and bequeath and devise to my son Peter Volz, one thousand dollars (\$1,000), to him paid by my son Joseph Volz, as hereinafter mentioned. (5) I give, bequeath, and devise to my son Fritz Volz five (\$5.00) dollars, to him paid by Barbara Volz, his mother, out of the personal property, as hereinafter mentioned. (6) I give, bequeath, and devise to my son Joseph Volz my homestead of ninety (90) acres, described as follows, to wit: The south one half of the northwest quarter, containing eighty acres more or less, and also ten (10) acres off of the north side of the north one half of the southwest quarter, adjoining the south one half of the northwest quarter, all in section No. sixteen (16), township No. five (5), range No. six (6) west of the third principal meridian, Madison county and state of Illinois. My said son Joseph Volz to pay my said son John Volz four hundred dollars, and also my said son Joseph Volz to pay my said son Peter Volz one thousand dollars, within two years after my death and that of my wife, Barbara Volz. (7) I give, bequeath, and devise to my son Adam Volz five dollars (\$5.00), to him paid by Barbara Volz, his mother, out of the personal property. (8) I give, bequeath, and devise to my daughter, Elizabeth Bingel, seventy (70) acres off of the south side of the north one half of the northwest quarter of section No. sixteen (16), township No. five (5), range No. six (6) W. of third principal meridian, county of Madison and state of Illinois. (9) My wife, Barbara Volz, to retain or hold her dower in the real estate during her natural lifetime, receiving the rent from said real estate, and to pay the taxes. After her death the before-described real estate to remain as hereinbefore mentioned. In witness whereof I have signed and published and declared this instrument my will, at Alhambra, county of Madison, Illinois, this 13th day of August, A. D. 1887. John Volz. [Seal]"

The testator, at the time of his death, was the owner of 160 acres of land in Madison county, being the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 16, township 5 N., of range 6 W. At that time he did not own, and so far as appears never had owned, the 70 acres off from the S. side of the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 16, which by said will was devised to his daughter, Elizabeth or Lizzie Bingel. Said daughter now insists that, by mistake of the draughtsman who drew up the will, the word "northwest" was inserted instead of the word "southwest" in the devise to her; and that in view of the remaining language of the will, and of the circumstances surrounding its execution, it should be construed as devising to her the S. 70 acres of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section.

Three of the brothers of said Lizzie Bingel executed to her a quitclaim deed of the S. 70 acres of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, reciting in said deed that it was "made for the purpose of removing the latent ambiguity in said will caused by using the word 'northwest' instead of 'southwest' in describing said land in said will." The widow of the testator having died, the two other brothers, Frederick and Adam Volz, filed their bill against their

three brothers and their sister, Lizzie Bingel, for a partition of said S. 70 acres of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, alleging that said tract was intestate estate, and that upon the death of their father it descended to his six children as tenants in common.

The three brothers who had quitclaimed to their sister filed a disclaimer. Lizzie Bingel answered, and filed her cross-bill, alleging that said John Volz, being the owner in fee of the 70 acres off from the S. side of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, by his last will and testament devised the same to her, by the designation and description of "seventy acres off of the south side of the north one half of the northwest quarter of section number sixteen," etc.; that said John Volz, at the time of making said will, was the owner in fee of the 160 acres of land first above described, and no other real estate, and that by said will he devised all of his real estate, except said 70 acres, to Joseph Volz; that at the time of making said will he did not own, or suppose he owned, or expect to become the owner of, any interest in the tract to which the devise to said Lizzie Bingel, taken literally, would apply, and that he intended, by said will, to dispose of all his estate, real and personal, and supposed he had done so; that during his lifetime he was a farmer, and cultivated said 160 acres of land owned by him; that said Frederick and Adam Volz, long prior to the making of said will, went to do and work for themselves, and refused to stay with or assist their father in the cultivation and management of said land, or otherwise, and were disposed to be disobedient, shiftless, and of unsteady habits, and to act in all things against their father's wishes; that John and Peter Volz, two of the other sons, also left their father a few years prior to his death, and went to do and work for themselves, and were, at the time of making said will residing in and engaged in business in the state of Kansas; that Joseph Volz, the remaining son, and the complainant in the cross-bill, although being past their majority, remained with their father and mother, and assisted, worked, and cared for them up to the time of their respective deaths, and that, for a number of years prior to the death of said John Volz, said Joseph Volz and the complainant were the only children who remained with or did anything for their said parents; that said last will and testament was written by Charles Reudy, as draughtsman, at the request of John Volz, and that, as a part of the instructions from said John Volz, said draughtsman was given the deeds by which said John Volz held the land owned by him, from which to obtain the description of the portions of said land to be devised to Joseph Volz and to said complainant, respectively, in writing said will; that in said deeds said lands were correctly described, but that in copying said description therefrom into said will said draughtsman erroneously and unintentionally wrote the word "northwest" instead of "southwest" in describing the quarter of said section in which the land devised to said complainant lay, which error was overlooked, and the said will was so executed, devising said 70 acres so owned by said John Volz to the complainant by said faulty description; that, while on the face of the will

the subject-matter of the devise is clear, yet, by reason of the premises, there arises a latent ambiguity, and a cloud is thereby cast upon the complainant's title to said land; but that, by construing said will in the light of surrounding circumstances, it will appear that said devise referred to and vested in the complainant the lands owned by said John Volz, and not devised to said Joseph Volz, and had reference to no other land or interest therein. Said cross-bill further represented that, in order to remove any ambiguity or uncertainty, or any cloud upon the complainant's title, arising from the failure of the testator to fully and accurately describe said land devised to the complainant, three of the complainant's brothers had executed to the complainant a quitclaim deed of said land, with the proper description. Said cross-bill prays that evidence be heard touching the matters therein alleged, and in aid of the construction of said will, and that the court examine the language of the devise to the complainant in connection with the facts alleged, and construe and interpret its meaning in the light of surrounding circumstances at the time the will was made, and determine and define what lands, if any, the complainant took by said devise, and what land was referred to and intended by the language there used; and decree that said will, by the language employed, devised to the complainant the said 70 acres off from the S. side of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, and that said land is the property of the complainant, and that complainants in the original bill have no interest therein or title thereto.

Frederick and Adam Volz answered denying the equities of the cross-bill; and, the cause coming on to be heard on pleadings and proofs, evidence was introduced by the complainant in the cross-bill substantially supporting the allegations therein contained; and, on consideration of the pleadings and evidence, the court entered a decree dismissing the cross-bill for want of equity, and awarding partition of said 70 acres of land in accordance with the prayer of the original bill. From that decree said Lizzie Bingel now appeals to this court.

The counsel for the appellant, while admitting that equity will not entertain a bill to reform a will, seems to us to be seeking to accomplish essentially the same thing under the guise of an attempt to construe the will. It is admitted that the terms of the devise to the appellant, on their face, are clear and unambiguous, and that they accurately describe a tract of land in existence, and capable of being readily identified, and which, if the testator had owned it, would have passed to the appellant by the terms of the will. But it is insisted that, when extrinsic evidence is applied to the devise, a latent ambiguity is raised, and that such evidence may therefore be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise to the appellant. The purpose of construction, as applied to wills, is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While, in attempting to construe a will, reference may

be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and, with that view, to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed.

On this subject, Mr. Jarman lays down the rule as follows: "As the law requires wills, of both real and personal estate (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition; for it would have been of little avail to require the will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources." 1 Jarm. Wills, 409.

This court has long been committed to this doctrine. This question arose and was carefully considered in *Kurtz v. Hibner*, 55 Ill. 514. There a devise to Elizabeth Kurtz described an 80-acre tract in section 32, and a devise to James Kurtz described a 40-acre tract in section 31. Proof was offered that the testator, at the time of his death, owned but one 80-acre tract, that being described precisely as was the devise to Elizabeth Kurtz, except that it was in section 33 instead of section 32; and also that the devisee had been in the actual possession of said tract for a number of years, and, upon the repeated promise of the testator in his lifetime that he would give her said tract, she had made valuable and lasting improvements thereon at her own expense. Evidence was also offered that James Kurtz, at the time of the death of the testator, was in actual possession of the 40-acre tract as the testator's tenant, and that the draughtsman of the will by mistake inserted the word "one" after the word "thirty," instead of the word "two," thus devising to James land in section 31 instead of section 32. This evidence was excluded, and this court, in sustaining said ruling, said: "The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of the will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received, to enable the court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the court. The devise is certain both as to the object and subject. There are no two objects, no two subjects." The doctrine of this case has been repeatedly

approved and reaffirmed in subsequent cases. Thus, in *Starkweather v. American Bible Soc.*, 72 Ill. 50, it was said: "The courts are so strict that they will not permit the terms of a will to be altered, even when the deviser has, by mistake, misdescribed the land in a devise, by substituting that which could be clearly proved to have been intended." In *Bishop v. Morgan*, 82 Ill. 851, 25 Am. Rep. 327, the testator was the owner of 40 acres of land, being the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section, and by his will he devised to his son the S. E. $\frac{1}{4}$ of said section, "containing 40 acres more or less;" and it was held, on the authority of *Kurtz v. Hibner*, *supra*, that the mistake in the description could not be corrected by reference to extrinsic evidence, and that such correction could not be made by reference to the words, "containing 40 acres, more or less," used in the will. See also *Heslop v. Gutton*, 71 Ill. 528; *Emmert v. Hays*, 89 Ill. 11; *Bowen v. Allen*, 118 Ill. 53, 55 Am. Rep. 398; *Bradley v. Rees*, 118 Ill. 327, 55 Am. Rep. 422; *Decker v. Decker*, 121 Ill. 841, 10 West. Rep. 844.

We are aware that other courts whose opinions are entitled to the highest consideration have gone considerably further than we have been disposed to do in holding that mistakes of the character of the one presented here constitute cases of latent ambiguity which may be explained, and, in effect, corrected by extrinsic evidence. It cannot be denied that decisions which so hold are based upon reasons which are at least plausible, and, if the question were a new one in this state, we might feel disposed to give them serious attention. But the contrary rule has long been in force here, and has become a rule of property, and a change now by judicial construction, which must necessarily be given a retroactive operation, would have the effect of unsettling titles of very considerable value, which rest upon the rule which we have heretofore laid down. We must therefore adhere to our former decisions, although, in particular cases, the result may be to defeat the real intentions of testators, which, by mistake of those charged with drafting their wills, they have failed to adequately express.

But it is contended that the real intention of the testator in the present case, as shown by the extrinsic evidence, and his intention as expressed in the language of the devise, may be brought into harmony by rejecting a portion of the description of the land devised as repugnant, as was done in *Decker v. Decker*, *supra*. The rule of construction here referred to is the one indicated by the familiar maxim, *falsa demonstratio non nocet*, and is applicable alike to the construction of deeds and wills. As applied to deeds, it is explained by Mr. Tiedeman in his treatise on Real Property, as follows: "It is a general rule of construction that the deed should be so construed that the whole deed may stand and be enforced. If this is impossible, and the description contains several elements or descriptions, all of which are necessary to the identification of the property intended to be conveyed, the deed will be void if no property of the grantor can be found which will correspond with every part of the description. But if the intention, as gathered

from the deed, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property intended by the parties to pass, whatever is repugnant is rejected, and the deed is enforced under this construction." *Tiedeman, Real Prop. § 829.*

Doubtless if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted. But we are unable to see, and the ingenuity of counsel has been unable to point out, any way in which that rule of construction can be applied, so as to work out the result sought to be attained. The description in the devise, as we have already seen, is in these words: "Seventy acres off of the south side of the north one half of the northwest quarter of section No. sixteen, township No. five, range No. six W. of the third principal meridian, county of Madison and State of Illinois." If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected so as to leave a description which will apply to the land which the appellant claims. If we reject the words "northwest quarter," or "northwest," or "north," what remains does not apply to the land in question. The difficulty of the description, as it appears in the devise, is that it substitutes "northwest" for "southwest," and the correction of the description, so as to make it apply to the right tract, requires, not only that one of these words should be stricken out, but that the other should be inserted. It involves more than construction; it requires reformation; and in this state, at least, courts of equity have persistently refused to entertain bills to reform wills.

We are of the opinion that the decrees was proper, and it will therefore be affirmed.

Theodore SONTAG *et al.*, Plffs in Err.,
v.

Walter W BIGELOW *et al.*

(.....III.....)

1. A plaintiff in ejectment cannot rely

NOTE.—*Parol partition to give legal title or color of title.*

The novel questions presented above as to the effect of a parol partition to give legal title or color of title are more interesting than difficult. A contrary decision on either point would have been surprising. The system of written conveyances and records of land titles would be exceedingly faulty and very poor protection to purchasers if parol agreements could transfer legal title even between co-tenants.

It is different however as to the effect of adverse possession, since possession itself constitutes notice to third persons. In states where color of title is not essential to adverse possession, it would seem clear that a parol partition would be sufficient to initiate the adverse possession of co-tenants as against each other to the shares partitioned to

upon a parol partition to establish his title.

2. A master's deed in partition proceedings is sufficient color of title upon which to found a claim to adverse possession notwithstanding the proceedings which led to the sale did not conform to the law.

3. A parol partition does not constitute color of title for the purpose of adverse possession against the co-tenant.

4. The mere receipt of rents and payment of taxes by a tenant in common is not a sufficient claim of adverse possession as against his co-tenant.

(June 18, 1892.)

ERROR to the Circuit Court for Monroe County to review a judgment in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. H. Clay Horner and George L. Riess, for plaintiffs in error:

As the partition was only by parol, each one on the parol partition's consummation became seized of the legal title to one half of his allotment, and had only the equitable title to the other half. As an equitable title will not support ejectment (*Barrett v. Hinckley*, 12 West. Rep. 792, 124 Ill. 36), on their own showing, defendants in error would be entitled to judgment for only the undivided one half of the land sued for.

Gage v. Bisell, 8 West. Rep. 54, 119 Ill. 305; *Shepard v. Rinks*, 78 Ill. 191; *Tomlin v. Hilyard*, 43 Ill. 302, 92 Am. Dec. 118, and cases there cited as to effect of parol partition; *Freem. Co-tenancy & Partition*, § 397; *Den v. Longstreet*, 18 N. J. L. 405; *Browne*, Stat. Fr. § 71.

In order to support this declaration and judgment, they should have shown "in themselves a fee-simple title at law, as contradistinguished from an equitable fee."

Barrett v. Hinckley, *supra*.

The legal title remains unaffected by parol division.

Tomlin v. Hilyard, *Gage v. Bisell*, *Shepard v. Rinks*, and *Den v. Longstreet*, *supra*.

As to the payment of taxes relied on by the defendants in error, it is stated by the widow that her husband paid them until his death and she paid them afterward. The payment of taxes must concur with the color. The

them respectively. To hold a parol partition sufficient for this purpose would be the logical effect of the principle by which such a partition when followed by actual possession is held valid as a defense or by way of estoppel.

For note on a conveyance by a co-tenant by metes and bounds, see *Benedict v. Torrent* (Mich.) 11 L. R. A. 278.

For the effect of an agreement upon a parol partition giving a right of one to enter on the other's portion and take a share of the fruit, see *Taylor v. Millard*, 6 L. R. A. 687, 118 N. Y. 244.

For notes on color of title, see *Gage v. Hamilton* (Ill.) 2 L. R. A. 612; *Cramer v. Clow* (Iowa) 9 L. R. A. 772.

For notes on adverse possession as between co-tenants, see *Erok v. Church* (Tenn.) 4 L. R. A. 646; *Baker v. Oakwood* (N. Y.) 10 L. R. A. 387. B. A. B.

color, to the extent it existed, was in the heirs after the father's death. It should have been paid by the heirs or their guardian. The mother is not the custodian of the heirs' estate; she has nothing to do with it.

Perry v. Carmichael, 95 Ill. 530; *Holmes v. Field*, 12 Ill. 428; *Rawson v. Fox*, 65 Ill. 200; *Chickering v. Failes*, 26 Ill. 507.

Messrs. Hartsell & Sprigg, for defendants in error:

A parol partition of lands between tenants in common, carried into effect by possession taken by each party of his share, is valid and binding on the parties thereto and on those claiming under them.

Tomlin v. Hilyari, 48 Ill. 300, 92 Am. Dec. 118; *Gage v. Bissell*, 48 West. Rep. 54, 119 Ill. 298; *Shepard v. Rinks*, 78 Ill. 188; *Best v. Jinks*, 18 West. Rep. 287, 123 Ill. 447.

As boundary lines can be settled by parol agreement, partition of lands can be so made by tenants in common, as title to land is involved in each instance.

Cutler v. Callison, 72 Ill. 113; *Kerr v. Hitt*, 75 Ill. 51; *Bauer v. Gottmanhausen*, 65 Ill. 499; *McNamara v. Seaton*, 82 Ill. 498; *Bloomington v. Bloomington Cemetery Assn.* 126 Ill. 221; *Fisher v. Bennetoff*, 11 West. Rep. 82, 121 Ill. 426; *Grim v. Murphy*, 110 Ill. 271.

Color of title, acquired in good faith, and payment of taxes for seven successive years, accompanied with actual possession of the parties, as in this case, is a complete bar.

Hynchman v. Whetstone, 23 Ill. 185; *Hale v. Gladfelder*, 52 Ill. 91, *Riverside Co. v. Townsend*, 10 West. Rep. 578, 120 Ill. 9, Aug. Lim. § 361.

A right to land acquired by limitation is affirmative and can be enforced.

Paulin v. Hale, 40 Ill. 274.

The statute of seven years' limitation does not require that the possession under claim and color of title should be continued in one person; nor that the same person shall pay all the taxes for that period; taxes may be paid by the administrator, tenant, trustee of a *cestui que trust*, or by those having or succeeding to the possession.

Coffield v. Purry, 19 Ill. 188; *Chickering v. Faile*, 38 Ill. 345.

Craig, J., delivered the opinion of the court:

This was an action of ejectment brought by Walter W. Bigelow and Martha Krueger, heirs-at-law of Walter Bigelow, Sr., deceased, against Theodore Sontag, to recover the W. $\frac{1}{2}$ of the W. fractional $\frac{1}{4}$ of section 4, township 8 S., range 11 W., in Monroe county, containing fifty-eight acres. On a trial of the cause in the circuit court the plaintiffs recovered a judgment for the land described in the declaration, and the defendant sued out this writ of error. For the purpose of establishing title, plaintiffs read in evidence a deed dated December 1, 1853, from James Moore and wife to N. B. Harlow, conveying the S. W. fractional $\frac{1}{4}$ of section 4, township 8, range 11 W., in Monroe county; also a deed dated January 7, 1857, from N. B. Harlow and wife to Alfred and Walter Bigelow, conveying the same land. The plaintiffs then called as a witness Mrs.

Means, who testified substantially as follows: "Walter Bigelow was my husband, and was the son of Alfred Bigelow, and was the father of plaintiffs. He died before this suit was begun, leaving Ellen and Martha and Walter Bigelow, his children and heirs. Ellen, the oldest, and Martha, were by a former wife. Walter is my child. Ellen is dead. Walter Bigelow, Sr., went into possession of this tract of land in 1857. He paid the taxes till he died, and I paid them after he died till 1868. I then moved to Missouri, and afterwards returned to Randolph county, Ill. Walter Bigelow, plaintiff, was born in 1862, April 15. Alfred Bigelow and Walter, Sr., divided this land shortly after buying from Harlow. I married Walter in 1861, after the land was divided. Walter took the west part, and Alfred took the east part. Walter built house, well, stable, and smokehouse on this land soon after land was bought, and cleared twenty-five acres. There was a dividing fence. Walter and his family occupied this land until 1868, and paid the taxes."

For the purpose, we presume, of proving that plaintiffs and defendant claim title through a common source, plaintiffs read in evidence the following deeds: A deed from Alfred and Walter Bigelow and wives to James Cann, of February 5, 1858, conveying S. E. corner of S. W. fractional $\frac{1}{4}$ of section 4, township 8, range 11, containing twenty-nine acres. Also, deed from James Cann to R. L. Bigelow, of October 4, 1858, for twenty-nine acres, in last deed. Also, deed from S. W. Means and wife to Joseph McGregor, of November 16, 1870, for S. W. fractional $\frac{1}{4}$ of section 4, township 8, range 11. Also, deed from J. Robinson and wife to R. L. Bigelow of February 6, 1868, for "our interest in" same land as last-mentioned deed. Also, deed from R. L. Bigelow and wife to N. B. Harlow, of August 15, 1863, for the twenty-nine acres bought by him from James Cann, (above;) "also, the interest of the above-described land, heirs by myself and wife; and also the interest deeded me by John Robinson and wife, being the interest of Alfred Bigelow's estate, being $7\frac{1}{2}$ acres, the last two interests; the whole tract containing 116 acres." Also, deed from Ezra Bigelow and wife to A. T. Cann, of April 26, 1865, for "all my interest in" said S. W. fractional $\frac{1}{4}$, etc. Also, deed from A. T. Cann and wife to B. F. Masterson, of April 6, 1866, for "all my interest in" said S. W. fractional $\frac{1}{4}$, "it being my interest, and that I purchased of Ezra Bigelow and wife, being $7\frac{1}{2}$ acres, more or less." Also, deed from N. B. Harlow and wife to B. F. Masterson, of November 4, 1865, for the lands deeded grantors by R. L. Bigelow, (see deed above.) Also deed from B. F. Masterson to Theodore Sontag, (defendant,) of March 1, 1867, for the following described premises: "twenty-nine acres in the southeast corner of the southwest fractional qr. of section No. 4, township No. three south, range No. eleven west, being the same conveyed to James U. Cann by Alfred Bigelow and others on the 15th day of February, 1858; also $7\frac{1}{2}$ acres on the

above-described fractional section heired by R. L. Bigelow and John Robinson and wife in the estate of Alfred Bigelow, deceased; and also seven and $\frac{1}{2}$ acres more or less in the above-described fractional qr. of the above-described section heired by Ezra Bigelow and A. T. Cann in the estate of Alfred Bigelow, dec'd; the whole tract containing 116 acres."

It will be observed that the plaintiffs did not establish a chain of title from the United States, but the title under which they claim started with a deed from James Moore to Harlow, and this was followed by a deed from Harlow to Alfred and Walter Bigelow.

While these two conveyances did not establish title in Alfred and Walter Bigelow, they were, however, good color of title, which, if followed with seven successive years' possession, and payment of taxes, would ripen into title to the premises; and, as we understand the position of plaintiffs, this is what they rely upon to sustain the judgment. In order to establish title under the Act of 1839, three things are requisite: Color of title, seven years' possession of the premises, and seven successive years' payment of taxes by the person in whose name the color of title stands. It may be regarded as sufficiently established by the evidence that Walter Bigelow went into possession of the land in controversy in 1857. He continued in possession and paid all taxes until his death, the date of which is not shown. It occurred, however, before the seven years had expired. After his death, his widow and children remained in the possession of the premises, and paid all taxes until 1868, which would make seven years' possession and payment of taxes, and two or three years to spare. But the question arises whether Walter Bigelow and his heirs, while so in possession, and while paying the taxes, had color of title to the entire tract in controversy. Under the deed from Harlow to Alfred and Walter Bigelow, it is plain that Walter Bigelow acquired color of title only to the undivided half of the premises, and upon his death that only descended to his heirs, the plaintiffs, and it nowhere appears that he ever received any other deed of the premises, or any part thereof, from any person. But it is said that, after Alfred and Walter Bigelow received a deed from Harlow, they made a parol partition, under which Walter took the west half and Alfred the east half of the premises conveyed to them, and, under this parol partition, Walter became vested with the color of title to the west half.

It is no doubt true, as held in *Tomlin v. Hilyard*, 43 Ill. 301, 92 Am. Dec. 118, and the authorities there cited, that a parol partition between tenants in common, when followed by a possession in conformity therewith, will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his property. But can a parol partition be treated as a deed, and is it sufficient to pass the legal title or color of title, so as to authorize the party claiming under it to maintain ejectment? In the case last cited, it is said,

while the legal title might not, perhaps, be considered as passing by such parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by a several possession, would leave each co-tenant seised of the legal title of one half of his allotment, and the equitable title to the other half, and by a bill in chancery he could compel from his co-tenant a conveyance of the legal title according to the terms of the partition.

In *Shepard v. Rinks*, 78 Ill. 188, a parol partition was held to be binding on the parties, and a possession of premises under a partition of that character was held to be sufficient to defeat an action of ejectment.

In *Best v. Jenks*, 123 Ill. 447, 18 West. Rep. 281, in a proceeding for partition and assignment of dower, where a parol partition of a certain tract of land had been made between a brother and sister, which had been acquiesced in for a period of thirty five years, it was held that the sister was the owner of the portion allotted to her at her death, and that her husband was entitled to dower therein.

Washburn on Real Property, p. 385, lays down the rule that a parol partition cannot be effectual unless accompanied by deed, on the ground that the Statute of Frauds applies; but the author also says, where a parol partition is followed by a possession in conformity with such partition, it will so far bind the possession as to give each co-tenant the rights and incidents of an exclusive possession of his property. But without citing further authorities we think it is plain, where a parol partition has been made, and the premises occupied according to the partition by the respective parties, the partition will be valid, and such partition may be set up as a defense, should an action be brought to recover the possession, in violation of the parol partition and a bill in equity may be maintained to compel a deed. But in an action of ejectment the plaintiff must recover, if at all, on a legal title, not upon an equity; and we are aware of no case which goes so far as to hold that a plaintiff could treat a parol partition as a deed, and thus recover upon it in an action of ejectment. We entertain no doubt that plaintiffs might maintain a bill in equity for a deed, or, had they been in possession under the partition, they could have relied upon it as a defense; but having lost the possession, we do not think they can in ejectment rely upon a parol partition to establish their title to the premises involved. From what has been said, it follows that plaintiffs recovered the entire premises described in the declaration, when they were only entitled to recover an undivided half.

But it is insisted by the defendant that he established color of title, and possession and payment of taxes for seven successive years before the action was brought, and the title thus established was sufficient to defeat plaintiffs' action. The defendant first offered in evidence the deeds conveying the premises to him, which had been read in evidence by the plaintiffs. The defendant then offered

in evidence: A patent from the United States to Porter, Glasgow, and Nervine of May 8, 1824, for W. fractional $\frac{1}{4}$ of section 4, township 3, range 11, signed, "By the President J. M. G. G., Commissioner of the General Land Office." (Objected to because not properly signed. Objection sustained. Exception.) Also, deed from Glasgow and wife (one of patentees) to William Henckler, of April 3, 1873, for patent land above. Also, bill in chancery by Henckler against Porter and Nervine, the other patentees, and others, including defendants and Joseph McGregor, for partition of land in controversy. Decree of March 6, 1874, for partition sale. Also, deed of master in pursuance of said partition decree to defendant, Theodore Sontag, Sr., of April 27, 1874, for W. fractional $\frac{1}{4}$ of section 4, township 3, range 11. The master's deed is relied upon as color of title. Whether the proceedings which led to the sale and execution of the master's deed conformed to the law or not was a question which would properly arise if the deed had been offered as title; but the proceedings, however defective, would not affect the deed as color of title. *Mason v. Ayers*, 78 Ill. 121; *Hardin v. Gouveneur*, 69 Ill. 140; *Dickenson v. Breeden*, 30 Ill. 826. In the last case cited, after referring to several decisions to establish what kind of an instrument constituted color of title, it was said: "The substance of these decisions is that any deed purporting on its face to convey title, no matter on what it may be founded, is color of title." Here the deed contained a grantor and grantee, and purported on its face to convey the land; and under the uniform decisions of this court, it constituted color of title. As to payment of taxes the defendant proved that he had paid for a period of at least ten years from 1875 to 1884, both years included. He also proved possession of the land during the same period.

But while the evidence established color of title, seven years' possession, and payment of taxes, we do not think the possession of the defendant was adverse; and upon that ground he cannot invoke the aid of the Statute of Limitations of 1839. As has been seen, Alfred Bigelow and Walter Bigelow were tenants in common, and on the 1st day of March, 1867, the defendant, Sontag, acquired the title originally held by Alfred Bigelow through deed from B. F. Masterson. Under this title, he went into the possession of the premises. On the trial in 1889, he testified that he had been in possession twenty or twenty-one years. From this testimony,

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it is manifest that the defendant went into the possession of the premises in 1868, the same year the plaintiffs moved away, and went in under the Bigelow title as he had no other title at that time. He therefore acquired possession of the premises as a tenant in common with the plaintiffs; and, occupying that position, he could not acquire color of title in 1874, and rely upon such title to defeat the plaintiffs. In *1 Washburn on Real Property*, p. 656, the author, in speaking in reference to the possession of tenants in common, says: "But their possession being common, and each having a right to occupy, not only will such possession, though held by one alone, be presumed not to be adverse to his co-tenant, but it is ordinarily held to be for the latter's benefit, so far as preserving his title thereto; the possession of one tenant in common being deemed to be the possession of all." In *Brown v. Hogle*, 30 Ill. 119, it was held that it was fraud for a tenant in common to permit the land he holds in common with others to be sold for taxes, and he himself became the purchaser for his own benefit. In *Busch v. Huston*, 75 Ill. 844, this court held, where one tenant in common is in possession of land, it requires clear and satisfactory proof of a subsequent disseisin of a co-tenant to characterize his possession as being adverse, so as by lapse of time to bar a right of entry. It is not sufficient that he continues to occupy the premises, and appropriates to himself the exclusive rents and profits, makes slight improvements on the land, and pays the taxes. The same doctrine was announced in *Ball v. Palmer*, 81 Ill. 370. Here the defendant did nothing to apprise the plaintiffs that he was claiming to be the absolute owner of the entire premises, except to receive the rents and pay the taxes, which in the case last cited was held to be insufficient. Had the defendant before he went into the possession of the property, acquired title or color of title from a stranger, and entered, claiming the land under such title, then he might properly invoke the Statute of Limitations as a bar; but he does not occupy that position. He acquired the title of the heirs of Alfred Bigelow, who were tenants in common with plaintiffs, and entered into possession under such title, and so far as appears, never gave the plaintiffs notice that he was claiming under any other or different title.

From what has been said, it follows that the decision of the court as to the defense of the Statute of Limitations was correct; but for the error indicated the judgment will be reversed, and the cause remanded.

MISSOURI SUPREME COURT.

John LARSON, *Appt.*,
v.

METROPOLITAN STREET R. CO., *Respt.*

(.....M.....)

1. One who employs a contractor to excavate for a building is not relieved of liability for the fall of a building on adjacent premises caused by digging a trench too long and deep alongside the wall by the fact that the work was done by a contractor where the contract stipulated that the employer's engineer should be in charge of the work, with power to order the discharge of men who refused to obey his orders and where by an authorized assistant he did in fact order the trench to be dug as it was dug.
2. One who promises the adjoining owner that in digging near the wall of the latter's building he will excavate and lay up his wall one section at a time, is liable for the fall of the building where after laying one section of his wall he causes the fall of the building by digging a long and dangerous trench without notice of his change of plan.

(*Sherwood, Ch. J., and Gantt, J., dissent.*)

(May 9, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover damages for the fall of plaintiff's building because of the alleged negligent removal by defendant of its lateral support. *Reversed.*

The facts are stated in the opinion.

Messrs. Gage, Ladd & Small, for appellant:

A proprietor who makes excavations in his own land, near the premises of his neighbor, in a careless and negligent manner, is liable in damages for injuries to the building of the adjoining owner, which were the consequence of his carelessness and negligence in the work of excavation.

Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; *Stevenson v. Wallace*, 27 Gratt. 89; *Mooty v. McClelland*, 39 Ala. 52, 84 Am. Dec. 770; *Myer v. Hobbs*, 57 Ala. 177, 29 Am. Rep. 719; *Shaffer v. Wilson*, 44 Md. 269; *Austin v. Hudson River R. Co.* 25 N.Y. 334; *Quincy v. Jones*, 76 Ill. 231, 29 Am. Rep. 243; *McMillin v. Staples*, 36 Iowa, 532; *Dodd v. Holme*, 1 Ad. & El. 498; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771; *Washb. Easem.* 4th ed. top p. 582 *et seq.*, *430 *et seq.*; *Thomp. Neg.* 276; *Cooley, Torts*, 2d ed. top p. 707, *595; *Wood, Nuisances*, 2d ed. §§ 189, 190.

Although work has been let to a contractor, this fact will not exonerate a party for whom the work is performed from liability for the

negligent acts of the contractor, or his servants, if the right to control or direct the mode or manner of the work in any respect is retained, or if such control be in fact exercised, or such direction assumed.

Speed v. Atlantic & P. R. Co. 71 Mo. 303; *New Orleans, M. & O. R. Co. v. Hanning*, 82 U. S. 15 Wall. 657, 21 L. ed. 223; *Heffernan v. Benkard*, 1 Robt. 432; *Schwartz v. Gilmore*, 45 Ill. 457, 92 Am. Dec. 227; *Faren v. Sellers*, 39 La. Ann. 1011; *Brophy v. Bartlett*, 10 Cent. Rep. 709, 108 N. Y. 632; *Jones v. Chantry*, 4 Thomp. & C. 61; *Whart. Neg.* § 181.

It is not only unnecessary, but improper, to plead the evidence of the fact to be established.

It is sufficient in this state to state the act complained of, and allege that it was negligently done.

Under such allegation, all facts and circumstances tending to prove negligence are admissible.

McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 24; *Kendig v. Chicago, R. I. & P. R. Co.* 79 Mo. 208; *Mack v. St. Louis, K. C. & N. R. Co.* 77 Mo. 234; *Crane v. Missouri Pac. R. Co.* 8 West. Rep. 922, 87 Mo. 594; *Goodwin v. Chicago, R. I. & P. R. Co.* 75 Mo. 75; *Braxton v. Hannibal & St. J. R. Co.* 77 Mo. 455; *Schneider v. Missouri Pac. R. Co.* 75 Mo. 296; *Robertson v. Wabash, St. L. & P. R. Co.* 84 Mo. 121; *Judd v. Wabash, St. L. & P. R. Co.* 23 Mo. App. 61; *Minter v. Hannibal & St. J. R. Co.* 83 Mo. 128.

Defendant failed to take the usual and ordinary precaution, and one imposed upon it by law, to give notice of its intention. The failure to take that precaution was one of the circumstances which made the digging and carrying away of the soil a negligent act.

Schultz v. Byers, 13 L. R. A. 569, 53 N. J. L. 442; *Ulrick v. Dakota Loan & T. Co.* (S. Dak.) Oct. 20, 1891.

Messrs. Pratt, Ferry & Hagerman for respondent.

Barclay, J., delivered the opinion of the court:

Plaintiff's case is for damages occasioned by the fall of a building, occupied by him as lessee of the Ackerson estate, in Kansas City, Mo. The gist of his petition is that "the defendant wrongfully, carelessly, and negligently dug out and carried away the soil immediately adjoining and under the west wall of said building, by means of which . . . the said west wall was made to fall, . . . thereby destroying and damaging the property of plaintiff therein contained . . . to the extent of \$3,000." The answer is a general denial. The circuit court forced plaintiff to a nonsuit, by giving an instruction in the nature of a demurrer to the evidence. It is therefore proper to outline the facts upon which plaintiff relies as constituting his cause of action. In so doing, he is entitled to the benefit of the most favorable view of his case that the evidence warrants, and of every reasonable inference therefrom. So viewed, the substance of his case is this: The plaintiff's build-

NOTE.—For note on the exceptions to the rule that an employer is not liable for acts of an independent contractor, see *Hawver v. Whalen* (Ohio) 14 L. R. A. 823.

For note on duty of owner in making excavations, see *Schultz v. Byers* (N. J. L.) 13 L. R. A. 569, 16 L. R. A.

See also 19 L. R. A. 240.

ing was a two-story brick, in which he carried on business. It stood two inches from the eastern boundary of defendant's property, and extended from the street line some seventy-two feet southward. The excavation to which the damage is ascribed was made upon defendant's lot, close along that boundary line. This line ran at a right angle to Ninth street, on which plaintiff's house fronted. Both the lots reached southward from the street 125 feet, to an alley. The defendant proposed erecting an engine house on its lot, and in prosecuting that purpose contracted in writing with a firm for the necessary excavating and masonry for the foundations. Some of the terms of that contract will be mentioned later. The contractors sublet the excavating to another, who began its performance, having a foreman there in charge of a number of workmen and teams. The defendant's chief engineer occasionally visited the work, but the actual superintendence, under the first contract mentioned, was mainly exercised by Mr. Butts, the engineer's assistant, who remained on the ground. The foreman of the digging party testified that the subcontractor placed him under the orders of Mr. Butts, and that the work was accordingly done as the latter directed. About the time the excavating began, plaintiff had an interview with Mr. Butts, in which he asked "if he thought it was not dangerous to be taking dirt away," (namely, from "alongside of the wall;") to which Mr. Butts replied that "there was not going to be any injury to the building. Of course, he was going to take it out in sections, and wall it up as they went along." Plaintiff says that that "kind of satisfied" him. The house fell about a week later. Plaintiff observed the work meanwhile. A trench some five feet wide and from seven to eleven feet deep was first dug, near defendant's east boundary line, from the street to a point about opposite the south end of plaintiff's building, some seventy-two or seventy-three feet. The foundation of the latter was at a depth of eleven feet from the natural surface. They then began at the street line, and carried the trench to a further depth of about two feet (a total depth of about thirteen feet) for a distance of twenty-five or thirty feet from the street. The concrete and footing stone of defendant's foundation wall were then laid in the space or section. Three days later, according to the testimony of the foreman of the excavators, Mr. Butts directed him to "take out the remainder of the ditch," and he proceeded to do so, excavating to the additional depth of twenty-four to twenty-six inches (to correspond with the level of the first section) along the entire building line opposite plaintiff's house, a stretch of forty odd feet from the end of the first section. Mr. Butts was present while this work was being done. The job was begun at half past 2 o'clock, and was finished about half past 5 o'clock of the same afternoon. That night, about 10 o'clock, a large part of plaintiff's building slipped into the excavation, on account, as it is claimed, of that removal of its lateral support; but that portion of the house which

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faced the masonry work of the first section of defendant's foundation (for a distance of twenty-six feet from the street front) remained in place. The soil of the locality is that of the Missouri river bottom,—a mixture of sand and loam, formed by alluvial deposits. There was abundant evidence of experienced builders and civil engineers that the customary way of removing such soil for foundations adjacent to and below that of other buildings is to take out the earth in sections of ten to sixteen feet, each, in length, and to substitute the new foundation in each section before opening the next one; that any other mode of doing such work is likely to result as in the present case; but that building in sections involves an expense from 18 to 80 per cent greater than the cost of proceeding without subdividing the work in that manner. On these facts the trial court declared that plaintiff had no cause of action, and he has appealed against that ruling.

1. Before reaching the main issue, it will be well to dispose of a subordinate one, touching the responsible connection between defendant and the digging force, to whose acts the consequences complained of are ascribed. The defendant claims that those acts were done, in effect, by a contractor independent of its control, and that it is not liable on account thereof. It is now an accepted rule that supervision of such work may be retained without interfering with the independent action of liability of contractors who have engaged to perform it or subdivision of it; but in the case at bar the contract under which the work was done goes much further. It declares that "the excavation shall be carried to such general depth as may be indicated by the engineer. Excavations for the trenches and piers will be made as required from time to time in the progress of the work, and to such an extent as may be indicated by the engineer." Along with this language are statements that the engineer was "in charge of the work," and that men who refused or neglected to obey his orders were to be discharged by the contractors. Now, the very act complained of here is the digging of the trench too long and too deep in the circumstances. That act is charged as negligence. It was ordered by defendant's representative on the spot acting for the chief engineer who had express power to direct "by his authorized agents" as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority which caused the catastrophe; and for that exercise of judgment defendant must respond. *Lancaster v. Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 10 West. Rep. 409; *Bower v. Peate*, (1876) L. R. 1 Q. B. Div. 321.

2. The chief question in the case is to determine what duty towards plaintiff rested upon defendant in view of the facts. Very much has been written upon the right of lateral support and its limitations under the English law. It will not be necessary to restate the general principles governing that right. They were discussed very lucidly

here years ago in *Charles v. Rankin*, (1856) 22 Mo. 573, 86 Am. Dec. 642, which remains a leading case on that subject. For present purposes it will suffice to say it is settled law that the unquestionable right of a landowner to remove the earth from his own premises, adjacent to another's building, is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing. We need not inquire how such a principle became ingrafted upon a system which traces its origin to the English common law; but that it is there is evidenced by abundant decisions, of which a few leaders, besides that above cited, may be mentioned: *Foley v. Wyeth*, (1861) 2 Allen, 131, 79 Am. Dec. 771; *Austin v. Hudson River R. Co.* (1863) 25 N. Y. 884; *Quincy v. Jones*, (1875) 76 Ill. 240, 29 Am. Rep. 243. The underlying principle of legal ethics on which this rule rests is well stated in *Charles v. Rankin*, above, to be that, "If a man, in the exercise of his own rights of property, do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care." The reports furnish many illustrations of its application, but we need not stop to emphasize the statement of it by references to them, since its force, in cases of this character, is now fully recognized. What is the standard of ordinary care which one excavating on his own estate must use to avoid damage to his neighbor's building, is a question of some difficulty. In many localities the subject is regulated by statutes defining the reciprocal rights of the parties. It may be stated generally, in the absence of a statutory rule, that the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation; but that statement affords meager aid in determining the exact duty imposed by the rule in its practical application to any given case. The fact is that the particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede, rather than to promote, the administration of justice. Quite recently it has been definitely held, following supposed indications in earlier cases, that prior notice to the neighbor whose property may be endangered by an excavation is an essential part of the ordinary care referred to.—*Schultz v. Byers*, (1891) 53 N. J. L. 442, 18 L. R. A. 569; but that ruling was accompanied by a vigorous dissent, and can scarcely be considered as settling the point. It is not necessary to decide it in the case at bar, for it is here conceded that plaintiff had ample notice, in fact, of the intended excavation. He also had notice that it was to be made in a particular manner, namely, by removing the dirt "in sections," and walling "it up as they went along." The defendant's superintendent in charge so stated to him at the outset, when plaintiff suggested the danger of the undertaking; and the former, as a witness in the cause, did not deny the plaintiff's account of that interview. It was in evidence that that course was the one indicated by ordinary prudence,

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and by the uniform custom of builders in that locality, in view of the nature of the surrounding soil. But for that information as to the mode of excavation and construction to be pursued, the plaintiff might have taken effective steps to shore up and protect his building,—steps which were unnecessary if the work was done in sections. We think that plaintiff had the right to rely upon the statement of the superintendent, made during the progress of the work and of his agency, (and hence *res gesta*,) as to the care which defendant intended to exercise towards the property of plaintiff, with reference to which that statement was made. He had the right to assume that the course foretold would be followed, at least until he had notice to the contrary, and a reasonable opportunity thereafter to act upon such later notice. We have added this last observation to meet the suggestion of defendant that plaintiff was duly advised that the excavation was not being done in sections. But on this point it appears that one section was first built substantially as promised, and that the long and dangerous excavation later, to which the fall of the building is charged, occurred between half past 2 and 5 o'clock of the afternoon preceding the injury.

On these facts the court cannot justly declare, as a conclusion of law, that plaintiff, in the exercise of reasonable care, was chargeable with notice that the plan of construction previously indicated by the superintendent was not to be followed, and should have taken measures of his own for the protection of his domicile. Nor do we think plaintiff's case concluded by the consideration that the removal of the earth in sections would have involved some additional outlay, and would have lessened, in some slight degree, the strength of its foundation wall. As to the latter fact, it is not claimed that the utility or value of the wall for the purpose of its construction would be in any wise impaired by the building in sections. As to the former fact of extra expense, we regard it immaterial, in view of the other evidence already alluded to, not to mention broader considerations bearing on that point. *Beauchamp v. Saginaw Mtn. Co.*, (1888,) 50 Mich. 163. If defendant notified plaintiff that a certain mode of proceeding was to be pursued, and thus led him to act upon that hypothesis, and refrain from taking steps which would otherwise have been necessary and prudent to insure the safety of his property, the risk of injury to the plaintiff in the premises imposed on defendant the duty towards him of conforming to the plan of work of which it had advised him, or to reasonably notify him of a change in that plan in season to admit of his adopting protective measures of his own. The evidence tends to prove that no such evidence was given, and, in default thereof, the measure of reasonable and proper care on defendant's part, in the circumstances, was that indicated in the statement of the superintendent. As to whether the same measure of care would rest upon defendant in the absence of the peculiar facts here presented we are not called upon to say. In the view we take of the

case, the fact that the promised course of construction involved a greater expense than some other one can have no material bearing on the rights of the parties. On the whole case we think it fairly a question of fact whether defendant exercised ordinary care in directing the excavation to be made as it did, in view of the circumstances mentioned, and whether the fall of the building was caused or contributed to by any want of such care. The trial court, we consider, erred in instructing to the contrary.

The judgment should be reversed, and the cause remanded. It is so ordered.

Black, Brace, MacFarlane, and Thomas, JJ., concur. **Sherwood, Ch. J., and Gantt, J.,** dissent.

Sherwood, Ch. J., dissenting:

Action for damages growing out of the defendant company digging ditches or trenches for the foundations of an engine house, then in process of erection, upon its own lot 18, and along the western line of the building and lot which plaintiff occupied as lessee of the Ackerson estate, in consequence of which digging the west wall of the house—a two-story brick building—in which plaintiff lived, and which he used as a saloon, restaurant, and boarding house, fell, and in its fall carried with it other portions of the building, thereby damaging and destroying the personal property of plaintiff therein, and rendering the building untenable. The petition charges that "the defendant wrongfully, carelessly, and negligently dug and carried away the soil immediately adjoining and under the west wall of said building, by means of which," etc. The building in question was built within one inch of the division line of the two lots, and had so stood for several years. The ditches for the east line of the engine house were dug quite close to the boundary line between the plaintiff's property and that of the defendant. The soil in the locality—the Missouri river bottom—is a mixture of sand and loam. In doing the work, a trench of sufficient depth and width for the proposed foundation was wholly dug upon respondent's lot near the east line thereof. The trench was first dug out by Collins and his men for a distance of twenty-five feet. The original contractors filled up this space with stone masonry work. Three days thereafter the subcontractor started to dig the remainder of the trench on the east side of the lot, and the night of the day this work was finished the Ackerson building fell and plaintiff's property therein was injured thereby. The evidence shows that the soil of lot 14, in its natural condition, without the additional weight of the Ackerson building, would not have fallen. And the testimony also shows that, so far as the mere fact of excavating was concerned, it was done in the proper way; but, had the work been done in sections, the injury would not have occurred. By doing the work in sections is meant that the excavators would dig 16 feet or less in length of the trench, and then, before proceeding further, wait till the

stone masons had walled up that portion of the excavation, and so continue till the work was completed. To have done the work in sections would have increased the cost from 20 to 80 per cent, and would have weakened the foundation. This increased expense would fall upon the contractor. The testimony also shows that the trenches for the foundation were dug to the depth of some thirteen feet, and five feet in width; and the first section of the trench, some twenty-five feet, running backward from Ninth street and along the boundary line, was at once filled in with concrete and footing stones, to a point just below the lower level of the adjoining foundation; but the Ackerson building, when it fell, did not fall beyond the south end of these footing stones of the new foundation wall.

At the close of the testimony the court instructed the jury that upon the pleadings and evidence the plaintiff could not recover, and this action of the court resulted in the plaintiff taking a nonsuit, with leave, etc. The correctness of the instruction thus given to the jury is the only question necessary for consideration, and this involves the salient question in this cause,—whether the plaintiff was guilty of actionable negligence in the circumstances stated. On the point in hand an eminent text-writer observes: "Of a nature somewhat akin to the easement of light connected with the ownership of a house is that of support, or the right of having one's land and the structures erected thereon supported by the land of a neighboring proprietor. The proposition may be stated thus: A, owning a piece of land without any buildings upon it, has a natural right of lateral support for his land from the adjoining land. This right exists independent of grant or prescription, and is also an absolute right; so that, if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskillfully performed. This natural right does not extend to any buildings A may place upon his land; and therefore, if A builds his house upon the verge of his own land, he does not thereby acquire the right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if, in so doing, the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there. But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil. . . . But this right of a land-owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land, so near the boundary line there-

of as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating the land would not be responsible in damages." 2 Washb. Real Prop. 5th ed. pp. 380-382, and cases cited. In 2 Shearman & Redfield on Negligence, 4th ed. § 701, it is stated: "In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is not bound to continue the support which his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing this support, yet in doing so he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land. One who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" and in the next preceding section the rule is laid down that "it is not, therefore necessarily negligence on the part of a landowner to make a use of his land which inevitably produces loss to his neighbor; for, as he may willfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally." In another approved writer on negligence it is stated: "But, whatever may be the right of one landowner to excavate his own soil so as to deprive his neighbor's land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor, and if he inflict an unnecessary injury upon his neighbor through negligence, he must pay the damages. Thus the authorities are agreed that one who proposes to excavate, or make other alterations or improvements upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work. Where the excavation was of itself lawful, and the gravamen of the plaintiff's complaint was that it was unskillfully done, it was held incumbent on the plaintiff to show negligence by other proof than by the mere fact that the walls of his house cracked and gave way. In the view of the court so deciding, this was not a case for the application of the rule *res ipsa loquitur*. . . . If the owner of a house, in a compact town finds it necessary to pull

it down and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he removes his own with reasonable and ordinary care." 1 Thomp. Neg. 276, 278.

The court of appeals of Kentucky says: "The proprietor making the excavation cannot be charged with damages for negligence because he failed to shore up his neighbor's house in a case where the latter has no right of support in the nature of an easement by grant or prescription. In such case his neighbor must shore up his own house." *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401. And there is no obligation on the part of the owner of a building about to be removed to shore up the other buildings. *Goddard, Easem.* (Bennet's ed.) pp. 43, 44. In *Shafer v. Wilson*, 44 Md. 268, the same doctrine is distinctly recognized,—that, proper notice being given to the owner of a building on an adjacent lot, it is the duty of the latter, on receiving such notice, to shore up his own building. In *Lasala v. Holbrook*, 4 Paige, 169, 8 L. ed. 390, the same principle finds recognition. To the same effect, see *Peyton v. London*, 9 Barn. & C. 725, and other English cases, and 2 Shearm. & Redf. Neg. *supra*, § 701. And the duty of the owner of a building on an adjacent lot which may probably be imperiled by the digging for a foundation on his neighbor's lot, to protect his building, is stated to begin after he has been notified of the intended improvement, and given an opportunity to protect his own interests. But if he has personal knowledge of the progress of the intended improvement, this is tantamount to notice. This is the doctrine, also, of this court in *Charles v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

These cases have been cited and quotations made from them as preliminary to the present investigation. Let us proceed to apply the result of these authorities to the facts in the case at bar. That the plaintiff was aware of the excavation going on, living as he did in the house which fell, and watching the excavation, cannot be questioned; and such actual knowledge has been held to countervail and overthrow the effect of notice when given even under an Act of parliament, and before the time specified in the notice had expired. *Peyton v. London*, *supra*. In that case, having such actual knowledge that the adjoining building was being pulled down, it was ruled that it was the duty of the plaintiffs to shore up their building by supports within that building, and, they having failed to do this, a nonsuit was directed; and this was so ruled notwithstanding that the adjoining house, whose removal caused the litigation, had been supported by struts, and that these struts were removed when the house was torn down, it not appearing that any peculiar right or servitude had been acquired by the plaintiffs over the adjoining house or property. The authorities cited also teach the doctrine that ordinary care is the measure of a man's liability,

when excavating upon his own lot, which adjoins that of his neighbor, on which a building stands. Such improving owner, assuming that notice of the intended excavation has been given, or that knowledge of it exists, is only responsible for actual or positive negligence in the manner of digging for the foundations of his proposed building. So long as he does not dig carelessly or recklessly, he is free from liability, let the consequences be what they will. 2 Washb. Real Prop. *supra*. And as the plaintiff here was fully cognizant of what was going on, he was bound properly to shore up, support, or protect his own building against any probable danger. It was his clear duty, under the authorities and upon the evidence, for him to do this. As it was the plaintiff's duty to protect his own property from destruction, it is clear that a concurrent duty to protect the same property could not exist as against the defendant. The bare statement of such a premise announces its own conclusion. But as the measure of the defendant's care was only ordinary care, it did not belong to him, nor was it required of him to use the same care that a prudent man would exercise in similar circumstances. Such a standard of care was held too high a one on the part of an excavating proprietor in *Charles v. Rankin*, *supra*. And that case is also authority for the assertion that the owner of the servient tenement owes no duty to the adjoining proprietor to guard the interests of his neighbor, as he would do as the prudent owner of both properties; that he was not bound, for illustration, to go to an increased expense in the progress of excavation, by building his foundation wall in sections, nor to weaken that wall by such a course, and that a failure thus to build and

thus to endanger the wall was not negligence. Applying these principles to this case, it becomes wholly immaterial whether or not a representative of the defendant company gave assurances to the plaintiff that he would build the remainder of the wall in sections. Such promise or assurance, if it were not the duty of that company, was but a *nude pact*, made without either duty to create, or consideration to support it, and therefore not obligatory on the defendant company, even granting that the party making such promise was in reality the representative of the company. Besides, even after the promise was made, the plaintiff was present, and knew that the promise as to building in sections was not performed, but making no effort to protect his property. In any event, this action is not brought because of any negligent failure of the defendant company to build the wall in sections, or to notify the plaintiff. The very gravamen of the action is the mere negligent manner in which the trenches for the foundations were dug. On such a statement, negligence in any other regard obviously would be excluded. *Peyton v. London*, *supra*; *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Reed v. Bott*, 100 Mo. 62. The judgment should be affirmed.

The foregoing opinion was filed by me in division No. 1 of this court, and I still adhere to the conclusions of fact and of law therein announced. The authorities I have cited fully sustain the positions I have taken, and especially is this true of *Peyton v. London*, *supra*, on the question of pleading, in which the opinion was delivered by Lord Tenterden, *Ch. J.* I am content to err, if err I do, in such good company. *Gantt, J.*, concurs in this dissent.

MINNESOTA SUPREME COURT.

James E. GLASS *et al.*, *Plffs.*,
v.

Nels A. FREEBURG *et al.*, *Respts.*,
and
Charles K. FULTON *et al.*, *Appts.*

(.....Minn.....)

***Where a building is constructed under one entire contract between the owner and**

***Head note by MITCHELL, J.**

NOTE.—*Relation back of subcontractor's lien to the date of that of original contractor.*

Whether or not the subcontractor's lien will relate back so as to become effective from the date when that of the principal contractor attaches depends almost exclusively on the wording of the particular statute under which it is claimed.

Where the statute makes the mechanics' lien effective from the time work on the building is commenced the tendency of the courts is to hold that all liens including those of subcontractors become effective at that time regardless of when the work was done or the material furnished.

Thus, in Montana, mechanics' liens have priority over all other incumbrances put upon the property 16 L. R. A.

the original contractor, the liens of all subcontractors, who furnished material or performed labor for the building at any time during the process of construction attach, by relation, as of the date of the commencement of the work, and are entitled to a preference over a mortgage on the premises, executed by the owner subsequent to that date.

(July 7, 1892.)

A PPEAL by defendants, Charles K. Fulton *et al.*, from a judgment of the District

after the commencement of the building. *Davis v. Bisland*, 85 U. S. 18 Wall. 659, 21 L. ed. 969.

The language of the statute there is that such liens "shall be prior to, and have precedence over, any mortgage made subsequent to the commencement of work on any contract for the erection of the building," and this is held to carry the lien of the subcontractor back to the date of the commencement of the building, although it is conceded that the rule might be otherwise if the statutes read "subsequent to the commencement of the work," as in some other states. *Merrigan v. English*, 5 L. R. A. 887, 9 Mont. 118.

The lien of a subcontractor relates back to the date of the commencement of the erection of a

Court for Hennepin County postponing their claim to a mechanics' lien on certain real estate, to the lien of a prior mortgage which had been filed after work on the building had been commenced. *Modified.*

The facts sufficiently appear in the opinion. *Messrs. Wilkinson & Traxler* for appellants.

Mr. George D. Emery for respondent Pioneer Savings & Loan Co.

Mr. Edson S. Gaylord for defendant Freeburg.

Messrs. Gray & Pulliam for defendants Henry Yost *et al.*

Mitchell, J., delivered the opinion of the court:

Counsel for the respondent building association claims that the correct construction of the findings of the trial court is that Nels A. Freeburg, was merely the agent of Olaf A. Freeburg, and as such contracted in the name and behalf of his principal for material and labor for the construction of the buildings referred to. We do not concur with this view. We think the findings are clearly to the effect that Olaf, as owner of the premises, contracted with Nels for the erection by the latter of the buildings, and that the latter, as principal and in his own behalf, purchased and contracted for the material and labor for the construction of the same and that when the court described him as the "agent" (as well as the contractor) of Olaf, "with authority and power to contract for labor and material for the construction of the buildings," it had reference merely to the legal principle upon which it is held that a contractor has authority to charge the land of the owner with debts for labor and material incurred by him in performing his contract. See *O'Neil v. St. Olaf's School*, 26 Minn. 329; *Laird v. Moonan*, 32 Minn. 353; *Meyer v. Berlandt*, 39 Minn. 433; *Bardwell v. Mann*, 46 Minn. 285.

According to the findings we have, then, this state of facts: The owner of land made one entire contract with another for the erection thereon by the latter of certain buildings; that in the performance of his contract the contractor purchased from plain-

tiffs, and the plaintiffs furnished to him, certain material for the construction of such buildings on May 17, 1890, so that it must be taken as a fact that the actual work of the construction of the buildings was commenced as early as that date; that subsequently, and while the work was in progress, the owner of the premises executed a mortgage thereon to the respondent building association; that after this mortgage had been executed and recorded, and while the work was still in progress, the appellant, the Fulton & Libby Company, furnished to the original contractor certain material for the construction of the buildings in question. So far as appears, and presumably, the erection of the buildings was one continuous job performed under the original contract between the owner and the original contractor. The original contractor never filed any claim for a lien, but the appellant, not having received its pay, seasonably filed its claim for a lien for the material thus furnished to the contractor.

The sole question on this appeal is whether the lien of the appellant is entitled to a preference over the mortgage of the building association. This question has never before been presented for our consideration.

In *Finlayson v. Orooks*, 47 Minn. 74, each of the liens arose under a separate and independent contract by the claimant directly with the owner of the property. Moreover, the question of priority between the mortgagee and the lien claimants was not raised.

In *Hill v. Aldrich* (Minn.) 50 N. W. Rep. 1020, the rights of subcontractors were not involved, and it also appeared that the mortgage was executed and recorded before anything had been done towards the construction of the building.

In *Haupt Lumber Co. v. Westman* (Minn.) 52 N. W. Rep. 33, the original contractor had not commenced performance of his contract when the mortgage was executed, but it was intimated that possibly a different result might have been reached had the work of the construction of the buildings been commenced before the execution of the mortgage.

We have had occasion recently to refer to the fact that the Mechanics' Lien Law fails

building the work upon which has been continuous and has priority over a mortgage placed upon the property after the work was begun. *Hydraulic Press Brick Co. v. Bormann*, 3 West. Rep. 454, 19 Mo. App. 664.

Although it has been previously held that under the Missouri law relating to St. Louis County, the lien attaches in favor of the subcontractor at the time of performing the work or furnishing the material for which it is claimed. *Kuhleman v. Schuler*, 35 Mo. 144.

In *Denkel's Estate*, 1 Pearson, 213, it is stated that claims of all mechanics and materialmen commence at the date of the first stroke of the axe or spade used in making the house, without regard to the time of their being filed or to the doing of the work or furnishing material.

Mellor v. Valentine, 8 Colo. 250, also seems to recognize the rule that the lien relates back to the time the work was commenced or the first of the material furnished.

As intimated above the language of the statute 16 L. R. A.

would change this rule and consequently a different rule is found in other jurisdictions, and the rule has been changed at times in the same state when a change has been made in the language of the statute. Thus an early California case held that the subcontractor's lien attaches at the time of service of notice on the owner. *Cahoon v. Levy*, 6 Cal. 295, 65 Am. Dec. 515.

But a later case held that the lien relates back to the time the work commenced. *Tuttle v. Montford*, 7 Cal. 360.

And the authority of *Cahoon v. Levy*, *supra*, is apparently recognized again in the later case of *Brennan v. Mara*, 10 Cal. 435.

Under the Act of 1882 if there is no written contract for the construction of the building the liens do not relate back to the commencement of the building, but each lien takes effect on the day when the particular labor was commenced for which it is claimed. *Barber v. Reynolds*, 44 Cal. 520. See also *Germania Bldg. & Loan Assn. v. Wagner*, 61 Cal. 355.

H. P. F.

to make any express provision with reference to cases where a mortgage or other incumbrance is placed on the premises after the work of construction has been actually commenced. But we have arrived at the conclusion that, even in the absence of any express provision on the subject, upon certain general equitable principles, and also as a necessary implication from certain provisions of the statute that are expressed, the appellant's lien is entitled to a preference over that of the mortgage. The lien of the original contractor for the entire building, if he had claimed one, would have been held to have attached at the date of the actual commencement of the work or of the furnishing the first material, and no subsequent sale or incumbrance of the land by the owner would have affected this right, and any party purchasing or taking an incumbrance on the property while the buildings were thus in process of erection would have done so subject to it. The contract for the erection of the buildings being an entirety, the contractor, notwithstanding the mortgage to the building association, had a right to go on and finish them, and to insist on the priority of his lien for his entire pay over the lien of the mortgage. A subcontractor comes in by reason of his direct contract relation to the contractor, and the right of lien of the former for his claim is *pro tanto*, in a certain sense, substitutionary to that of the latter, and by relation is deemed to have attached at the date when the lien of the original contractor attached. The whole work, being done in the performance of one entire contract with the owner, is to be deemed a unit, whether done directly by the contractor himself or by subcontractors, and all liens therefor, without regard to the time in the progress of the work when the labor was done or the material furnished, are co-ordinate, and all attach by relation as of the date of the commencement of the work. The

authority of the contractor to charge the land for the purposes of the contract is co-extensive with the necessities of the building, and continues until it is finished, and the commencement of the building is notice to all the world of the existence of the power. Everyone dealing with the property has the means, by ocular examination, of ascertaining whether work has been commenced or materials furnished on the ground. The fact that buildings are in process of erection on premises charges everyone with notice of the rights of the parties doing the work. If a building is being erected under a contract with the owner, any one dealing with the property is bound to take notice of the fact that labor and material for the completion of the building will be required, and that those who perform or furnish it will, under the law, be entitled to a lien therefor; and if they see fit to take a mortgage under such circumstances they assume the risk of its being subordinated to all liens which may attach to the premises for labor or material for the completion of the building in accordance with the contract under which it is being erected. This rule is almost necessarily implied from the provisions of section 10 of the statute regulating the enforcement of such liens as between the contractor and the subcontractors and as between the subcontractors themselves. The incongruities and confusion that would arise in attempting to carry out these provisions upon any other theory will be apparent on a moment's reflection, as, for example, where a lien is given to the contractor as well as to subcontractors, or where, after judgment, the contractor pays off the subcontractors and is subrogated to their rights. Our conclusion is that appellant's lien is entitled to a preference over respondents' mortgage. The cause is remanded, with directions to *modify the judgment* accordingly.

FLORIDA SUPREME COURT.

JACKSONVILLE, TAMPA & KEY WEST
R. CO., *Appt.*,

Joseph GALVIN.

(.....Fla.....)

***1. A declaration against a railroad corporation, alleging that the defendant company unsafely and negligently loaded a certain car upon its railroad with railroad iron so that the bars projected a considerable distance over the end of said car, and that it was negligently accepted by defendant company for transportation when in an un-**

safe condition, and unfit for the purpose of coupling, which was known to defendant, but of which plaintiff, a brakeman employed on defendant's train to couple cars, was ignorant, and by due care could not have known, and by means whereof said plaintiff was injured while attempting to couple said car, is not amenable to a demurrer, on the ground that the injury was caused by the acts of fellow-servants of plaintiff.

2. A brakeman employed by a railroad company to couple cars on its railroad assumes the hazards of the ordinary perils which are incidental to such employment, and in a suit by such brakeman against the company to recover damage for injuries received in attempting to couple cars on account of alleged negligence in loading a car to be

*Head notes by MARRY, J.

NOTE.—In addition to the cases discussed in the opinion which directly touch the subject of a brakeman's assumption of the risks of projecting timbers or other articles over the ends of a loaded car, we call attention to the following notes on the general subject of assumption of risks by employees.
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Pidcock v. Union Pac. R. Co. (Utah) 1 L. R. A. 181; Foley v. Pettee Mach. Works (Mass.) 4 L. R. A. 51; Howard v. Delaware & H. Canal Co. (Vt.), 6 L. R. A. 75.

See also the case next following this one in which on a similar state of facts an opposite conclusion was reached.

coupled, and in negligently accepting a car to be coupled, when the same was in an unsafe condition, a charge of the court to the jury that excludes the right to consider such a coupling as coming within the ordinary hazards and risks of his employment is erroneous.

3. The instructions of the court must be confined to the issues made by the pleading, and it is error for the trial court to instruct the jury that they may base their verdict in favor of plaintiff upon a cause of action however meritorious or satisfactorily proved, that is substantially different from that which he has alleged.

(May 23, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Duval County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Statement by **Mabry, J.:**

The appellee, Galvin, sued the appellant, a railroad corporation, in the Duval circuit court, for personal injuries received by the alleged negligence of said corporation. The allegations of the declaration, as to the cause of action, are as follows: "That the plaintiff (appellee here) was employed by the defendant (appellant) as brakeman, to couple cars for the defendant upon its said railway, and upon the 26th day of November, 1885, at Palatka, in Putnam county, said state, on defendant's said railway being so employed, a certain one of said cars was coupled, or attempted to be coupled, by plaintiff, which, by the negligence and default of defendant, had been loaded unsafely and negligently, and was so received and accepted by defendant for coupling and transportation, and was in an unsafe condition and unfit for the purpose of coupling, which the defendant well knew, but of which the plaintiff was ignorant, and by due care could not have known, and by reason of the premises, whilst the plaintiff was so employed as such brakeman as aforesaid upon said railway at said place, defendant's railroad locomotive engine and train of cars attached thereto, driven and conducted by its servants, was driven to said car to be coupled thereto when the said car so negligently and unsafely loaded as aforesaid, being so negligently and unsafely loaded with railroad iron that the bars projected a considerable distance over the end of said car, thereby leaving so little space between said car sought to be coupled, and the engine and train of cars to which said car was sought to be coupled, that plaintiff was mashed and squeezed between said cars, so sought to be coupled, and said engine and train of cars attached thereto, to which said car was sought to be coupled, and his collar-bone was broken, and one of his hands broken and he was permanently injured and rendered unfit for work, to the damage of plaintiff of \$10,000, and therefore he brings suit and claims damages in the sum \$10,000." The summons was served upon the superintendent of the defendant company in Duval county, Florida.

The railroad corporation interposed a demurrer to the declaration on the ground that

the alleged injury was caused by the acts of fellow-servants of plaintiff, and for which defendant corporation is not liable. The demurrer was overruled, and said defendant plead the general issue, that the alleged injury was caused by the acts of fellow-servants, and that plaintiff by his own carelessness and negligence contributed to said injuries. A trial of the cause resulted in a verdict and judgment for plaintiff below for \$2,472, from which an appeal is prosecuted to this court.

The other facts of the case sufficiently appear in the opinion of the court.

Mr. J. R. Parrot for appellant.

Mr. Frank W. Pope for appellee.

Mabry, J., delivered the opinion of the court:

The first error assigned is the overruling of defendant's demurrer to the declaration. There is no error in the decision of the court overruling this demurrer. The declaration in substance alleges that the defendant corporation unsafely and negligently loaded a certain car upon its railroad with railroad iron so that the bars projected a considerable distance over the end of said car, and that defendant negligently received and accepted said car for coupling and transportation; that said car was in an unsafe condition and unfit for the purpose of coupling, which was well known to said defendant, but of which the plaintiff was ignorant, and by due care could not have known; that plaintiff was employed by defendant to couple cars on its road, and while so employed, at Palatka, in Putnam county, Florida, on the 26th day of November, 1885, coupled, or attempted to couple, said car so negligently and unsafely loaded, and received and accepted by defendant for coupling and transportation; that defendant's locomotive engine, with a train of cars attached thereto, was driven by its servants to said loaded car to be coupled, and that the projection of said railroad iron over the end of said car left so little space between the said car sought to be coupled, and the train of cars attached to the said engine that plaintiff was mashed between said cars and received the alleged injuries. The allegation is that the defendant corporation negligently loaded the car in the manner specified, and negligently accepted it for coupling and transportation when in an unsafe condition, and that in consequence thereof plaintiff was damaged.

The defendant cannot under a demurrer to this declaration avail itself of an exemption from liability on the ground that it is not chargeable with the acts of plaintiff's fellow-servants. The declaration does not disclose what class of servants of defendant performed the acts alleged to have caused the injury. The averment is that the defendant loaded and accepted the car, and not only so, but it is alleged that the defendant negligently loaded and accepted the car for coupling and transportation. The demurrer admits these allegations to be true, and if true, they show a cause of action against the defendant. The demurrer was properly overruled.

Various assignments of error are predicated upon exceptions taken to instructions given for plaintiff, and refused to defendant in the

trial court. Before considering these assignments of error we will refer to the testimony on the point of defendant's liability. The plaintiff, at the time of the accident, was employed by the defendant company as brakeman on one of its freight trains. His account of the occurrence is as follows: "On November 26 we were backing down on the side track to get at a car of iron. They gave me the keys and told me to get out that car, and just as he gave me the keys he said 'I will go myself.' I was on one side and he on the other side; we both came down to the switch, and when we came to the switch I jumped off to let the engine in, and we went back by the main line and against the car to couple on. He halloosed to the engineer to come back, and the engineer came back very carefully, but being dark I could not see at all till I got up to the car. When I got up to the car, it came back and crushed me down and I did not know anything more."

The testimony shows that the defendant company, at the time of the injury, was engaged in extending its railroad beyond the point of the accident, and the freight train on which plaintiff was employed as brakeman was daily hauling cars loaded with lumber and iron to a point near where the road was being constructed. On the day of the accident a flat car was loaded with railroad iron by a gang of men working with a construction train of defendant, and placed on a side-track at Palatka for the freight train to pick up and haul to the work on the road. The construction train was under the control of a conductor, whose duty it was to have the cars loaded.

The iron on the flat car projected over one end eighteen or twenty inches, and the car was about the length of or a little longer than the iron. It appears from the testimony of the freight conductor, who was examined as a witness for defendant, that it was his duty to inspect the cars to be taken into the train, and that he received this car after he saw the iron projecting over the end. He states, however, that he was daily hauling lumber and iron for the construction of the road, and it was very common at this time to find cars loaded with lumber and iron projecting over the ends. A witness, who was at the time a brakeman on the construction train, and introduced by plaintiff, testified that he could not say it was a general thing for the company to load trains in that way, but that the flat cars had brakes on them at one end, set back eighteen or twenty inches, and in loading iron the conductor would tell the men to push it back so as not to hit the brakes, and this would cause a projection over the other end. This witness also states that the iron could have been loaded so as to avoid the brakes and still not project over the end. The plaintiff says that his train was engaged in daily hauling cars loaded with lumber and iron, but he never saw any before projecting over the ends of the cars. At the time of the accident plaintiff had been in the service of the company two or three weeks, but he states that he was an experienced brakeman, and had been engaged in this business on other roads two or three years.

The freight train on which plaintiff was employed arrived in Palatka about dark, and the 16 L. R. A.

accident occurred between half-past six and seven o'clock at night, in attempting to couple on the car loaded with iron. The engine to which was attached a flat car loaded with lumber, was backed in on the side track to connect with the iron car, and the proof is that the engine went back very carefully. The conductor directed the plaintiff to couple the car, and he went between them for this purpose, and was mashed by the projecting iron. At the time he had a lantern which was giving good light, but he says he did not see that the iron projected until it was too late, and he was caught. The conductor says he saw the iron projecting, and halloosed to plaintiff to look out for himself, but did not call attention to the fact that the iron projected. His reason for calling to plaintiff to look out for himself, he says, was because he was naturally apt to be careless, and it was a bad coupling to make. The engineer, who was examined for defendant, says that he saw the iron projecting over the end of the car, and told plaintiff not to stand up to make the coupling. He knows plaintiff heard him, because he made reply that it was his business, or something like that. Plaintiff says he heard none of this, and did not see his danger until it was too late. He says he acted as carefully as he could, and went between the cars on the side that he thought would be open, as the curve was coming that way. He stood up straight to make the coupling, and he says he could not have coupled the car in any other way, and that was the only way to couple cars. The dead-woods between the cars were long enough for a man to stand between them and turn any way, and the bumpers were one and one fourth to one and one half feet long. One witness for plaintiff testified that plaintiff could not have seen the projection of the iron from where he was standing and attempting to couple the car, and that he could not have coupled in any other way unless he had been possessed of a stick or had been looking to see if the iron was projecting. He says further that coupling can be made by going underneath, and this way is safer, but a brakeman must have his time, and to brake this way he cannot perform his work properly. The conductor testified that he had had ten or twelve years' experience in railroad business, and his invariable rule as brakeman, when coupling at night, was to get down below, in order to avoid mashing, and that a brakeman always runs some risk of getting mashed unless he gets down when coupling without a stick at night. He says it was his custom to instruct brakemen how to couple, but does not remember giving any instructions to plaintiff. The engineer says his first work in railroad business was coupling cars, and the proper way to couple after dark was "under," and then the cars can go together and not hurt the coupler, because he is under, and out of the way. The other brakeman on the train with plaintiff testified that he was not present when the accident happened, but went to the scene soon thereafter. He says the proper way to couple after night is by getting underneath and reaching up, so that the head will be clear of the platform, and that witness coupled this car after the accident in this way without getting hurt. Other testi-

mony in the record relates to the character and extent of the injuries received by plaintiff.

Among other charges for the plaintiff, the circuit judge instructed the jury as follows: "If you believe from the evidence that a car of railroad iron was loaded under the direction and supervision of a conductor of a construction train charged with that duty by the defendant railroad company, and that the same was loaded so that the bars of iron projected over the end of the car, and that with ordinary care in loading, such projection would have been obviated, and that in such condition it was, under the direction of such conductor, placed on a track of defendant's railway for the purpose of being transported by a freight train of defendant's railroad company, and that the plaintiff was a brakeman on said freight train, and that in obedience to the orders of the conductor of said train he proceeded in the nighttime with due care to couple said cars and was injured by said iron projecting over said car, without fault on his part, while attempting to couple said car, then your verdict should be for the plaintiff."

"When a brakeman enters the employ of a railroad company he only risks the dangers which ordinarily attend such employment, and not risks which are directly and only caused by an omission of duty on the part of his employer; and if you believe from the evidence that the plaintiff was injured without fault on his part, by railroad iron projecting over the car, while attempting to couple the car, in the line of his duty and in obedience to the order of his superior, in the night time, and without knowledge of the danger, if such danger was known to his superior, then it is not a risk ordinarily incident to his employment and which he assumes to take, but it is an omission of duty on the part of the defendant, and for which the defendant is liable to plaintiff in whatever damages may have been sustained by him from such injury." These instructions were duly excepted to by the defendant.

By referring to the declaration it will be seen that plaintiff bases his cause of action upon the alleged negligence and default of defendant in loading a car with railroad iron so that the rails projected over the end, and in receiving said car for coupling and transportation in an unsafe and unfit condition. If the declaration can be construed to allege any defect or imperfection in the car other than the way in which the iron was placed on it, it is clear from the evidence that no such defect was shown either in the car or any other machinery or implements with which plaintiff was employed to work. The improper arrangement of the iron on the car cannot be classed under the head of defective machinery, whatever may be defendant's liability by reason thereof on other grounds. The liability of defendant must rest upon the loading of the car so that the bars of iron projected over the end eighteen or twenty inches, or in accepting the car so loaded for coupling and transportation. The accident, it must be remembered, occurred not while the car was being loaded or placed on the side track, but in attempting to couple it on to a train to be carried forward on the road. Ac-

cording to the first charge above referred to, the loading of the car under the supervision of a conductor in charge of defendant's construction train with iron, so that the bars projected over the end, which could have been avoided by ordinary care and placing the same on the side-track of defendant's road for transportation by the freight train, impose a liability upon defendant for an injury received by a brakeman on the freight train in attempting to couple said car at night by direction of his conductor. The charge necessarily excludes the right of the jury to consider such a coupling as coming within the ordinary hazards and risks of the employment which a brakeman assumes in his engagement with the company, because they are instructed to find for plaintiff if they believe from the evidence that a car was so loaded and placed on the side-track for transportation, and that plaintiff was injured in coupling the same while acting within the line of his duty without fault. It was the duty of plaintiff to couple cars on the road of defendant, and when the accident occurred he was acting within the line of his employment. By voluntarily engaging in the hazardous business of coupling cars he assumed the ordinary risk and dangers incident to such business. The authorities are clear on this point. Does the loading of the car in the manner shown by the testimony, and its acceptance for transportation, take the case out of this rule?

In *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112, a brakeman sued for injuries received from alleged defective and careless loading of railroad iron, so that it projected over the end of the car. The rails projected over the end eighteen inches, if not further, and plaintiff testified that if the rails had not projected he would have seen the difficulty of coupling, and would not have attempted it. It appears that he had been in the employment of the defendant company as a switchman at its yard six or seven months prior to the accident, and that cars had frequently come in there before loaded as the one in question was with old iron projecting over the end of the cars. The plaintiff stated that he discovered the improper loading just as the car to be coupled was coming towards him, about six feet off, and that he was standing with his lantern, at the end of the caboose, to which it was to be coupled, and the car was coming slowly. It also appeared that the car was about twenty-eight feet long and the rails projected over both ends; that old rails are of different lengths and was a common article of freight shipped over the road frequently, and generally projected over the ends of the cars; that this resulted sometimes from irregular loading or jolting by transportation, and sometimes the rails were longer than the cars. The plaintiff stooped down to make the coupling and his hand was caught between the iron bars and crushed, and his leg was also injured. It was held that the plaintiff could not recover. The court said: "The accident with which he met was but an ordinary peril of the service which he had undertaken. The business of the employment was attended with danger, and upon entering into it plaintiff assumed the hazard of the ordinary perils which are incidental to it. We do not see why the

casualty in question is not one which is to be held as having been in the contemplation of plaintiff as liable to happen, and which he took the risk of when he engaged to enter into the employment."

In *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, a brakeman on a railroad recovered a verdict for injuries received in coupling cars. In this case a car loaded with lumber had been taken into a train, and at a station two flat cars were taken out of the train and placed on a side-track, which necessitated the coupling of the lumber car with a box car. It was the duty of the plaintiff to make the coupling, which was done without special order. He stood at one end of the box car, signaled the engineer to back to the car, which was carefully done. When within a few feet of the box car the plaintiff observed that the plank projected over the end of the lumber car, and that it was necessary for him to stoop to avoid it in entering between the cars to make the coupling. He entered in this way and made the coupling, but on account of some difficulty in getting the coupling-pin into the draw-head he raised his head and was caught between the box car and the projecting lumber and badly injured. The trial court instructed the jury, in substance, that the reception of a car so loaded that the lumber projected eighteen inches over the end of it was negligence on the part of the company, and that it was an extraordinary hazard to which the company must not subject its employes. This was declared to be error. The opinion states that it may be extra hazardous in the sense that it is not a coupling ordinarily or frequently required; but it is one incident to the duties of the place, and not more hazardous, as a matter of law, than he stipulates to perform on the occasions, however rare and infrequent, where such couplings become necessary in the variety of shipments made to meet the demands and necessities of trade and transportation. Lumber of all kinds, iron, steel and finished structures must often necessarily be transported on cars of shorter length than the material transported. . . . To hold that such a service is not to be anticipated by a railroad employe as occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines and their common and well understood service in conformity to such requirements."

The facts in the case of *Northern Cent. R. Co. v. Husson*, 101 Pa. 1, 47 Am. Rep. 690, were, that Husson was in the employment of the railway company as a hand on one of its gravel trains engaged in hauling ballast, earth, railroad iron, bridge irons, bridge timbers and other material required in constructing a road-bed. It was Husson's duty to assist in coupling the cars, and he assisted one morning in making up a train consisting of four cars loaded with large pieces of bridge iron in such a manner that the ends extended beyond the ends of the cars. When the bumpers or dead-woods of the cars were together the distance between the projecting ends of the iron was about five inches. While Husson was coupling the cars his head was caught and crushed between the ends of the iron so that he died. His widow and child brought suit to recover

damages for his death occasioned by the alleged negligence of defendant. The company had a regulation, which was known to Husson, that persons in coupling cars together should stoop below and make the coupling by reaching up. It was held that the risk run by decedent in coupling the cars was ordinarily incident to his employment, and also that he failed to take ordinary care in making the coupling. For a further discussion of the principle of law controlling cases like the one at bar, see *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188; *Brown v. Atchison, T. & S. F. R. Co.* 31 Kan. 1; *Day v. Toledo, O. S. & D. R. Co.* 42 Mich. 523; *Patterson, Railway Accident Law*, § 316.

There are two cases in Iowa which hold a different doctrine: one is the case of *Haugh v. Chicago, R. I. & P. R. Co.*, 73 Iowa, 66, cited by counsel for appellee, and the other is reported in 86 Iowa, 81 [*Hamilton v. Des Moines Valley R. Co.*]. It appears that they have a statute in this state imposing liability upon railroad corporations for all damages sustained by any persons, including employes, in consequence of any neglect of its agents, or mismanagement of any of its employes. How far these decisions have been influenced by the statute does not appear, as the decision in *Haugh's Case* makes no reference to any statute.

In the case at bar the plaintiff was twenty-eight years old, and an experienced brakeman. The train on which he was employed was engaged daily in hauling cars loaded with railroad iron and lumber for railroad construction. The conductor testified that it was very common for the iron and lumber to project over the ends of the cars. The plaintiff admits the train was daily hauling lumber and iron, but says he never saw any before the accident projecting over the ends of the cars. Under the charge of the court to the jury, they were precluded from finding that the injury resulted from the ordinary risks and hazards incident to plaintiff's employment, and in this respect it was erroneous, and prejudicial to the defendant.

The second instruction was also calculated to mislead the jury in considering the real question involved in the case. In so far as this charge can be construed as a direction to the jury that the coupling of a car loaded with iron projecting over the end is not such a danger and risk as ordinarily appertain to plaintiff's employment, it would not differ from the first charge considered. In our opinion, however, the second charge changes the basis of a verdict from that presented in the first, and puts it upon the action of a superior officer with knowledge of an extra hazardous coupling, directing the plaintiff, who was a brakeman without knowledge of the extra danger, to make the coupling in the night-time without informing him of this danger. This instruction directed the jury that if plaintiff was injured, without fault on his part, by railroad iron projecting over the end of the car which he was attempting to couple in the night, in obedience to the orders of a superior who knew the danger, and which was not known to plaintiff, then the risk in coupling the car was one not ordinarily incident to plaintiff's employment. The negligence of defendant, upon which plaintiff relied in his declaration, was in load

ing a car with railroad iron projecting over the end, and in receiving such car for transportation. The jury was directed to find for plaintiff if they believed that a superior, with knowledge of danger in making a coupling, directed the plaintiff to perform this duty at night when he was ignorant of the danger. There are no allegations in the declaration to justify a finding on this particular phase of the charge. We do not hold that the company would be exempt from liability in a case where a conductor, with knowledge of a dangerous coupling, directed a brakeman to make it in the dark without informing him of the danger, when he did not know of it. What would be the rule in such a case we need not say, because the declaration before us does not allege it. We held in the case of *Parrish v. Pensacola & A. R. Co.*, 28 Fla.—, that there could be no recovery upon a cause of action, however meritorious it may be, or however satisfac-

torily proved, that is in substance variant from that which is pleaded by the plaintiff. And in *Jacksonville, T. & K.W. R. Co. v. Neff*, 28 Fla.—, we held that the instructions of the court to the jury must be confined to the issues made by the pleadings. In the case now under consideration we think the jury was clearly misled, to the prejudice of defendant, by the charges of the court as to the real question involved, and a new trial should be granted. It is well to note that the present case arose before the passage of chapter 8744, Laws of Florida, and no question is presented under this statute.

There are other exceptions in the record to charges given and refused by the court, but we do not consider them, for the reason that what is stated above covers the question presented by the declaration.

The judgment of the court below is reversed, and a new trial awarded.

MICHIGAN SUPREME COURT.

Calvin B. DEWEY, *Appt.*,

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

(.....Mich.....)

1. An inspector of cars is not a fellow-servant of a brakeman so as to relieve the railroad company from liability for injury to the latter while coupling cars caused by the negligent loading of a car so that lumber projected over the end.
2. The fact that loaded cars were received by a railroad company from another road does not relieve the company from liability for injuries to a brakeman caused by the improper manner in which they were loaded.

(*Montgomery and Grant, JJ., dissent.*)

(July 23, 1892.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Dickinson, Thurber & Stevenson, for appellant:

If any doubt could remain, since *Van Duzen v. Letellier*, 78 Mich. 492, as to the doctrine now existing, it is swept away by the holding in *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423. In that case a brakeman on a logging train was thrown from a car and killed by reason of the breaking of the brake chain, which was of insufficient strength to be used with safety. Here it is disjunctly stated that it is settled law in this state that a master is

bound not only to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another, so as to relieve the master from personal responsibility.

See also *Northern Pac. R. Co. v. Herbert*, 116 U. S. 650, 29 L. ed. 759; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Town v. Michigan Cent. R. Co.* 84 Mich. 214; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Lewis v. Seifert*, 9 Cent. Rep. 751, 116 Pa. 648; *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 74; *King v. Ohio & M. R. Co.* 14 Fed. Rep. 277; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 652, 29 L. ed. 760; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 281; *Guttridge v. Missouri Pac. R. Co.* 13 West. Rep. 644, 94 Mo. 468; *Gottlieb v. New York, L. E. & W. R. Co.* 1 Cent. Rep. 728, 100 N. Y. 466; *International & G. N. R. Co. v. Kernan*, 9 L. R. A. 708, 78 Tex. 294.

Mr. Otto Kirchner, with *Mr. E. W. Meddaugh*, for appellee:

The testimony clearly shows that plaintiff fully understood not only the risk attending his employment generally, but that he fully understood the risk involved in doing the particular work in which he was injured, consequently he cannot recover.

Michigan Cent. R. Co. v. Smithson, 45 Mich. 212; *Hathaway v. Michigan Cent. R. Co.* 51 Mich. 253, 47 Am. Rep. 569; *Braver v. Flint & P. M. R. Co.* 56 Mich. 620.

The reception of the car improperly laden with lumber, was the negligence of plaintiff's fellow-servant, to wit: the car inspector at Holly.

Smith v. Potter, 46 Mich. 258.

The doctrine of *Smith v. Potter*, *supra*, has recently (December 23, 1891) been approved by

NOTE.—See the case next preceding this one in which after apparently agreeing that the inspection of cars is not the work of the fellow-servant of 16 L. R. A.

a brakeman the court nevertheless holds that the brakeman assumes the risk of negligence in making such inspection.

this court in *Irvine v. Flint & P. M. R. Co.* 89 Mich. 416.

McGrath, J., delivered the opinion of the court:

Plaintiff, a brakeman in defendant's employ, was injured while attempting to recouple, after dropping two cars at the Lake Shore junction, near Detroit, at 2 o'clock in the morning of October 21, 1890. The last car on the moving section of the train was what is known as a "sand flat car," upon which the bumpers are much shorter than in the ordinary car. The car to be attached was one laden with lumber. The lumber projected several inches beyond the end of the floor of the car, leaving a space of but seven inches, when the cars were coupled, between the ends of the lumber and the end of the sand flat car. When plaintiff went between the cars they were two rods apart. With the aid of his lantern he noticed the character of the drawbar and bumpers upon the sand flat car, and held up his light, and saw that the other car was an ordinary flat, but did not notice that the lumber projected beyond the end of the car. When the cars came together, plaintiff's body was caught between the lumber and the end of the sand flat car, his arm was thrown between the bumpers and crushed. At the conclusion of plaintiff's case the court directed a verdict for defendant, upon the ground that the proximate cause of the injury was the improper loading of the lumber car, and that, as defendant had made provision for the inspection of cars, the negligence was that of the inspector, who was a fellow servant of the plaintiff.

The rule that the master must furnish the servant with a reasonably safe place in which to perform his work has been settled by repeated decisions of this court. *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 428; *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 519; *Irvine v. Flint & P. M. R. Co.* 89 Mich. 416.

It is also well settled that this duty cannot be delegated to another, so as to relieve the master from personal responsibility. *Van Dusen v. Letellier* and *Morton v. Detroit, B. C. & A. R. Co.* *supra*.

These cases clearly overrule the doctrine of *Smith v. Potter*, 46 Mich. 238. It was there held that the duty of inspection was not one of management or supervision, and that inspectors and brakemen were in the strictest sense fellow servants. In the *Van Dusen* and *Morton Cases*, it was held that the duty of inspection was one that could not be delegated so as to relieve the master of liability. Justice Morse, in the *Van Dusen Case*, says: "If the master can delegate this duty to an employé, and apply the doctrine of fellow servant to such employé, because he is working in and about the same business, and in the same general line of such business,—as, in this case, the manufacture and piling of lumber,—then the employer is permitted to shirk his duty upon another, and then allowed to escape all responsibility and liability upon the plea that the person injured is the fellow servant of his delegate or agent. The law, as I understand it, will not permit this. It is a duty the mas-

ter owes, which he cannot delegate to a fellow servant of his employés. If he picks out one of the men working about the mill, and imposes upon him the duty of seeing that the machinery is kept in safe repair, or delegates to one of the men working in the millyard the duty of seeing that these docks are kept safe and sound, these men, as far as these duties are concerned, stand in the place of their employer, and their negligence is his negligence." Champlin, J., concurring, says: "I do not think the duty of inspection, when such inspection is required by the circumstances of the case, can be delegated by the master in such manner as to avoid responsibility, and I concur in reversing the judgment." Campbell, J., who wrote in the *Smith Case*, says: "I agree in reversing the judgment, but I do not think it proper to throw doubt on our previous decisions which have dealt with the questions in this cause." The *Morton Case*, by a very full and able opinion by Cabill, J., reaffirms the doctrine of *Van Dusen v. Letellier*.

In *Irvine v. Flint & P. M. R. Co.* we held that it is as much the duty of the company to see that the cars are so loaded that brakemen will have reasonably safe access to the brakes, and an opportunity for the discharge of their duties, as it is to see that proper appliances are provided. In the discussion of that question, however, I am satisfied that the statement made in that opinion, that if the cars were inspected, or if the company provided the means for their inspection, by a fellow servant, and the inspector neglected his duty, then there would be no recovery, is not supported by the later decisions of our own court, nor by the weight of authority elsewhere. Shearn, & Redf. Neg. 4th ed. §§ 194-204; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; *Ford v. Fitchburg R. Co.* 110 Mass. 241; *Hough v. Texas & Pac. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 652, 29 L. ed. 760; *King v. Ohio & M. R. Co.* 14 Fed. Rep. 277; *Lewis v. Seifert*, 116 Pa. 648, 9 Cent. Rep. 751; *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 74; *Fay v. Minneapolis & St. L. R. Co.* 80 Minn. 231; *Guttridge v. Missouri Pac. R. Co.* 94 Mo. 468, 18 West. Rep. 644; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Gottlieb v. New York, L. E. & W. R. Co.* 100 N. Y. 466; *International & G. N. R. Co. v. Kernan*, 78 Tex. 294, 9 L. R. A. 703; *Hulehan v. Green Bay, W. & St. P. R. Co.* 68 Wis. 520; 7 Am. & Eng. Encyclop. Law, p. 825, and note. The doctrine of these cases is that, when it is the duty of the master to furnish sound apparatus, machinery, etc., and defective machinery causes an injury to the servant, the rule which exempts the master from liability for injury to servants through the negligence of a fellow servant does not apply.

In *Hulehan v. Green Bay, W. & St. P. R. Co.*, *supra*, it was held that where a railway company permitted its track to be incumbered with sticks and blocks of wood at places where plaintiff was called upon to perform his duties in coupling cars, by reason of which he was injured, the negligence of permitting the roadway to be obstructed was that of the company. At best, the duties of brakemen are

dangerous, and it is the plain duty of their employers to provide against increased peril. There is no reason why one rule should apply to the case of a defective brake chain, and that another should govern a case where a car has been so improperly loaded as to prevent the use of the brake without great hazard.

In the recent case of *Mexican Cent. R. Co. v. Shean* (Tex.) 18 S. W. Rep. 151, the cars were improperly loaded, but the decision was put upon the ground that the plaintiff knew that the car was loaded in such a manner as to render the attempt to couple it extremely hazardous. In the present case plaintiff had no such knowledge. It is insisted, however, that this lumber car was one received from another company; but the obligation to receive cars from other roads does not require the reception of defective cars, or cars so loaded as to render their transportation hazardous to employes. The duty is not one to be discharged without reward. The service rendered is not gratuitous. As was said by Campbell, J., in *Smith v. Potter*: "This [duty imposed by statute] does not require the transfer of cars unfit for passage. . . . There is no difference in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical." In *Fay v. Minneapolis & St. L. R. Co.*, *Gutridge v. Missouri Pac. R. Co.*, *Gottlieb v. New York, L. E. & W. R. Co.* and *International & G. N. R. Co. v. Kernan*, *supra*, the cars were freight cars, but the cases hold, and I think correctly, that the fact was immaterial. It follows that *the judgment must be reversed*, and a new trial had, with costs of this court to plaintiff.

Morse, Ch. J., and Long, J., concurred.

Montgomery, J., dissenting:

I cannot yield my assent to the views expressed by Mr. Justice McGrath in this case. The evidence showed that whatever of fault there was in permitting the car to be loaded in the manner in which it was, was the fault of an inspector provided by the company, and no fault was attributed to the company in employing him. This court has held, not once, but repeatedly, that an inspector of cars, under such circumstances, is a fellow servant of the trainmen, and that no recovery can be had on account of his negligence. *Smith v. Potter*, 46 Mich. 258; *Irvine v. Flint & P. M. R. Co.*, 89 Mich. 416. And the doctrine of nonliability for the fault of a co-employe has been also applied in other cases where the relations were analogous, and where the authority of the offending servant was quite as broad as is that of one whose duty it is to see that cars are properly loaded. *Hoar v. Merritt*, 62 Mich. 386; *Gardner v. Michigan Cent. R. Co.*, 58 Mich. 584; *Greenwald v. Marquette, H. & O. R. Co.*, 49 Mich. 197; *Quincy Min. Co. v. Kitts*, 42 Mich. 84; *Michigan Cent. R. Co. v. Dolan*, 82 Mich. 510. The case of *Smith v. Potter* was cited and its doctrine approved in 16 L. R. A.

Peterson v. Chicago & N. W. R. Co. 67 Mich. 102, and was also cited with approval in *Randall v. Baltimore & O. R. Co.*, 109 U. S. 481, 27 L. ed. 1004. But it is suggested that the case of *Smith v. Potter* has been overruled by *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Rous v. Blodgett & D. Lumber Co.* 85 Mich. 519. It is clear, as I think, that it was not the purpose of Justice Morse, who wrote the opinion in *Van Dusen v. Letellier*, to overrule the case of *Smith v. Potter*. In *Peterson v. Chicago & N. W. R. Co.*, Justice Morse recognizes the binding authority of *Smith v. Potter* and other kindred cases in the following language: "If the question were an open one in this state I should not be inclined to hold that either of these persons was a fellow employe of the plaintiff; but the law in this respect is well settled in this state, and the circuit judge followed the decisions of this court, citing them in his charge to the jury." In *Van Dusen v. Letellier*, the case of *Smith v. Potter* is distinguished, as is also the case of *Hoar v. Merritt*. All that is held by *Van Dusen v. Letellier* is that the employer owes a duty of providing a safe place for his employes to work, and that this duty cannot be delegated to a fellow servant. The case fully recognizes the distinction between the duty of furnishing a safe place and safe machinery to the employe and the duty of seeing that the machinery, appliances or place are properly used or employed. The same may be said of *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423. This distinction is again recognized in *Rawley v. Colliar* (Mich.) 51 N. W. Rep. 350, and *Kehoe v. Allen*, 52 N. W. Rep. 740, (decided at the present term.) In *Morton v. Detroit, B. C. & A. R. Co.*, as the case was put to the jury, the sole question was whether the appliance in question was reasonably safe when originally provided by the defendant, and the circuit judge instructed the jury that the defendant's liability ceased when it provided a chain that was in the first instance reasonably safe. In *Irvine v. Flint & P. M. R. Co.* in an opinion by Mr. Justice McGrath, the court held distinctly that, if the company provided means for the inspection of the cars by a fellow servant, and the inspector neglected his duty, there could be no recovery. In the present case the injury resulted, not from any fault in the appliances used, but because, in making use of cars and machinery suitable to the purpose, a fellow servant of the plaintiff, engaged in the same general employment, within the rule in *Smith v. Potter*, neglected his duty. The case of *Smith v. Potter* has not, as I view it, been overruled by the case referred to, and certainly the court has not taken the pains to point out to the profession the fact that it has been overruled; on the contrary, its doctrine has been frequently recognized, and has become the settled law of the state. The circuit judge applied the doctrine to the case at bar, and the judgment should be affirmed.

Grant, J., concurred with Montgomery, J.

John HEFFRON, Appt.,
v.
DETROIT CITY R. CO.

(.....Mich.....)

A restriction that a street railway transfer ticket given without extra charge must be used within fifteen minutes after it is punched on the first line, is not unreasonable or invalid in the absence of any contract to carry a passenger on both lines for a single fare without exception or conditions or any provision to that effect in the charter or ordinance or of any holding out to the public to this effect, although this might be subject to exception if no car came along within the time limited.

(July 1, 1892.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for alleged wrongful expulsion of plaintiff from defendant's car. *Affirmed.*

The facts are stated in the opinion.

Mr. E. S. Grace, for appellant:

The plaintiff had paid his fare and was entitled to ride to the Michigan Central Railway depot. The company, instead of taking him there on the first car which it placed at his disposal, by its agent, assaulted him and put him off its car, after he presented to its said agent the certificate received from another agent of the same company, showing he had paid the regular fare for a ride to his destination. This gave him a good cause of action.

Hufford v. Grand Rapids & I. R. Co. 7 West. Rep. 867, 64 Mich. 681; *Wilsey v. Louisville & N. R. Co.* 88 Ky. 511; Am. Dig. 1890, 487; *Elliot v. New York Cent. & H. R. R. Co.* 53 Hun, 78; *Carsten v. Northern Pac. R. Co.* 9 L. R. A. 688, 44 Minn. 454; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Eddy v. Harris*, 78 Tex. 661; *Eddy v. Rider*, 79 Tex. 58; *Georgia R. & Bkg. Co. v. Murden*, 86 Ga. 484; *Georgia R. & Bkg. Co. v. Dougherty*, Id. 744.

Liability for wrongful expulsion.

Johnson v. Northern Pac. R. Co. 46 Fed. Rep. 347; *Georgia R. & Bkg. Co. v. Eskeu*, 86 Ga. 641; *Head v. Georgia Pac. R. Co.* 79 Ga. 358; *Baltimore & O. R. Co. v. Brambery* (Pa.) Nov. 5, 1888; *Chicago, St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281; *Hall v. South Carolina R. Co.* 25 S. C. 564.

As to rules of companies.

Butler v. Manchester, S. & L. R. Co. L. R. 21 Q. B. 207, 28 Am. L. Reg. 81; *Ward v. New York Cent. & H. R. R. Co.* 56 Hun, 268.

The plaintiff was rightfully on the car and had a right to pursue his journey to the depot.

The assault upon him was unlawful and the action is properly brought.

English v. Delaware & H. Canal Co. 66 N. Y. 454, 28 Am. Rep. 69; *Tarbell v. Northern Cent. R. Co.* 24 Hun, 51; *Jeffersonville R. Co. v. Rogers*, 88 Ind. 116, 10 Am. Rep. 103, *Mur-*

dock v. Boston & A. R. Co. 137 Mass. 293, 50 Am. Rep. 807; *Head v. Georgia Pac. R. Co.* 79 Ga. 358; *Alabama, G. S. R. Co. v. Heddleston*, 82 Ala. 218; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Burnham v. Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Pittsburg, O. & St. L. R. Co. v. Hennigh*, 89 Ind. 506; *Palmer v. Charlotte, C. & A. R. Co.* 3 S. C. 580; *City & S. R. Co. v. Itrauss*, 70 Ga. 369.

The rules of the company should be reasonable, if passengers are to be bound by them; and patrons ought not to be held responsible for the company's breach of its own regulations.

Townsend v. New York Cent. & H. R. R. Co. 6 Thomp. & C. 495, 4 Hun, 217.

Often cars are not on time as in this case, or, if they are, are too crowded to admit the passenger, and yet has the passenger no remedy for being expelled from a car but a suit for five cents damages?

Wheeler, Carriers, 180; *Lynch v. Metropolitan Elec. R. Co.* 90 N. Y. 77.

The mere acceptance of a ticket does not bind a passenger by its terms.

Prentice v. Decker, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283; *Great Western R. Co. of Canada v. Miller*, 19 Mich. 806.

Besides the actual damages sustained plaintiff is entitled to damages for the indignity done him, the annoyance, and to injured feelings, etc.

Delaware, L. & W. R. Co. v. Walsh, 47 N. J. L. 543; *Carsten v. Northern Pac. R. Co.* 9 L. R. A. 688, 44 Minn. 454.

Messrs. Sidney T. Miller and John C. Donnelly for appellee.

Morse, Ch. J., delivered the opinion of the court:

The plaintiff sues in trespass on the case, claiming damages on account of his ejection by a conductor from one of defendant's cars. The declaration, in substance, alleges that, on payment by any passenger of the regular fare, five cents, at any point where the cars are boarded on Woodward avenue, in Detroit, such passenger is entitled to ride on defendant's car from such point to the Michigan Central depot; and that, on payment of said five cents to the Woodward avenue conductor, such passenger becomes entitled to a ticket, to show he has paid his fare on the Woodward avenue line car, and which ticket entitles such passenger to ride on one of defendant's cars on Jefferson avenue, from said Woodward avenue, along said Jefferson avenue, to said depot. The plaintiff, on October 8, 1890, boarded one of defendant's cars on Woodward avenue, and paid the conductor five cents, and received from said conductor a ticket, to show that he had paid his fare on the Woodward avenue car, and which, presented to the conductor on the Jefferson avenue car, would entitle him to ride to said depot. And the plaintiff accordingly rode on

NOTE.—The rights of street railway passengers on transfer tickets do not seem to have been hitherto brought into litigation, at least so far as to establish precedents which have been reported. The constantly swelling current of passenger traffic on 16 L. R. A.

street railway lines which furnish transfer tickets makes decisions on the subject highly important. Following the above case is another case on this same subject. See *Pine v. St. Paul City R. Co.* (Minn.) post, 347.

defendant's car, on Woodward avenue, to the intersection of the Jefferson avenue line, and a few moments thereafter boarded one of defendant's cars on said Jefferson avenue, to complete his journey, and then and there seated himself in said car to be conveyed to said depot, as aforesaid; yet, plaintiff avers, notwithstanding he had paid the defendant its legal fare, as aforesaid, on said Woodward avenue, and had received said ticket, and voucher therefor, showing plaintiff had so paid his fare, and was entitled to ride to said depot, as aforesaid, on defendant's car which he had taken, and although he duly presented the said ticket to the conductor of said Jefferson avenue car, showing his right to ride thereon to said depot, when demanded by said conductor, defendant's agent operating said car, which ticket said conductor then and there refused to accept or receive as satisfaction of plaintiff's fare, and as showing his right to ride on said road in said car, and demanded of plaintiff that he pay another five cents, or get off said car, both of which plaintiff then and there refused to do, but insisted that he had paid his fare, and produced his said ticket, and offered the same to the said conductor of defendant's car, as showing that he had so paid his fare, and was entitled to ride on said car to said depot; but the said agent of defendant refused to take said ticket, or acknowledge the same in any way, but, on the other hand, there and then made an assault upon plaintiff, in the presence of several fellow passengers, and with great force and violence pushed and pulled plaintiff about, violently pushed and forced plaintiff from the car into the public street and highway, and then and there, in the presence of said divers passengers and persons on the street, accused plaintiff of fraudulently attempting to ride on defendant's car without paying his fare, and unlawfully attempting to obtain a passage on the said car without paying his fare, and of trying to defraud the defendant in so doing.

The proofs show that plaintiff paid his fare as alleged upon the Woodward avenue car, and asked the conductor for a "change-off" ticket to the Michigan Central depot. This ticket showed upon its face that it was "void unless used October 8, 1890, as indicated hereon." This indication, marked by the pointing of the index finger of a hand, read as follows:

"This slip will not be honored unless presented at the intersection of the Woodward avenue line and line punched in margin, within fifteen minutes of time punched, for a continuous trip only.

"S. Hendrie, Treas."

The plaintiff testifies that he got off of the Woodward avenue car at the corner of Woodward and Jefferson avenues, and waited fourteen minutes, and, no car coming along or being in sight going towards the depot on Jefferson avenue, he then went to the postoffice, going there on Jefferson avenue and Griswold street; mailed some letters, and came back, where he again waited for eleven minutes before he got a car. On presenting his ticket the conductor told him it was not good. Plaintiff asked what was the matter of it, and the conductor replied, "Read your ticket." Plaintiff said, "I am not obliged to read it." Conduct-

or replied, "They are good only fifteen minutes after they are punched." Plaintiff then said, "I have been waiting a good deal longer than that for your car." The conductor then told him that he must pay the fare, or get off the car. Plaintiff refused to pay the fare, and said that he should not get off the car, unless he was put off. The conductor then put him off. The plaintiff did not resist, and was not injured physically. He had the money to pay the fare, but did not think he ought to pay it. He had used these tickets before, but never had read them, and did not read this one before he was ejected from the car. It will be seen that the proofs did not correspond with the allegations of the declaration, as plaintiff was not given a ticket which entitled him to ride on this car, except within a certain time; and from the declaration it would be inferred that there were no conditions attached to the ticket.

But, under the proofs, if the declaration had made proper averments to correspond therewith, we do not think the plaintiff was entitled to recover. The following section of the ordinance of the city of Detroit was put in evidence: "Sec. 80. The tracks upon Jefferson avenue, Woodward avenue, and Gratiot street shall each be considered and run as one route, and subject its passengers to the payment of a single fare each: provided, however, that all cars running north of Jefferson avenue shall run to and from Jefferson avenue, and the routes intersecting Woodward avenue shall be considered as making a portion of each of said routes respectively." The defendant company was under no obligation, by contract or ordinance, to take the plaintiff upon the Jefferson avenue line, from off the Woodward avenue line, to the Michigan Central depot, for the single fare of five cents, except upon the conditions printed on the face of the ticket; nor is there anything unreasonable in the requirement that the ticket must be used within fifteen minutes. The company had the right, under the ordinances of the city, to treat the Jefferson avenue line as a single road, and to charge five cents fare; but it saw fit to make a continuous fare of five cents from any point on the Woodward avenue line to the Michigan Central depot, if the transfer was made in fifteen minutes from one line to the other. In this case half an hour, at least, had elapsed. If no car had passed within that time, and the car from which plaintiff was ejected was the first one to pass after plaintiff had alighted from the Woodward avenue car, the plaintiff may, under a proper declaration, have an action against defendant, but no such state of facts was averred in the declaration in this case. It was the duty of the plaintiff to read the ticket. His failure to read it cannot give him any rights against the defendant which he would not have had had he read it. And it was also the duty of the conductor not to receive this ticket, and to require the payment of five cents fare, and neither he nor the company could be made liable for putting plaintiff off the car in the manner he was ejected, without physical hurt or damage. The case is ruled by *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531. This case is much stronger than that, because here there is no question but the conductor gave plaintiff

the right ticket,—the same ticket given to all others, and which was good, if used according to its terms and conditions. The case of *Hufford v. Grand Rapids & I. R. Co.*, 61 Mich. 631, 7 West. Rep. 867, is distinguishable in this: There the ticket was one purporting, on its face, to cover the distance to be traveled by Hufford. He paid the usual fare between the two places, and the ticket contained no printed exceptions or conditions restricting Hufford from using it at the time he presented it to the conductor. Its infirmity, if any, was not open to Hufford's plain observation, so that he was informed on its face that it was not good. There were punch marks upon it, but he did not know the significance of them. He asked the station agent about it, who told him the ticket was good. It was sold to him by the company's agent for a good ticket, and it was therefore held to be a good ticket. But there were no such representations to plaintiff in this case. He asked for a "change off"

ticket; he received one, which plainly informed him, upon its face, that it must be used within a certain time or it would be void. As long as the defendant had made no contract with the plaintiff to carry him, without exception or conditions, on both lines to the depot for a single fare of five cents, while it had not held out to the public that it would do so, and when it was not obligated so to do by its own charter or the ordinances of the city of Detroit, there was no legal reason why it could not make the regulation that it would carry passengers to the depot on both lines, for a single fare of five cents, provided the transfer ticket was used within fifteen minutes after it was punched on the Woodward avenue line; and, there being no legal reason why this restriction should not be made, the passenger who accepts the ticket must abide by its terms.

The judgment is affirmed, with costs.
The other Justices concurred.

MINNESOTA SUPREME COURT.

Oran S. PINE, *Resp't.*,
v.
ST. PAUL CITY R. CO., *Appt.*
(.....Minn.....)

- *1 By the ordinance of the city of St. Paul, granting certain franchises to the defendant, a passenger who has paid one fare on any line operated by the company in the city is entitled to a transfer check or ticket entitling him to a continuous passage over any connecting or crossing line. Where such passenger applies for and accepts a transfer ticket for one of several continuous or crossing lines, plainly marked and designated, he will be limited to the line so selected, but where the route designated is not so limited, but is equally applicable to several lines, he will be entitled to be transported over either.
2. Where a passenger is ejected by a conductor acting in good faith in pursuance of the rules of the company, and upon due notice to him, and with the exercise of no more force than is reasonably necessary, the damages to be allowed, if a recovery is had, are compensatory only.

(June 10, 1892.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling its motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for the alleged wrongful expulsion of plaintiff from defendant's street-cars. *Reversed.*

The facts are stated in the opinion.

Messrs. McCafferty & Noyes, for appellant:

*Head notes by VANDERBURGH, J.

NOTE.—Please see the case of *Heffron v. Detroit City R. Co.* (Mich.) *ante*, 845, reported next before the above case and involving the same subject of street railway transfer tickets.
16 L. R. A.

It was plaintiff's duty to submit for the time being to the reasonable rules of the company, and after he had discovered the mistake in the issuance of the ticket, to quietly and peaceably leave the car or pay his fare and seek redress in a proper action for the mistake of the conductor who gave him a wrong ticket.

Townsend v. New York Cent. & H. R. R. Co. 56 N. Y. 295, 15 Am. Rep. 419; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Weaver v. Rome, W. & O. R. Co.* 8 Thomp. & C. 270; *Mackey v. Ohio River R. Co.* 9 L. R. A. 183, 34 W. Va. 65; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Edwards v. Lake Shore & M. S. R. Co.* 81 Mich. 364; *Friderick v. Marquette, H. & O. R. Co.* 87 Mich. 342, 26 Am. Rep. 531; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Walker v. Dry Dock E. B. & B. R. Co.* 38 How. Fr. 327; *Dietrich v. Pennsylvania Street R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Downs v. New York & N. H. R. Co.* 36 Conn. 287, 4 Am. Rep. 77.

In the absence of malice in ejecting a passenger from the cars, damages must be compensatory only.

Du Laurans v. First Div. of St. Paul & P. R. Co. 15 Minn. 49 and cases cited.

The fact that the conductor, under the construction placed by the court upon the ordinance, acted illegally, is not a circumstance even, showing or tending to show that he acted with malice.

Hoffman v. Northern Pac. R. Co. 45 Minn. 58.

The jury gave a verdict of \$400, which is excessive to extortion even allowing the element of vindictive damages to remain a factor.

Finch v. Northern Pac. R. Co. 47 Minn. 36.

Mr. M. L. Countryman, for respondent: *Murdock v. Boston & A. R. Co.*, 187 Mass. 293, 50 Am. Rep. 307, shows what the law is where a passenger is ejected because an apparently valid ticket given him by an agent of the company is, under the "rules and regulations," in fact invalid.

In *Finch v. Northern Pac. R. Co.*, 47 Minn. 86, this court allowed \$250 for a technical ejection, where no personal injury or indignity was suffered.

Finch v. Northern Pac. R. Co. *supra*, and *Serve v. Northern Pac. R. Co.* (Minn.) Jan. 18, 1892, establish the liability of the company in tort for the conductor's act in ejecting a passenger, notwithstanding the conductor obeyed "rules and regulations" and had no evidence of the passenger's right of exception to the rule.

See also *City & S. R. Co. of Savannah v. Brauns*, 70 Ga. 388; *Hubbard v. Grand Rapids & I. R. Co.* (Mich.) 18 Am. & Eng. R. R. Cas. 886.

In *Higgins v. Louisville, N. O. & T. R. Co.*, 64 Miss. 80, it was held that a verdict of \$500 for carrying a passenger nearly three fourths of a mile past his station, on a dark and rainy night, thus compelling him to walk back, was not an excessive compensation.

In *St. Louis, A. & T. R. Co. v. Berry* (Tex. App.) Nov. 12, 1890, a verdict of \$500 for mental suffering caused by delay in reaching destination was held not excessive.

In *Chicago, St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281, a verdict of \$200 was sustained in favor of a passenger who, without any force being used, was required to pay twenty-five cents extra in order to avoid being ejected.

In *Harlenbergh v. St. Paul, M. & M. R. Co.*, 41 Minn. 200, \$400 was allowed for a technical ejection, without actual force or injury.

In *Serve v. Northern Pac. R. Co.*, *supra*, \$550 was allowed in a case of ejection where no personal violence was resorted to.

Vanderburgh, J., delivered the opinion of the court:

Action for damages for an alleged wrongful expulsion from one of defendant's street-cars. At the time of the injury complained of defendant was operating several lines of street-cars in the city of St. Paul, and among them was the Grand Avenue line, which intersects Wabasha street on West Seventh street. The St. Anthony Park, Fair Grounds and Hamline line extends over Wabasha and University avenues to Lexington avenue, and thence to Hamline; the Interurban line extends over Wabasha and University avenues to and beyond Lexington avenue; and the University avenue, Wabasha and West St. Paul line from West St. Paul over Wabasha and University avenues to Kent street, its western terminus, which is a considerable distance east of Lexington avenue. These lines all connect with the Grand Avenue line on Wabasha street. By the ordinance forming its contract with the city, and from which it derives its authority to run its cars and exercise its franchise in the city, the defendant is required "to issue a transfer check or ticket to any person who has paid one fare on any line operated by it in the city of St. Paul, which ticket entitles the passenger to a continuous passage

over any connecting or crossing line operated by the company. No passenger shall be entitled to more than one transfer for one fare, and such transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used upon the next car departing upon the connecting line upon which it is to be used." Under this ordinance, a passenger on the Grand Avenue line, going east, would be entitled to a transfer over any one of three other routes mentioned which he might select, and of course but one. If, for instance, such passenger should desire to go to Lexington avenue, he could take either the first or second lines mentioned running on Wabasha street and University avenue; but if he took passage on the third line the car would take him, in the same direction, no further than Kent street. On the day in question the plaintiff was a passenger on the Grand Avenue line, going east, and, having paid one fare, was entitled to, and applied for, a transfer ticket. He notified the conductor that he wanted to go to Lexington avenue, and asked for a transfer to that avenue. The conductor thereupon gave him a transfer check which on its face purported to be a transfer "from Grand Avenue line to line punched." And under the words "going east" thereon was printed in separate lines "N. on Interurban," "N. on Rondo," "N. on Rice," "University and Wab." (the latter word being an abbreviation for "Wabasha"), "N. on Lexington." The line actually punched was "University and Wab." There were no other words on the check to indicate the Hamline line, or the line to Lexington avenue, or that "the line punched" was the West St. Paul line. The plaintiff wanted a transfer good to Lexington avenue. The defendant might, therefore, have given him one over either the Interurban or Hamline line, and, by accepting a transfer ticket limited to either in accordance with the rules of the company, if properly expressed on the ticket, he could not complain that he was obliged to take the particular line indicated by the transfer ticket. In response to his request he was given a ticket which apparently entitled him to be carried over the University and Wabasha route as far as the car on that route which he might take should go. There was nothing on the face of it to show that the route or line punched was not the one that he desired. By its terms it presumptively gave him a legal right under the ordinance to ride on the cars of the Hamline line which ran over Wabasha street and the University avenue. The transfer check is furnished by the company, and the terms used must be most strongly construed against it; and when he asked for a ticket to "University and Lexington," and was given a transfer over "University and Wab.,"—that being a route leading directly to Lexington avenue,—it was rightly construed, as against the company by the trial court, as entitling the plaintiff to take a car over that route, and he was rightly on board the car from which he was ejected. This was the construction placed upon the transfer by the plaintiff, by the conductor who issued it, and by the conductor upon the Interurban car, who directed him to take the Hamline car. At the instance of the conductor of one of the

cars on the Interurban line, the plaintiff entered a car of the Hamline line. The conductor on the latter car refused to accept the transfer in question, in conformity with the rules of the company, which forbade him to accept a transfer check given for another line. As a matter of fact the first conductor made a mistake in the form of the transfer, the line punched being the West St. Paul line, as before stated. Under the regulations of the company, however, it became the duty of the conductor to reject the transfer and collect of the plaintiff the regular fare, because his transfer check was not good over the Hamline line. The plaintiff, having refused to pay his fare or leave the car, was removed by the aid of a policeman.

In order to the successful and orderly management of its business, it is proper for the company to adopt and enforce suitable regulations for the transfer of passengers, as enjoined by the ordinances. Whether a passenger has not a right to insist upon a transfer general in its terms and good for any connecting line he may elect, or whether the city council might require the transfer to be in that form, it is not necessary to decide in this case. If the passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car of another and different line. By accepting such a transfer he so far consents to the regu-

lations of the company in respect to the route and line of cars designated, and the conductors on the several lines would be obliged, in obedience to the rules of the company, to distinguish between the transfers and require them to be used on the particular lines designated. But in this case, as we have seen, the transfer was not sufficiently explicit to limit its application to the West St. Paul line, as the company intended, and under the ordinance it was good for the line of cars which plaintiff took, running over University and Wabasha streets; that is to say, he was entitled to a transfer for the line he took and asked for, and the transfer accepted was sufficiently general to entitle him to use it thereon. His expulsion from the car was therefore wrongful. But the evidence does not present a case for the allowance of punitive damages, and upon this point the instructions of the court were erroneous. The conductor acted in obedience to the rules of the company. He so informed the plaintiff, and no more force was used than was absolutely necessary. Compensatory damages only were recoverable. The instructions were presumptively prejudicial on this point, and from the amount of the verdict it is apparent, we think, that it could not have been limited to compensatory damages merely. There must therefore be a new trial.

Order reversed.

NEBRASKA SUPREME COURT.

Clark D. GILLESPIE, Admr., etc., of Clark D. GILLESPIE, Deceased, *Plff. in Err.*,
v.
City of LINCOLN.¹

(.....Neb.....)

- *1. A city is not liable at common law for the negligent acts of the members of its fire department.
3. Plaintiff's intestate was struck and killed by a ladder wagon or truck belonging to the fire department of the defendant city, through the negligence of the driver thereof, a member of said department, while driving along one of the streets of the city for the purpose of exercising a team of horses belonging to the department. *Held*, that the city is not liable.

(June 11, 1892.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles O. Whedon, for plaintiff in error:

Liability of a city for the acts of its employes

*Head notes by Post, J.

NOTE.—For note on liability of municipal corporation for negligent acts of firemen, see Dodge v. Granger (R. L.) 15 L. R. A. 781.
15 L. R. A.

"is based upon the right which [the employer has to select his servants, to discharge them if not competent, or skillful, or well-behaved, and to direct and control them while in his employ."

Kelly v. New York, 11 N. Y. 482.

The non-liability of cities for the negligent acts of fire departments is based in some states upon the language of the statute which in those states makes the maintenance of a fire department obligatory upon the city. If, however, the statute simply confers a power that the city is at liberty to exercise or not, at will; that is in no sense compulsory, but its exercise is purely voluntary, and if the city chooses to organize and control the department, it is unlike in its effects and consequences the exercise of a power imposed upon the city by legislative requirement—one is voluntary and the other would be compulsory, and this should make a difference in the two cases.

The language of our statute is permissive only, and what the city of Lincoln does regarding its fire department it does voluntarily.

This being true, the doctrine of *respondent superior* applies, and the city would be liable.

The manner in which the driver followed the instructions given him is what constitutes the wrong. The public have the right to use the streets. The city is obliged to keep them in such shape and condition as will allow their use by the public.

Lincoln v. Walker, 18 Neb. 251; *Lincoln v. Gillilan*, Id. 119; *Lincoln v. Holmes*, 20 Neb. 39; *Lincoln v. Woodward*, 19 Neb. 259; *Plattsmouth v. Mitchell*, 20 Neb. 280.

Of what use is this requirement if the city

can keep its fire apparatus charging along the streets at a high rate of speed when no alarm of fire has been given? When a fire breaks out and an alarm is given, the knowledge almost instantly becomes general. Everybody is on the lookout to prevent injury. Fast driving then is not especially dangerous. But in exercising the teams the case is different, and for the city to order or allow its employes to run a dangerous truck at a high rate of speed when no emergency existed, is gross negligence for which the city should be held liable.

Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526; *Todd v. Troy*, 61 N. Y. 506; *Clemence v. Auburn*, 66 N. Y. 384; *Evans v. Utica*, 69 N. Y. 166, 25 Am. Rep. 166; *Niven v. Rochester*, 76 N. Y. 619; *Weed v. Ballston Spa*, Id. 329; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219.

When a municipal corporation is charged by its charter with the duty of keeping its streets in suitable condition for public travel, the agents of the corporation charged with that duty are bound to exercise an active vigilance in the performance thereof.

Todd v. Troy, *supra*; *Atlanta v. Perdue*, 53 Ga. 607; *Rosenberg v. Des Moines*, 41 Iowa, 415; *Chicago v. Hoy*, 75 Ill. 530; *Pomfret v. Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459.

The degree of care and foresight which it is necessary to use must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence that is to be anticipated and guarded against.

New York v. Bailey, 2 Denio, 433; *Smid v. New York*, 17 Jones & S. 126.

A person standing in the relation of master to one he has selected as his servant from a knowledge or belief in his skill, and who can remove him for misconduct, and whose orders the employe is bound to receive and obey, is liable for his acts of negligence in the business intrusted to him, whether such servant has been appointed directly, or through the intervention of an agent.

Quarman v. Burnett, 6 Mees. & W. 509; *Miligan v. Wedge*, 13 Ad. & El. 737; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Sprout v. Hemingway*, 14 Pick. 1, 25 Am. Dec. 350.

One of the duties of a municipal corporation arising out of the voluntary adoption of its charter, is to use reasonable care in the conduct of any work which it undertakes and the accomplishment of which is within its corporate power.

Chicago v. O'Brennan, 65 Ill. 160; *Chicago v. Turner*, 80 Ill. 419; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

When the city has the appointment and supervision of the employes, and the duty to be performed is for the benefit of the corporation, the city is liable for the wrongful or negligent act.

New York v. Bailey, *supra*; *Torney v. New York*, 12 Hun, 542; *Walsh v. New York*, 41 Hun, 299.

And where the duty is imposed on the corporation, and the officers or departments are simply made by charter agents of the corporation.

Martin v. Brooklyn, 1 Hin, 545; *Polley v. Buffalo*, 20 N. Y. Week. Dig. 163; *Niven v.* 16 L. R. A.

Rochester, 76 N. Y. 619; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Deyoe v. Saratoga Springs*, 3 Thomp. & C. 504; *Groves v. Rochester*, 89 Hun, 5; *Pattengill v. Yonkers*, 25 N. Y. Week. Dig. 451.

Supposing the city had built an engine-house abutting on one of the principal streets in such a defective manner that it fell down upon a passer-by who was exercising the proper care and discretion in passing along the street. Would not the city be liable for any injury he might sustain? It would seem that this question must be answered in the affirmative. Wherein does the supposed case differ in principle from the one at bar?

Briegleb v. Philadelphia, 135 Pa. 451; *Goodloe v. Cincinnati*, 4 Ohio, 518; *Rhodes v. Cleveland*, 10 Ohio, 160, 86 Am. Dec. 82; *McCombs v. Akron*, 15 Ohio, 479.

Mr. C. E. Magoon, also for plaintiff in error.

Mr. E. P. Holmes, *City Atty.*, for defendant in error.

Post, J., delivered the opinion of the court:

This case comes into this court on a petition in error. The error assigned is the sustaining of a demurrer by the district court of Lancaster county to the petition of plaintiff in error, the material part of which is as follows: "That on and prior to the 29th day of May, 1889, the said defendant had an organized and paid fire department, and had and owned engines, hose, hose-carts, ladders, wagons, trucks, and other apparatus for the use by, and which was used by, said defendant and its said fire department in extinguishing fires. That said defendant then had and owned horses, which were used by said defendant in drawing said wagons, trucks, hose-carts, and engines to the place in said city where a fire might be burning, and for other purposes. That among other apparatus the said defendant then owned a large truck or wagon, upwards of twenty feet in length, which was used by the defendant in transporting about the city long ladders, used by said fire department. That said defendant, at the time of committing the wrongs hereinafter mentioned, had in its pay and employ one Peter Keykendall, who was under the direction and control of the defendant, and whose duty it was, under the direction of said defendant, to drive the team attached to said ladder truck or wagon about the city; and said wagon was not at the time hereinbefore mentioned, May 29, 1889, supplied with any brake or lock or other appliance for stopping said wagon when in motion, or to assist the horses to said wagon attached in stopping the same; that the distance between the front and hind wheels to said truck or wagon was about eighteen feet; that said wagon or truck, when loaded with ladders and other apparatus carried thereon, and with the driver thereon, weighed upwards of two thousand pounds. That Ninth street extends through said city from north to south, and intersects and crosses P, R, and S streets in said city, and said Ninth street and said P, R, and S streets have for many years last past been public streets in said city, and on said 29th day of May, 1889, said Ninth street was paved with wood, and between S

and P streets was a paved and smooth street, and from S to R street had a smooth and level surface, and was free from obstruction, and was paved with wood. That the said Peter Keykendall, under his employment, was by the defendant required to drive said ladder truck or wagon about the city when no fires were burning which required to be extinguished by said defendant or said fire department, for the purpose of exercising the horses to said wagon attached, and was also required to drive said horses attached to said wagon, when the same was heavily loaded, on and along the public streets of the said city at a furious rate of speed, and as fast as said horses could be made to run, without any regard whatever for the lives or safety of citizens of the city who might be upon the streets, and this when no fire or fires were burning which required the action of the defendant or its fire department to extinguish, for the sole and only purpose of exercising said horses. That on the 29th day of May, 1889, the said Peter Keykendall, then being in the employ of the defendant, and acting under the orders and direction of the defendant, drove a span of large, high-spirited, and powerful horses attached to said ladder truck or wagon about the public streets of said city, for the purpose of exercising said horses. Said wagon or truck was loaded with ladders and other apparatus, and the driver rode therein, and said wagon with its load weighed upwards of two thousand pounds; that said wagon was not on said day supplied with any lock or brake or other appliances for stopping or assisting in stopping said wagon when in motion, as the defendant then well knew. That said Keykendall on said day drove said span of horses to said wagon attached as aforesaid on and along said Ninth street at a furious and dangerous rate of speed, and as fast as said horses could be driven, when there was no fire burning which required the services of said fire department or any of its members or employés of said city to extinguish, but said horses were driven for exercise only; that Clark D. Gillespie, an infant of tender years, being then but six years of age, was at the time crossing said Ninth street near the place where said street intersects and crosses R street at the north side of said R street, and said span of horses were driven upon said Clark D. Gillespie, and he was thrown upon the pavement, and the front wheel of said wagon was driven over and across his body; that said boy, after being knocked down and run over by said horses, and by one of the front wheels of said wagon, raised his head and attempted to arise from the pavement, when he was struck and run over by one of the hind wheels of said truck or wagon and was instantly killed. That the killing of said boy was caused by the driving over him of said team and wagon as aforesaid. Plaintiff further says that at said time said team and wagon were not being driven to any fire which required to be extinguished, but were being driven on and along said street for the sole and only purpose of exercising said horses, under the direction and orders of the defendant, at a dangerous rate of speed, and were driven so fast that it was impossible for the said Clark D. Gillespie to escape being run

over. That the said Clark D. Gillespie was the son of the plaintiff. That on the 22d of July, 1889, the plaintiff was by the county court of said Lancaster county duly appointed administrator of the estate of said Clark D. Gillespie, and gave the bond by said court required, and took the oath by law required in such case. That on or about the 22d of July, 1889, plaintiff presented to the city council his claim for damages sustained by the estate of said Clark D. Gillespie by reason of the killing of him, the said Clark D. Gillespie, together with the names of the witnesses and a statement of the time, place, nature, circumstances, and cause of the injury and damages complained of, which claim was verified by the oath of the plaintiff; that afterwards, and on or about the 12th of August, 1889, said claim was by the defendant and the mayor and council thereof, to which it was presented as aforesaid, rejected and disallowed. That by reason of the killing of said Clark D. Gillespie as aforesaid the estate of the deceased has sustained damages in the sum of \$5,000, for which sum plaintiff prays judgment, with interest from the 12th of August, 1889, and for costs."

The contention of the defendant in error is that no liability exists on the part of a city like Lincoln for injuries occasioned by the negligent acts of members of its fire department. This exemption is placed upon the ground that, in performing their duties, firemen act in obedience to a legislative command, and, although appointed and paid by the city, they are to be regarded rather as officers charged with a public duty than as servants of the city. Public policy, it is claimed, forbids the imposition upon a city of liability for the negligence of this class of employés, since they are engaged in the discharge of a duty imposed by law for the welfare of the public, and from which the city, as a corporation, derives no benefit or advantage. Counsel for plaintiff in error, while not conceding the rule to be as stated, insists that it could have no application to the case at bar, for the reason that the statute under which the fire department of the city of Lincoln is organized and governed is permissive only, and whatever is done by the city in that respect it does voluntarily, and therefore the rule *respondet superior* is applicable. To this proposition we cannot assent.

The provision on the subject is found in subdivision 33, § 67, of the charter of the city of Lincoln: "Cities governed under the provisions of this Act shall have power by ordinance to provide for the organization of a fire department, to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding \$100, and to make the necessary appropriations therefor, and to establish regulations for the protection from and extinguishment of fires." This language, although permissive in form, is in one sense mandatory. True, it is not mandatory in the fullest sense of the word, since the duty of the city to provide protection to life and property from fire cannot be enforced by mandamus or other

remedy. It is not every duty imposed upon the state, or the different agencies thereof called "municipal corporations," that can be thus enforced. *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 16 L. ed. 717; Dill. Mun. Corp. 4th ed. 93. It is none the less a duty on the part of the city because the law has not provided a means for its enforcement by the mandate of the court. There existed a moral or equitable obligation on the part of the defendant city to provide means of protection from fires within its limits, and in the discharge of that duty provision was made for its fire department. If defendant is to answer for the wrongful act of Keykendall, the driver of the ladder wagon, it must be upon the rule *respondent superior*. It is clear that upon no other principle is it chargeable. In this connection, it should be noted that the claim is made by plaintiff that Keykendall, in driving the team at the time in question, was acting within the scope of his authority. Counsel says in his brief: "The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires*. The way in which it was performed is what we complain of." Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved.

In Dill. Mun. Corp. 4th ed. 974, the rule is stated thus: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondent superior* applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondent superior* is not applicable." Among the officers who are not servants of a city, within the foregoing rule, and for whose negligence it will not be chargeable, the learned author enumerates policemen, health officers, and firemen. The rule as to the liability of the latter the author states, in section 976, as follows: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an Act of the Legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no es-

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pecial benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given. The maxim of *respondent superior* has therefore no application." To the same effect, see 2 Thomp. Neg. 735; Shearm. & Redf. Neg. 295, 296.

Hayes v. Oshkosh, 83 Wis. 814, 14 Am. Rep. 760, was an action to recover damages resulting from a fire occasioned by the negligent use of an engine employed in suppressing a fire in the neighborhood. Chief Justice Dixon, in the opinion, says: "Neither the charter of the city nor the general statutes of the state contains any peculiar provision imposing liability in cases of this kind, and the decisions elsewhere are numerous and uniform that no such liability exists." *Wilcox v. Chicago*, 107 Ill. 884, 47 Am. Rep. 484, is directly in point. In that case the plaintiff sought to recover for injuries occasioned by a collision between his carriage and a hook and ladder wagon of the city, through the negligence of the driver while in the discharge of his duty. In the opinion of the court, by Judge Walker, it is said: "To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great if not greater burdens than are suffered from damage by fire. Sound public policy would forbid it, if it were not prohibited by authority." In *Fisher v. Boston*, 104 Mass. 94, 6 Am. Rep. 196, the plaintiff received personal injuries through the negligent use of hose by a fire company of the city in extinguishing a fire on adjoining premises. Judge Gray, in the opinion of the court, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity, nor is any part of the expense thereof authorized to be assessed upon owners of buildings or other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town or highway."

In *Hafford v. New Bedford*, 16 Gray, 297, the plaintiff was struck and injured by a horse-cart on a sidewalk of a public street. The firemen in charge thereof had negligently drawn it along and upon the sidewalk from the engine house ten or fifteen rods distant. The city was held not liable. In *Jewett v. New Haven*, 88 Conn. 863, 9 Am. Rep. 883, the plaintiff, without negligence on his part, was struck and injured in a public street by a horse cart, which was being driven to the engine house for an additional supply of hose for use at a fire then raging, but at a dangerous rate of speed, and without the exercise of reasonable precaution for the safety of passers-by. It was held the rule *respondent superior* did not apply, and the city was not chargeable.

In *Dodge v. Granger*, 17 R. L. —, 15 L. R. A. 781, a very recent case, on the authority of

cases above cited, the city was held not liable for injuries caused by contact with a ladder projecting across the sidewalk in front of an engine house, negligently permitted by the firemen to remain in that position while engaged in cleaning the house. This principle has been repeatedly applied to other officers or employés of municipal corporations, as in *Mazmilian v. New York*, 62 N. Y. 160, where plaintiff's intestate was killed by a collision with an ambulance wagon, which was caused by the negligence of the driver, an employé of the commissioners of public charities and corrections; *Haight v. New York*, 24 Fed. Rep. 93, where, following the last case, it is held that the city is not liable for damage caused by a collision with a steamboat owned by the city, but in the exclusive use of the board of charities and corrections; *Condict v. Jersey City*, 46 N. J. L. 157, where the deceased was killed through the negligence of a driver employed by the board of public works to remove garbage from the streets to a public dumping ground; *Caldwell v. Boone*, 51 Iowa, 687, where the injury resulted from the wrongful act of a policeman paid by the city; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Vinahaven*, 65 Me. 402, 20 Am. Rep. 709, and *Barbour v. Ellsworth*, 67 Me. 294,—in each of which it was held that the city was not chargeable with the negligence of its health officers; *Burrill v. Augusta*, 79 Me. 118, 1 New Eng. Rep. 697, in which plaintiff's horse was frightened by the escape of steam from a fire engine, negligently allowed to remain in the street; *Elliott v. Philadelphia*, 75 Pa. 347, where plaintiff's horse was killed through the negligence of a police officer, by whom he had been arrested for violation of an ordinance of the city against fast driving; *Bryant v. St. Paul*, 33 Minn. 289, where the plaintiff fell into a vault negligently left open and exposed by the board of health. In the last case, the distinction between the class of officers above-

mentioned and other agents of the city is clearly pointed out by Vanderburgh, J., as follows: "The duties of such officers are not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body." There are many cases in the reports of the states and the United States in harmony with the foregoing, among which are *Smith v. Rochester*, 76 N. Y. 506; *Van Horn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750; *O'Meara v. New York*, 1 Daly, 425; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Howard v. San Francisco*, 51 Cal. 53; *Ham v. New York*, 70 N. Y. 459; *Welsh v. Rutland*, 58 Vt. 228. The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger, in *Mazmilian v. New York*, *supra*: "It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." This distinction is made also in *Ehrgott v. New York*, 96 N. Y. 274, 48 Am. Rep. 622, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city, it must be held to be an exception thereto,—an exception based upon a public policy which subordinates mere private interests to the welfare of the general public.

The judgment is right and is affirmed.

The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT

William A. TAPPAN
v.
BOSTON WATER POWER CO.

Edward I. BROWNE et al.
v.
SAME.

(.....Mass.....)

1. The boundary line between owners of land on opposite sides of a channel not more than 200 rods wide into which the tide flows, but from which it wholly ebbs and through which a fresh water stream flows is the middle of the tidal channel and not affected by the fresh water stream, although the Colonial Ordinance of 1641-7 which extends the ownership of the

land on tidal waters to low water mark, if not more than 100 rods, furnishes no guide for the division, since the land to be divided is all above low water mark.

2. Flats in the bed of a fresh-water stream into which the tide flows, but from which it wholly ebbs at low water where they are between separate channels of the stream are to be divided between riparian owners by straight lines from the points where the division lines of the owners end on the bank drawn to and at right angles with the center line of the tidal channel at the ordinary stage of the waters.

3. An objection that a disclaimer in an action by writ of entry was not filed at the same time with a plea of *nul disseisin* comes too late when first made at the argument.

4. Disclaimers in an action by writ of

NOTE.—Ownership of flats, or land below high-water mark.

Although the common-law rule limiting the title of an owner of lands upon navigable waters to high-water mark is changed in Massachusetts, the decision in the above case that this statutory change
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does not apply to the conflicting rights of owners on opposite sides of a fresh-water stream in which the tide flows but from which it wholly ebbs at low water, makes the further decision as to the ownership of flats in the bed of such a fresh-water stream one of general application, while the question as to whether the low-water

entry are conclusive as between the parties and their privies as to the right and title of the demandants to the lands included in the disclaimers.

(Field, Ch. J., and Knowlton and Lathrop, JJ., dissent from propositions 1 and 2.)

(June 24, 1892.)

REPORT from the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of two actions by writ of entry, brought to recover possession of certain mud flats, in each of which there had been a finding in favor of the tenants. *Reversed.*

The facts are stated in the opinion.

Messrs. W. G. Russell and H. W. Putnam, for demandants:

The demandants' title extends to the center of the creek at high water, i. e., to the line midway between the ordinary high-water lines or lines of marsh.

"The low-water mark" under the ordinance is the mark or line where the sea, at its lowest ebb, touches the land. A tidal stream is—where the tide ebbs wholly from it—simply a tidal creek with a fresh-water stream flowing through it when the tide is out. In such a creek the Commonwealth has no title, the fresh-water stream is not the "low-water mark" of the colonial ordinance; and the opposite proprietors own in severalty, in equal shares proportionally to their frontage, the whole flats of the creek from shore to shore as parcel of their respective upland, as if there were no fresh water stream there,—each owning to the *medium filum*, or center line of the creek.

Seuall & D. Cordage Co. v. Boston Water Power Co. 6 New Eng. Rep. 820, 147 Mass. 61; *Ashby v. Eastern R. Co.* 5 Met. 368, 88 Am. Dec. 426; *Rust v. Boston Mill Corp.* 6 Pick. 158; *Boston v. Richardson*, 18 Allen, 146; *Harlow v. Fisk*, 12 Cush. 802; *Valentine v. Piper*, 22 Pick. 85; *Walker v. Boston & M. R. Co.* 8 Cush. 1; *Gray v. Deluce*, 5 Cush. 9; *Womson v. Womson*, 14 Allen, 71.

It is only a depression or channel from which the tide does not ebb at low water that determines the direction and extent of the riparian proprietor's flats.

Walker v. Boston & M. R. Co. supra; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 558; *Sparhawk v. Bullard*, 1 Met. 95; *Drury v. Midland R. Co.* 127 Mass. 571; *Ashby v. Eastern R. Co. supra*.

The aim of the court in dividing flats is "to lay down such a line of division as to give to each riparian owner his fair and equal share," upon "the principle of giving an equal division."

Walker v. Boston & M. R. Co. supra.

The outward boundary of flats to which the side lines shall run is the *medium filum*, or center-line between the banks.

Harlow v. Fisk and *Boston v. Richardson, supra.*

The rule follows in principle the analogy of non-navigable rivers in which the riparian proprietors own in severalty to the center or middle line between the shores,—the "shores," in the case of a tidal creek or river, being the mean high-water lines of the tide, or edges of the upland, and in the case of a non-navigable river, the ordinary water-lines of the fresh-water stream.

Ingraham v. Wilkinson, 4 Pick. 268, 16 Am. Dec. 342; *Bardwell v. Ames*, 22 Pick. 383; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544; *Knight v. Wilder*, 2 Cush. 199, 48 Am. Dec. 660; *Boscawen v. Canterbury*, 23 N. H. 188; *Plymouth v. Holderness*, cited in 28 N. H. 217.

The language of the ordinance, as repeatedly construed and applied by the courts, necessarily leads to the conclusion for which we contend.

Watuppa Reservoir Co. v. Fall River, 1 L. R. A. 466, 147 Mass. 548.

Before the ordinance was passed, i. e., at common law, we bounded not by the fresh-water stream or its thread, but by the mean high-water mark of the sea, and the colony owned the flats from shore to shore.

Com. v. Alger, 7 Cush. 53; Gould, Waters, §§ 27, 42; *Porter v. Sullivan*, 7 Gray, 441.

The moment the ordinance was passed we bounded by "the [extreme] low-water mark" of the sea, not by the fresh-water stream or its thread. We therefore have never bounded by the fresh-water stream, either at common law or under the ordinance, and consequently, never by its thread. We have never been riparian proprietors on it, but always littoral proprietors on the sea, to speak with exactness. The ordinance grants to each littoral proprietor his "due share" (Wilde, J., in *Rust v. Boston Mill Corp.* 6 Pick. 186), of the flats in severalty; and the bed of a fresh-water stream within that share,—whether running parallel with his line of upland or at any angle with it,—passes to him as much as it does when it falls within an original allotment of upland made to him in the book of possessions.

Watuppa Reservoir Co. v. Fall River, supra; *Rust v. Boston Mill Corp.* 6 Pick. 198; *Ashby v. Eastern R. Co.* 5 Met. 368, 88 Am. Dec. 426.

The dominant purpose of the ordinance is to establish a just, uniform, and definite rule of title in the soil of flats not exceeding 100 rods in extent from the upland, without reference to the rights of navigation or of access to the water.

Walker v. Boston & M. R. Co. 8 Cush. 1.

The demandants' title as riparian proprietors upon a fresh-water stream (assuming that they are such in law) extends to the thread of the fresh-water stream.

mark intended by the statutory provision is to be regarded as the point to which the tide water recedes or that to which the fresh water of the stream recedes, is novel and peculiarly interesting.

For notes on the title and riparian rights of the owners of land bounded on navigable waters, see Fulmer v. Williams (Pa.) 1 L. R. A. 608; Par-16 L. R. A.

ker v. West Coast Packing Co. (Or.) 5 L. R. A. 61; Case v. Loftus (Or.) 5 L. R. A. 684; Miller v. Mendenhall (Minn.) 8 L. R. A. 89; Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632.

For note on boundaries of land bordering on a fresh-water stream, see Chandlos v. Mack (Wia.) 10 L. R. A. 207. B. A. R.

The western branch of the fresh-water stream was the wider and larger in volume.

The law gives us title to the thread of the western channel as the main or principal one, and including the island.

Phear, Rights of Water, 11, 12; *Ang. Watercourses*, § 45; *Claremont v. Carleton*, 2 N. H. 369, 9 Am. Dec. 88; *Greenleaf v. Kilton*, 11 N. H. 530; *Kimball v. Schoff*, 40 N. H. 190.

If, upon the facts, the two branches of the fresh-water stream are to be treated as substantially equal in width, the thread of the stream will be the center line between the threads of the channels, and will bisect the island.

Ingraham v. Wilkinson, 4 Pick. 283, 16 Am. Dec. 342; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276.

Messrs. Henry D. Hyde, George F. Richardson, and G. D. Braman, for tenants:

As the demanded premises are situated below the ordinary high water mark, the title of these premises before the Colonial Ordinance of 1847 was passed was in the Massachusetts Bay Company.

Storer v. Freeman, 6 Mass. 485, 4 Am. Dec. 153; *Com. v. Roxbury*, 9 Gray, 451.

The title of the demandants in this case must depend on the construction to be placed on this ordinance. The two limitations which appear in the ordinance are the low-water mark or 100 rods when the low-water mark is more than 100 rods.

These flats run in the direction of the nearest tidal channel, and such a channel forms the limit of the ownership of flats derived under this ordinance.

The rule is the same whether the water which remains in the channel is salt water or the fresh water of the stream above running through the bed of the fresh-water creek.

See *Sparhawk v. Bullard*, 1 Met. 95; *Ashby v. Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426; *Walker v. Boston & M. R. Co.* 3 Cush. 1; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 553; *Drury v. Midland R. Co.* 127 Mass. 571.

The burden in this case is on the demandants to show that there was no such channel between the edge or bank of their upland and the center of the westerly channel.

Williams v. Ingell, 21 Pick. 298; *Ashby v. Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426.

This they have failed to do, for it was expressly found that, "on the evidence the demandants did not by a fair preponderance of the evidence satisfy me that at any time before the waters of Muddy river were cut off, said waters ceased to flow in the easterly channel at the lowest spring tides." This channel, then, must be the limit of the demandants' flats.

Morton, J., delivered the opinion of the court:

These two actions involve the title to flats in Muddy river, in Boston, lying between marsh lands on the easterly and westerly sides of the river, which belong respectively to the demandants and tenants. Both were tried together, and depend on the same facts. Evidence was introduced by the parties of acts of ownership and possession by themselves and their predecessors in title relating 16 L. R. A.

to a part of the demanded premises; but the court was not satisfied that such acts had been exercised. The cases do not depend, therefore, at all upon possessory titles. The demandants also claimed title by accretion. The findings of the court would seem to have disposed of this claim, and it has not been argued.

The titles of the parties depend on the rights which owners of lands on opposite sides of a stream like Muddy river have to the interjacent flats in the natural condition of things under the Colony Ordinance of 1641-47. It appears that Muddy river is a fresh-water stream, and that prior to 1820 it had a large flow in the winter and spring, and a diminished flow in the summer, and ran unobstructed to Charles river. It was navigable at certain stages of the tide to a point above the demanded premises, and the tide ebbed and flowed to a point above them. Between the lands of the demandants in the second action and those of the tenants was an island, which at ordinary high tide was nearly or entirely covered by water, and which the presiding justice treated as flats. This island divided the river into two channels, which united below it,—one called the "easterly channel," which at high water ran nearer the lands of the demandants than the center of the stream; and the other called the "westerly channel," which ran nearer the lands of the tenants than the center of the stream at high water. The demanded premises lie between the edge of the marsh land of the demandants and the center of the westerly channel, and the distance between the two lines is less than 100 rods. At ordinary low water there was no water on the demanded premises except such as came from the flow of Muddy river, and that was confined to the two channels. The presiding justice was not satisfied that the tide ebbed from the easterly channel, before it did from the westerly channel, or that the waters of the river ceased to flow in the easterly channel at the lowest spring tides, or that they did or did not run through the westerly channel at the lowest spring tides. Certain dams were built in Charles river in 1820 and 1821, which thereafter affected the flow of Muddy river. The extent to which they affected it is not material. In 1885, Muddy river was cut off at Brookline avenue, and tide water was cut off by the Back Bay park. It is not stated where the line of low tide was. We do not know whether it was where Muddy river emptied into the Charles, or above or below that point. It is evident that it was below the demanded premises, for it is found that at ordinary low tide the only water that flowed over them was that of Muddy river, flowing in the two channels above named.

At common law the title of the owner of land bounding on tide water only extends to ordinary high-water mark. *Com. v. Charlestown*, 1 Pick. 182; *Porter v. Sullivan*, 7 Gray, 441; *Com. v. Roxbury*, 9 Gray, 477, 483, 491; *Com. v. Alger*, 7 Cush. 58, 66, 66.

This applies to a stream discharging fresh water, but in which the tide ebbs and flows. The test whether or not it is to be regarded as tide water is whether there is a regular

rise and fall under the influence of the tide. *Atty-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Peyroux v. Howard*, 32 U. S. 7 Pet. 843, 8 L. ed. 707; *Lapish v. Bangor Bank*, 8 Me. 85.

The Colony Ordinance of 1641-47, however, extended the title of all proprietors of land adjoining creeks, coves, and other places where the tide ebbs and flows to low-water mark, if not more than 100 rods. It is under the title thus conferred that the demandants claim. The tenants have disclaimed in both cases as to the land between the edge of demandants' marsh land, and the center of the easterly channel. They contend that that channel is the demandants' boundary, and that their line does not go beyond the nearest tidal channel, whether that be one in which only fresh water flows at low tide, or one from which the tide does not wholly ebb. They rely for this upon certain expressions in cases that have been decided by this court; and they are obliged in effect to concede that under it the title to the land between the channels may still be in the Commonwealth. We do not think the cases to which the tenants have referred us maintain the proposition on which they rely, or show that the low-water mark intended by the ordinance is the low-water mark of the fresh-water stream.

In *Sparhawk v. Bullard*, 1 Met. 95, 107, there was a question respecting the existence of a creek alleged to have separated the land demanded from the upland and flats belonging to the demandants. The jury was instructed that, "if they should find there was naturally and originally any creek in which the tide ebbed and flowed, and from which it did not ebb entirely at the times when from natural causes it ebbed the lowest, this would constitute a boundary of the flats beyond which the demandants would not by law be entitled to recover." These instructions, which had been given originally by Shaw, *Ch. J.*, and were adopted by Morton, *J.*, in a later trial of the same case, were excepted to, but this court held that they were correct. In *Ashby v. Eastern R. Co.*, 5 Met. 868, 370, 38 Am. Dec. 426, which was decided only two years and a half or thereabouts after *Sparhawk v. Bullard*, the opinion was given by Chief Justice Shaw, and certainly no intention is manifested to overrule that case. On the contrary, we think it conforms to it. In this case also the question was whether the land of the petitioner went to a channel. In defining what was meant by a channel the chief justice used the following language: "If this part of flats called 'South River' had no channel running through it,—that is, no depression from which the tide did not ebb at low water,—then it must have been a cove. . . ." It is evident that the word "channel" is used in this sense throughout the opinion, and that he does not mean to say that a channel formed by a stream of fresh water, out of which the tide ebbed at low water, would constitute a boundary to flats.

In *Walker v. Boston & M. R. Co.*, 3 Cush. 1, 22, the same rule is laid down as in *Sparhawk v. Bullard*, and that case is cited 13 L. R. A.

in support of it. Chief Justice Shaw gives the opinion in this case also, and he says: "It appears by the case that the stream running from the tide mills along through the westerly part of these flats is a natural channel or creek, from out of which the tide does not ebb. It must therefore be a terminus to a claim of flats in that direction."

In *Atty-Gen. v. Boston Wharf Co.*, 12 Gray, 558, the rule laid down in *Sparhawk v. Bullard* is again affirmed in these words: "A natural or original creek, in which the tide ebbed and flowed, and from which it did not ebb entirely at the time when from natural causes it ebbed the lowest, would constitute a boundary of the flats."

In *Drury v. Midland R. Co.*, 127 Mass. 581, the court says that a creek from which the tide does not wholly ebb was a natural boundary, and bounded the claims of all adjacent proprietors of flats. See also *Porter v. Sullivan*, 7 Gray, 448, 449; *Harlow v. Fisk*, 12 Cush. 304.

There is no suggestion in these cases that a tidal channel from which the tide ebbs, and through which a fresh-water stream flows at low tide, will constitute a boundary to flats, or that the fresh-water stream will constitute low-water mark. And we think it plain that a channel, to be a boundary to flats, must be one from which the tide does not ebb at low water. It is expressly found in the cases at bar that the tide ebbs from the channel over the demanded premises at low water, and it does not, therefore, constitute a boundary to demandants' flats. It appears that it also ebbs from the other channel. It is immaterial on this point whether the tide ebbed from one channel sooner than the other, or whether there was or was not fresh water flowing in either or neither or both of them at low water, or whether one channel was wider than the other, or whether at one stage of the tide more water flowed in one than in the other, and at another stage of the tide this was reversed. The controlling fact is that the tide wholly ebbed from both channels at low water. The ordinance relates, so far as concerns the point which we are now considering, to land adjoining "creeks, coves, and other places upon and about salt water, where the tide ebbs and flows." It establishes that the proprietor of such land "shall have propriety to low-water mark when the sea doth not ebb above a hundred rods, and not more, wheresoever it ebbs further." By low-water mark is meant the lowest line made by the receding tide with the land; not the lowest line which a stream of fresh water emptying into the sea, or a cove, or tidal river makes with the land. It has nothing to do with a fresh-water stream, or with a tidal channel through which only fresh water flows at low tide. Nothing in the ordinance indicates an intention to preserve the fresh-water stream or channel as a boundary below ordinary high-water mark; and the cases cited show it has not been done in applying it. The channel would not be the boundary, even above high-water mark. The rules of proprietorship on a fresh-water stream may furnish, in a given case, the best analogy for the division of interjacent

flats on a stream below a point where the tide ebbs and flows, but beyond that they have no force.

How, then, in these cases, are these flats to be divided? The ordinance itself furnishes no guide. It simply declares a rule of property, leaving the court to make the division in such manner as appears to be just and reasonable. *Walker v. Boston & M. R. Co.* 8 Cush. 22; *Gray v. Deluce*, 5 Cush 12. In applying it, the aim has been to secure a fair and equal division of the flats among those to whom they belonged. *Walker v. Boston & M. R. Co.* 8 Cush. 22. No fixed plan has been or can be adopted which will operate with equal justice in all cases. Certain general rules have been laid down, but even these yield to the circumstances of particular cases. Thus, for instance, it is said that the flats are to extend to low-water mark, (*Porter v. Sullivan*, 7 Gray, 442, 443; *Wenon v. Wenon*, 14 Allen, 71; *Sewall & D. Cordage Co. v. Boston Water-Power Co.* 147 Mass. 64, 6 New Eng. Rep. 320,) that they must be in front of the upland, when practicable, to which they are appurtenant, and also, when practicable, of equal width at the low-water line with the upland at the high-water line, (*Gray v. Deluce*, 5 Cush. 9, 12; *Porter v. Sullivan*, 7 Gray, 441-443;) and, in the case of a cove, from which the tide ebbs, and where there is no channel, they are to be divided by straight lines from the external lines of each proprietor's upland to a base line across the mouth of the cove, so as to give each proprietor a distance upon the base line proportioned to the width at the ordinary high-water mark of his upland. *Rust v. Boston Mill Corp.* 6 Pick. 156.

In the present case the line of low water is below the demanded premises. The flats are in the bed of a stream, which extends some distance below the demanded premises before entering Charles river. It is obviously impracticable to extend the lines of division to low-water mark, or to follow the rules of division laid down for flats in a cove. The most satisfactory analogy would seem to be that presented by a fresh-water stream or river, where the line of division between opposite proprietors is the thread of the stream. *Ingraham v. Wilkinson*, 4 Pick. 268, 273, 16 Am. Dec. 342; *Bardwell v. Ames*, 23 Pick. 338, 354; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544, 552; *Knight v. Wilder*, 2 Cush. 199, 207, 208, 48 Am. Dec. 660; *Boston v. Richardson*, 13 Allen, 154. In such a case each proprietor owns an equal share of the bed of the stream in proportion to his line on the margin and in front of or adjacent to his upland. Ang. Watercourses, § 11. The principle of division between them is, as in the case of flats, that of equality, and the division is effected by drawing lines at right angles from the termini of the side lines on the shore to and at right angles with the thread of the stream. *Knight v. Wilder*, 2 Cush. 209, 48 Am. Dec. 660. In a somewhat similar case respecting this very river it was said that the title of the riparian owners extended to the thread of the stream. *Sewall & D. Cordage Co. v. Boston*

Water-Power Co. 147 Mass. 61, 64, 6 New Eng. Rep. 320. And it seems to have been the view of the court in cases where the tide wholly ebbed at low water from a tidal creek that a boundary by it would convey the title to the flats to the center of the creek, (*Harlow v. Fish*, 12 Cush. 302, 306; *Boston v. Richardson*, 13 Allen, 146, 159;) although in one case the margin of the creek was held to constitute the boundary. *Chapman v. Edmonds*, 8 Allen, 512. This case, however, depended on the peculiar language used in the deed which was thought to exclude the creek. By the thread of the stream is meant the center line from one bank to the other, not when swollen by floods or diminished by drought, but in its ordinary and natural condition. This may or may not coincide with the channel. That is immaterial. And it is immaterial also whether there is one channel or more than one. *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544, 559; *Pratt v. Lamson*, 2 Allen, 275, 285; *Boscawen v. Canterbury*, 28 N. H. 189; Ang. Watercourses, §§ 10, 11; Gould, Waters, § 196. What the result might be if it should appear that the land in the middle of the river between the marsh land of the demandants in the second case and that of the tenants was an island, we need not now consider. For the purposes of the trial it was treated by the presiding justice as flats, and this view seems to have been acquiesced in by all parties. Assuming that it is to be regarded as flats we think the demandants are respectively entitled to recover so much as falls within straight lines drawn from the termini on its banks at the ordinary stage of the water of the side lines of their respective marsh lands to and at right angles with the center line of the stream.

The remaining question is whether judgment should be entered for the tenants on their disclaimers. The tenants first pleaded *nul disseisin*, more than a year after the disclaimers were filed. The demandants object that they should have been filed as specifications of defense with the plea of *nul disseisin*. But no objection appears to have been made at the time of filing, or at any time before argument in this court, that they should not be considered as having been filed as specifications of defense under the plea of *nul disseisin*. We think the objection comes too late, and that they must be regarded as having been so filed. The pleas of *nul disseisin* put in issue the title of the demandants, but admitted possession by the tenants. *Higbee v. Rice*, 5 Mass. 352, 4 Am. Dec. 68; *Burridge v. Fogg*, 8 Cush. 183. The disclaimers admitted the title and right to possession of the demandants of the tracts described in them. *Oakham v. Hall*, 112 Mass. 539. The effect of the pleas of *nul disseisin* with the disclaimers was therefore to admit on the part of the tenants the title and right to possession of the demandants to so much of the demanded premises as lies easterly of the center of the easterly channel, and to claim title in themselves as to the rest of the demanded premises. The demandants could thereupon have discontinued these actions as to the parts dis-

claimed. *Johnson v. Rayner*, 6 Gray, 108. They did not do so, and the cases went to trial upon the pleadings as they stood. The tenants having disclaimed as to a part of the demanded premises, the only issue on the disclaimers was not whether they had any right or title to those portions, but whether they had asserted any right or done any act inconsistent with their disclaimers. *Merrimack River Locks & Canals Proprs. v. Nashua & L. R. Co.* 104 Mass. 10. The finding of the court was generally in favor of the tenants, and there is nothing to show that on this branch of the case it was erroneous. The tenants are therefore entitled to judgment upon their disclaimers, and for their costs from the time of filing them. Pub. Stat. chap. 178, § 9. This does not give them title to the tracts disclaimed. The disclaimers are conclusive as between them and the demandants and their privies as to the right and title of the demandants to the lands included in the disclaimers. *Oakham v. Hall*, 112 Mass. 539; *Prescott v. Hutchinson*, 13 Mass. 440; *Porter v. Rummary*, 10 Mass. 64. If, therefore, the demandants eventually should succeed in also establishing their title to so much of the demanded premises as lies between the easterly channel and the thread of the stream, they will have established their title, as between themselves and the tenants and their privies, to all of the demanded premises that fall within the lines previously

described. Stearns, Real Act. 2d ed. 197. While a disclaimer filed as a specification of defense under the present method of pleading in real actions is not, strictly speaking, a plea, it was treated as having the same effect as one in *Oakham v. Hall*, *supra*, and the judgments in these cases would have relation to it. In *Cole v. Eastham*, 124 Mass. 810, the court regarded the pleadings as intending to raise only the question whether the tenant had such possession of the demanded premises as to exclude the demandants, or entitle them to consider themselves disseised, and accordingly directed judgment for the demandants for possession, and for the tenant for his costs. We think upon the main question the finding should have been, upon the facts reported, for the demandants to the center of the stream, and that, in accordance with the terms of the report, the findings must be set aside, and a new trial granted, and it is so ordered.

The Chief Justice and Knowlton and Lathrop, JJ., are of opinion that when land bounds on a running stream which is within the ebb and flow of the tide, and out of which the tide wholly ebbs, but which at ebb tide is still a stream with well-defined banks, the Colonial Ordinance of 1641-47 does not extend the boundary of the land of the riparian or littoral owners across the stream or beyond the line of low water of the stream.

OHIO SUPREME COURT.

Charles CRAIG, *Plff. in Err.*,

v.

STATE OF OHIO.

(.....Ohio St.....)

*The provisions of section 7316, Rev. Stat., which provide that "if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly," are constitutional and valid.

*Head note by the COURT.

(May 10, 1890.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment sentencing defendant to suffer death for having committed murder in the first degree. *Affirmed.*

Statement by Bradbury, J.:

At the October Term, 1890, of the court of common pleas of Hamilton county, an indictment was found by the grand jury charging the plaintiff in error with the crime of murder in the first degree. He

NOTE.—Statute allowing plea of guilty in capital case.

In view of the history of criminal procedure with its strict rules designed for the protection of accused persons, but which in recent times often proves an obstruction of justice, the constitutionality of a statute permitting a plea of guilty in a capital case is a question of much interest.

We know of no direct precedent for the above decision, but it is in line with a tendency which is fortunately growing stronger, both in and out of the legal profession, to secure a simpler and swifter procedure in criminal cases to prevent the frequent miscarriage of justice by reason of technical rules and of the long delays which often nullify the effect of a conviction even if it is finally obtained.

It will be noticed that the question in the above case as to the necessity of a jury arises by reason of the statutory provision making it the duty of the court to hear witnesses and determine the de-

gree of the offense and that the court holds that, except for this, the plea of guilty would warrant the imposition of a capital sentence without any further proceedings.

For notes on the general question of the constitutional right to trial by jury, see *Grand Rapids & L. R. Co. v. Sparrow* (Mich.) 1 L. R. A. 493; *Anderson v. O'Donnell* (S. C.) 1 L. R. A. 632.

As to the right of an accused to waive a trial by jury, see note to *King v. State* (Tenn.) 3 L. R. A. 211.

For note on the constitutional right to jury for assessment of damages on default, see *Dean v. Willamette Bridge R. Co.* (Or.) 15 L. R. A. 614.

For note as to jury trial on appeal as satisfying the constitutional right to trial by jury, see *Miller v. Com.* (Va.) 15 L. R. A. 441.

For note on the constitutional right to trial by jury in equitable cases on account of a demand for damages, see *Lynch v. Metropolitan Elev. R. Co.* (N. Y.) 15 L. R. A. 287.

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was afterwards arraigned, and pleaded not guilty. A jury was drawn, summoned, and in attendance for his trial on November 17, 1890, when in open court, by leave thereof, and by the advice of counsel, he withdrew his plea of not guilty, in the following words: "And thereupon the defendant, Charles Craig, after being fully advised in the premises by his counsel, and being cautioned by the court, pleaded guilty as charged in the indictment herein. . . ." The court thereupon proceeded, under section 7316, Rev. Stat., to hear evidence "and determine the degree of the crime, and pronounce sentence accordingly." After hearing the evidence, the court found the grade of the homicide to be murder in the first degree, and sentenced the prisoner to suffer death. The proceedings and evidence were embodied in a bill of exceptions, and the cause taken to the circuit court on error, where the judgment of the lower court was affirmed. Thereupon proceedings were begun in this court to obtain a reversal of both of said judgments.

Mr. Wade Cushing for plaintiff in error.

Mr. D. Thew Wright for defendant in error.

Bradbury, J., delivered the opinion of the court:

The only question arising on the record is the constitutionality of that provision of section 7316, Rev. Stat., which requires the court, where, upon a charge of murder, the accused confesses his guilt in open court, to "examine witnesses, and determine the degree of the crime, and pronounce sentence accordingly." The record discloses that the plaintiff in error, voluntarily, by the advice of counsel, and after being cautioned by the court, entered a plea of guilty; and then, without objection or protest, permitted the court of common pleas to hear evidence offered by the state, and submitted evidence himself, tending to show the degree of the crime he had committed. That this action of the court was warranted by the statute above quoted, is clear. Counsel for plaintiff in error contends, however, that the General Assembly transcended its constitutional powers in enacting that statute; that the right, upon an indictment for a felony, especially if capital, to be tried by a jury, is so sacred that the accused could not waive it, even when authorized by a statute enacted by the Legislature for that purpose. The denial, in criminal cases, of the power of waiver, has, in many instances, been carried to an extreme, if not absurd, length. The doctrine had its origin at a period in the history of the law of England when offenses that would now be regarded as comparatively trivial were, upon conviction, visited with death, and when the criminal procedure was as crude and imperfect as the Criminal Code was harsh; the accused being allowed, upon the trial of an issue of not guilty, neither counsel nor witnesses to aid him in his defense. The judges, frequently more humane than the law, were reluctant

in many instances to pronounce the sentence of death prescribed by the statute, and were ready to seize upon any irregularity occurring in the course of the procedure to save the life of the prisoner, when neither the nature of the offense of which he had been convicted nor the circumstances of its commission, indicated any considerable depravity or viciousness of character. In addition to this the judge was, in theory at least, the counsel for the accused, and if, through the act, advice, or omission of the judge, the accused was induced to omit making an available objection, or consented to relinquish a right, this was deemed not an act of the accused, but of the court, and the law would not permit the party to suffer for it. Bishop, *Crim. Proc.* 20. In this state, however, the court is no longer, in fact, the adviser or counsel of the accused. Instead, other counsel is guaranteed to him, and, if he is indigent, provided at the public expense. He is entitled to compulsory process to secure the attendance of witnesses in his behalf, and may, under the sanction of a judicial oath, if he so chooses, detail to the court and jury every fact or circumstance known to him that may bear on the question of his guilt or innocence. Every reasonable facility is thus provided for a complete and thorough investigation of the charge against him, which is the surest shield of innocence. Also the penalties prescribed for violations of our criminal laws are more humanely and reasonably apportioned according to the character and magnitude of the crime to which they are respectively attached. Under this state of the law there can be but little sound reason for maintaining a doctrine, defensible mainly, if not solely, by the circumstances under which it originated, and which have long since ceased to exist; and therefore, as might be expected, courts and Legislatures view with diminishing respect that strict ancient doctrine on the subject of waiver in proceedings and trials of even the higher grades of crimes.

A plea of guilty is not an unusual proceeding in criminal prosecutions. The accused is arraigned to afford him an opportunity either to admit or deny the truth of the accusation. The subsequent proceedings are within his control, and depend upon his plea. By a plea of not guilty, he denies and puts in issue every material fact alleged in the indictment, thus imposing upon the prosecutor the burden of proving them. 1 Bishop, *Crim. Proc.* 799; 1 Chitty, *Crim. Law*, 471; Wharton, *Crim. Pl.* 408; *People v. Aleck*, 61 Cal. 137. On the other hand, a plea of guilty, from an early period in the history of criminal procedure, both in England and in the several states of the Union, has been regarded as an admission of every material fact well pleaded in the indictment dispensing with the necessity of proving them, and authorizing the court to proceed to judgment. 4 Bl. Com. 329; 1 Chitty, *Crim. Law*, 429; *Crow v. State*, 6 Tex. 334; 1 Bishop, *Crim. Proc.* 795.

It may be true that a court of common pleas, in the exercise of its discretion, may refuse to accept a plea of guilty of a capi-

tal or other infamous offense, or even in a prosecution for a misdemeanor, until it has ascertained, by an examination of witnesses, whether or not the accused is of sound mind, and free from the influence of promises and hopes unduly raised on the one hand, and of threats and intimidation wrongfully made or used upon the other. This course was pursued in Massachusetts at an early day in at least one capital case. *Com. v. Battis*, 1 Mass. 94. But the exercise of this humane discretion by the court before permitting a plea of guilty to be entered in no way detracts from the force or effect of the plea when it has been finally accepted. In the case before the court, the indictment charged upon the accused both deliberation and premeditation. The plea of guilty was, in its nature, as much a judicial confession of the truth of those two allegations as of any other contained in the indictment, and but for the provisions of section 7816, Rev. Stat., making it the duty of the court to hear witnesses and determine the degree of the offense, would have warranted a capital sentence. That provision, therefore, confers upon the accused a benefit, instead of depriving him of a right, by forbidding that extreme sentence which would otherwise follow his plea, until the court hears evidence, and ascertains that it is warranted by the facts as well as by the plea.

The contention made on behalf of the plaintiff in error as we understand it goes, however, a step further. It is insisted that the framers of the Constitution of 1851 intended to make the punishment for crime, at least in its higher grades, an act of society, to be accomplished only through the intervention of a jury, the special representatives of society. This doctrine would exclude a plea of guilty, and force upon the accused as well as the state a trial by jury to establish facts about which there was no dispute. It was, no doubt, competent for the framers of the Constitution to provide that no person shall be convicted or punished for an offense by his own confession, or in any other mode than by a trial by jury; but the history of the struggle by which the right to trial by jury was established does not afford sufficient ground to require us to construe a constitutional provision, that in terms merely guarantees to the accused a right to a trial by jury, as absolutely prohibiting any other mode of trial, even with the consent of the accused. The only provisions in the Constitution of 1851, of this state, relating to trial by jury, are found in sections 5 and 10 of the Bill of Rights. Section 5 provides simply that "the right of trial by jury shall be inviolate," while section 10 provides that "in any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury." The same provisions of the Constitution that secure a trial by jury to the ac-

cused in capital cases also secure it to one charged with a misdemeanor punishable with imprisonment. Section 10, art. 1. The constitutional guaranty in the one case is no stronger than in the other, and this court very soon after the adoption of the Constitution held that, in a prosecution for a misdemeanor, "the constitutional right of trial by jury is not infringed when the option is given to the accused to have the issue tried by the court or the jury, and he submits the cause to the court." *Dillingham v. State*, 5 Ohio St. 280; *Dailey v. State*, 4 Ohio St. 57. There is no necessary conflict between these cases and that of *Williams v. State*, 12 Ohio St. 622. In the latter case the plaintiffs in error were indicted for altering bank notes, and, pleading not guilty, they waived a jury trial, and consented to be tried by the court. They were convicted, and sentenced to imprisonment in the penitentiary. The attorney-general submitted to a reversal of the judgment and sentence, upon the ground "that upon the trial of an issue raised by a plea of not guilty, in the higher grades of crime, it is not in the power of the accused to waive a trial by jury, and, by consent, submit to have the facts found by the court, so as to authorize a legal judgment and sentence upon such finding." The court neither gave a reason nor cited an authority for the proposition. The case was no doubt correctly decided, for whether the defendants could or could not waive a trial by jury, in a prosecution of that character, the court of common pleas had no authority to try the case without one. It was a mode of trial unknown to the law. The Legislature had not clothed the court with that form of jurisdiction, and no act or consent of the accused could create or confer a jurisdiction not established by law. The question would have been very different had the General Assembly, by statute, authorized the court, with the consent of the accused, to hear the evidence and render judgment accordingly, and the record had disclosed their consent. The power of the court to hear evidence and determine the degree of the crime is maintained in Pennsylvania. *Jones v. Com.*, 75 Pa. 408. California has a statute similar to the provisions of section 7816, Rev. Stat., now under consideration, and the supreme court of that state has held that the examination after a plea of guilty to an indictment for murder, to ascertain the degree of the crime, is not a trial, and the legality of the inquiry was sustained. *People v. Noll*, 20 Cal. 164. And in *People v. Lennox*, 67 Cal. 118, it was held that a plea of guilty in a prosecution for murder is a waiver of trial by jury.

But, whatever may be the rule elsewhere, in this state all legislative power is, by the Constitution of 1851, vested in the General Assembly, (sec. 1, art. 2,) subject, of course, to any limitations that may be found in other parts of that instrument. It is only necessary, therefore, in order to determine whether in any particular instance the General Assembly has transcended its power, to inquire (1) if the act is, in its essential character, legislative; and, (2) if so, whether

it is prohibited by the Constitution; and if it is found to be legislative in its nature, and not prohibited by the Constitution, it must be held to be within the power of the General Assembly. The power to clothe the courts of the state with jurisdiction to hear and determine causes is in its character legislative; and, as we have already seen, there is no constitutional prohibition against vesting in the court of common pleas the

power to examine witnesses, and ascertain the degree of the crime, where, in an indictment for murder, the defendant enters a plea of guilty. Therefore it necessarily follows that the proceeding, whether it possesses the essential attributes of a trial or not, authorized by the provisions of section 7816, Rev. Stat., now under consideration is constitutional and valid.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

R. T. DUNLAP, *Respt.*,

v.

John STEERE, *Appt.*

(.....Cal.....)

A suit in equity will lie to set aside a judgment quieting title to real estate which was taken by default after notice by publication where defendant had no actual notice of the action until the time for making a defense therein had elapsed and plaintiff had no title to the property but knowingly set out a false statement of cause of action in his complaint and in the affidavit for publication.

(December 14, 1891.)

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff and from an order denying a motion for a new trial in an action brought to quiet title to real estate and to an-

nul a judgment which had adjudged the title to be in defendant. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wells, Monroe & Lee, for appellant:

The judgment roll in *Steere v. Dunlap*, No. 8281, of the superior court of the county of Los Angeles, which is in evidence, works an estoppel in favor of the defendant in this case.

Equity will not take cognizance on the same grounds of the very point which a court of competent jurisdiction in the case has considered and decided.

Sweatman v. Stratton, 74 Tex. 76; *Simpson v. Hart*, 1 Johns. Ch. 91, 1 L. ed. 70; *Ross v. Wood*, 70 N. Y. 11; *Greene v. Darling*, 5 Mason, 207.

A decision of a court of competent jurisdiction is *res adjudicata*.

Simpson v. Hart, *supra*; *Beecher v. Bennett*, 11 Barb. 381; *Greenup v. Orosks*, 50 Ind. 419; *Shepardson v. Cory*, 29 Wis. 89.

NOTE.—Relief from judgments rendered on publication of process.

The statute authorizing constructive service usually provides that a defendant against whom a judgment is rendered upon such service may apply within a certain period to open the same and make his defense under certain restrictions. Applications for relief under these statutes are not included here.

Where it appears from the judgment roll that the judgment is void by reason of defective publication of process, the judgment will be set aside on motion at any time. *People v. Greene*, 74 Cal. 400, (in this case fourteen years after entry of the judgment). *People v. Pearson*, 78 Cal. 400 (eleven years). See *People v. Harrison*, 84 Cal. 607.

Where the judgment is void by reason of a defective order for the publication of process, it may be vacated upon motion after the expiration of the term at which it was rendered, when the rights of third parties have not intervened. *Park v. Higbee* (Utah) July 12, 1890.

Where the judgment is not void on its face it will not be vacated upon motion, after the time limited by statute, but a separate action must be resorted to. *People v. Harrison*, *supra*; *People v. Goodhue*, 80 Cal. 199. *Hanson v. Hanson* (Cal.) March 11, 1889, although not mentioned in *People v. Harrison*, 84 Cal. 607, is in effect overruled by it on this point.

Equitable jurisdiction to cancel and set aside or restrain judgments and decrees of any court which have been obtained by a fraud practiced upon the court and the losing party, is well settled and familiar. Pom. Eq. Jur. 2d ed. § 819.

16 L. R. A.

Where a husband by falsely representing that his wife's residence was unknown, obtained an order for publication of process in an action for divorce and by willfully depriving her of actual notice and opportunity to defend secured a judgment of divorce, equity will annul such judgment (*Johnson v. Coleman*, 28 Wis. 482), or it will be set aside on motion. *Everett v. Everett*, 60 Wis. 200.

Equity will relieve against a judgment and grant a recital, where it was fraudulently procured by publication of process and concealed from the defendant until the time fixed by statute for opening a judgment so obtained has elapsed. *Clark v. Ellsworth* (Iowa) Feb. 8, 1892.

Equity will grant relief against a judgment in an attachment suit obtained by a creditor against his nonresident debtor upon service by publication and compel a restoration of property held by the creditor by virtue of a sale under such judgment, where it appears that jurisdiction of the person of the debtor could have been easily obtained or actual notice of the suit given him, but that the intent of the creditor was, by keeping the debtor in ignorance of the suit, to prevent a defense and thus get a judgment upon an outlaid claim. *Herbert v. Herbert* (N. J.) Oct. 28, 1891; *Herbert v. Herbert*, 47 N. J. Eq. 11.

The New York statute fixing the time within which a defendant, "except in an action for divorce" may come in and defend, where service of summons was by publication, does not deprive the court of power to open a judgment by default in a divorce case where service is by publication but places such judgment on the same footing as one rendered upon personal service of process. *Brown v. Brown*, 58 N. Y. 809.

J. G. G.

Where a court has jurisdiction *ejusdem generis*, its judgment in any case is not void, because its invalidity cannot appear without an inquiry into the facts; an inquiry which the court itself must be presumed to have made, and which will not therefore be permitted to be reviewed collaterally.

Fisher v. Bassett, 9 Leigh, 119, 33 Am. Dec. 232; *Brittain v. Kinnaird*, 1 Brod. & B. 482; *Grignon v. Astor*, 43 U. S. 2 How. 819, 11 L. ed. 283; *Wyatt v. Steele*, 26 Ala. 649; *Stoddard v. Johnson*, 75 Ind. 30.

It must be conclusively presumed that the pleadings and evidence sustained the judgment and the judgment having passed it must be executed, unless it be an absolute nullity upon its face, by reason of showing affirmatively a want of jurisdiction.

Dickson v. Wilkinson, 44 U. S. 3 How. 61, 11 L. ed. 493; *Robbins v. Bacon*, 1 Root, 548; *Vredenburg v. Snyder*, 6 Iowa, 39.

Equity will not entertain a bill to set aside a void judgment.

Chipman v. Brown, 14 Cal. 158; *Logan v. Hillegas*, 16 Cal. 200; *Murdock v. De Vries*, 37 Cal. 527; *Gates v. Lane*, 49 Cal. 266.

Where the court of original jurisdiction has decided the jurisdictional fact, the order and judgment based upon it will be valid until reversed by an attack by some direct proceeding. It cannot be questioned collaterally.

Little v. Chambers, 27 Iowa, 522; *Forbes v. Hyde*, 31 Cal. 848; *Ligars v. California S. R. Co.* 76 Cal. 618.

Nowhere throughout the complaint has plaintiff averred that he has a defense to the claim upon which the judgment which he seeks to set aside was rendered, and inasmuch as such an averment is necessary to give a court of equity jurisdiction for the purpose of setting aside a judgment, the complaint states no cause of action for the purpose of setting aside a judgment.

Rotan v. Springer, 53 Ark. 80; *Osborne v. Gehr*, 29 Neb. 661; *Freem. Judgm.* § 498; 3 Pom. Eq. Jur. § 1364, note 1; *Colson v. Leitch*, 110 Ill. 504; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Taggart v. Wood*, 20 Iowa, 236; *Secor v. Wood*, 8 Ala. 500; *Saunders v. Abritton*, 37 Ala. 716.

Where fraud is relied upon for the purpose of impeaching and setting aside a judgment, it must be an intentional concealment or intentional act of fraud, done for the purpose of misleading and taking an undue advantage of the opposite party.

Ward v. Southfield, 8 Cent. Rep. 196, 102 N. Y. 287; *Verplanck v. Van Buren*, 76 N. Y. 247; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Ross v. Wood*, 70 N. Y. 8; *Smith v. Nelson*, 62 N. Y. 286; *Bigelow, Fraud*, ed. 1868, p. 87; *Freem. Judgm.* § 844; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 98.

The complaint does not suggest fraud, and without it the facts in the sheriff's return and the affidavit of Steere must be taken as true, and so taken, they gave the court jurisdiction even if false.

Taylor v. Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581; *Sargeant of Ct. App. v. George*, 5 Litt. 199.

The judgment debtor is precluded by the judgment of the court from calling in question 16 L. R. A.

the sufficiency of the publications, and the affidavits on which they are based.

Essig v. Lower, 130 Ind. 239; *Jackson v. State*, 1 West. Rep. 269, 103 Ind. 250; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Riley v. Waugh*, 8 Cush. 220; *Cooper v. Sunderland*, 8 Iowa, 114, 66 Am. Dec. 52; *Henderson v. Brown*, 1 Cal. 92, 3 Am. Dec. 164; *Vail v. Owen*, 19 Barb. 22; *Youngman v. Elmira & W. R. Co.* 65 Pa. 278; *Sheldon v. Wright*, 5 N. Y. 497.

The judgment in *Steere v. Dunlap* must be held to include an adjudication that the tax-deed was valid.

Marion County Comrs. v. Welch, 40 Kan. 767; *Freem. Judgm.* § 830; *Bradford v. Bradford*, 5 Conn. 127; *Gates v. Preston*, 41 N. Y. 113.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.

Re Griffith, 84 Cal. 107; *Perkins v. Waksham*, 86 Cal. 580; *Allen v. Currey*, 41 Cal. 321; *Amdor Canal & Min. Co. v. Mitchell*, 59 Cal. 176; *Edle v. Hazen*, 61 Cal. 380; *Zellerbach v. Allenberg*, 67 Cal. 208; *Mastick v. Thorp*, 29 Cal. 447; *Boston v. Haynes*, 83 Cal. 32; *Phelps v. Peabody*, 7 Cal. 53; *Pico v. Cohn*, 18 L. R. A. 386, 91 Cal. 129.

A mistake or ignorance of law is not sufficient to authorize the setting aside of a judgment taken against a party through his mistake, excusable neglect, etc.

Skinner v. Terry, 107 N. C. 103.

Messrs. Chapman & Hendrick, for respondent:

If a judgment has been obtained through fraud, mistake, or accident, and the defendant in the action, having a valid defense on the merits, has been prevented from maintaining it by fraud, mistake, or accident, and there has been no negligence on his part, equity will grant relief against it.

3 Pom. Eq. Jur. § 1364, and note 1, p. 400.

When the remedy by motion is lost by lapse of time, without the laches of the party, equity will freely grant relief although a new trial would have been granted or the judgment vacated in the court in which it was begun upon motion.

Guy v. Ide, 6 Cal. 101.

There are many cases which show that where there is a judgment by default, without personal service or actual notice of the pendency of the action, a meritorious defense and the lapse of such time as to preclude the remedy by motion are all that is necessary to show in a bill in equity for relief against the judgment.

Gregory v. Ford, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 201; *Peterson v. Weissstein*, 65 Cal. 42; *Farrington v. Brown*, 65 Cal. 320; *Larnish v. Bramer*, 71 Cal. 155; *Freem. Judgm.* 8d ed. § 100.

De Haven, J., delivered the opinion of the court:

The action is one in equity, and is in effect to set aside a former judgment be-

tween the parties, wherein the alleged title of the defendant herein to the land described in the complaint was quieted as against all claims of the present plaintiff. The findings of the court below show that this judgment was obtained by default, and upon a service of the summons therein by publication, and that the present plaintiff had no knowledge of the pendency of that action, or of the rendition of said judgment, until more than one year after its date. The court also finds, and the evidence is sufficient to sustain these findings, that in point of fact the plaintiff here was the owner of the property involved in that action, and that not only was the defendant here without title, but that he knew that the allegations of the complaint filed by him for the purpose of obtaining the judgment referred to were wholly false. The question, therefore, presented, is whether a judgment thus obtained is beyond the reach of successful attack in a court of equity. The legal effect of this judgment, if premittted to stand, is to divest plaintiff of all title to his property, in favor of one who has succeeded by a compliance with the mere forms of law in obtaining such judgment, and that, too, without the knowledge of plaintiff, and therefore when it was morally impossible for him to defeat it. We think the plaintiff is entitled to the relief which he asks, not only upon authority, but upon the plainest principles of justice. "In general, it may be stated that in all cases where, by accident or mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained." Story, Eq. Jur. § 885. In order to justify the application of this rule, it must appear not only that the judgment against which relief is sought is unjust and unconscionable in itself, but that the person against whom it was rendered was not guilty of negligence in omitting to make his defense in the original action. The facts as found by the court below bring this case fully and clearly within the operation of the rule of equity just cited. In the first place the defendant practiced a fraud upon the court, as well as the defendant, in procuring the order for the publication of the summons in the action referred to. Under section 412 of the Code of Civil Procedure, a plaintiff is entitled, under certain circumstances, to procure such an order; but, in order to be so entitled, he is required by that section to first present to the court or judge, either in the form of a verified complaint or an affidavit, a statement of facts showing that a cause of action exists in his favor against the defendant. Such an affidavit was presented in this case, but it necessarily results from the findings of the court that not only was the defendant's affidavit false in this respect, but that defendant knew that it was false. An affidavit of this character is always *ex parte*. The absent defendant is not present to impeach it, and if it

is sufficient in form the court cannot disregard it, but is compelled to accept its statements as true, and make the order which is demanded. Under such circumstances a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons must at least exercise good faith in his representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose named is itself an act of fraud; and when the judgment which rests upon it is itself unconscionable, and was obtained without the knowledge of the defendant therein, it should be set aside.

It is claimed, however, that the fraud here complained of is concluded by the judgment itself; that whether the defendant had a good title to the land in controversy was the very matter involved in the former action, and the judgment therein is conclusive upon the plaintiff; and in support of that the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, and other similar cases, are cited. But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs. The case of *United States v. Throckmorton* was one where a retrial was sought of a case which had been once fully tried, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense to the false and fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his rights therein, and his failure to defend was not a negligent omission on his part. It is this difference in the cases which brings the plaintiff here within the protection of the exception to the general rule which was acted upon in *United States v. Throckmorton*, *supra*, and the existence of which exception was not only admitted in the opinion of the court in *United States v. Throckmorton*, but was applied in the later case of *United States v. Minor*, 114 U. S. 238, 29 L. ed. 112. In the case of *Adams v. Secor*, 6 Kan. 542, it was held by the supreme court of that state that a judgment based upon a false and fraudulent claim should be set aside where the defendant therein had only been served by publication, and did not have actual notice of the pendency of the action. In the case of *Tomkins v. Tomkins*, 11 N. J. Eq. 512, the court, while refusing relief upon the facts before it, recognized the justice of relieving a defendant from an unjust judgment obtained without his knowledge. It is there said: "The usual ground upon which a court of equity refuses to interfere with a judgment is because the defendant should have protected himself in the court where the judgment was obtained. In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the

defendant, and the proceedings are all necessarily *ex parte*, it would be hard, indeed, if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interfering in such cases is too obvious to require its vindication." In the case of *Irvine v. Leyh*, 102 Mo. 200, 209, the supreme court of Missouri states what we deem the true rule to be applied here. After referring to the case of *United States v. Throckmorton*, *supra*, the court says: "The principle thus so strongly stated in the cases cited proceeds upon the ground that the party had an opportunity to appear and interpose the defense in the suit in which the judgment complained of was rendered. The cases before cited are those in which the defendant in the first suit appeared, or had actual notice of the suit, and might have interposed the fraud as a defense. In all such cases the issues made by the pleading, or which might have been made, are justly regarded as settled and merged in the judgment, leaving collateral matters only open to investigation. But in our opinion the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and as a consequence had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application. But to entitle the plaintiffs to the relief which they asked and procured in the case, it is not enough for them to simply show that Leyh had no valid cause of action against them. They must at least show that the claim was founded upon or conceived in fraud, and that the machinery of the law was resorted to for the purpose of enforcing what was known to be a fraudulent demand." The facts found by the court here fully satisfy the rule as held in the case just cited. That rule, it seems to us, gives to one obtaining a judgment against another without a trial, and without his knowledge, sufficient protection. Its application to the facts of this case must result in an affirmance of the order appealed from.

Appeal from judgment dismissed; order denying motion for new trial affirmed.

We concur: **Sharpstein, J.; Harrison, J.**

Beatty, Ch. J.:

I concur. It appears that Dunlap was, without any fault of his own, deprived of the opportunity of interposing a perfect defense to the action of *Steers v. Dunlap*, and it is alleged in the complaint herein, and found by the court, not only that the allegations of the complaint in the former action were untrue, but that Steere at the time knew they were false. The evidence is sufficient to sustain this finding, at least so far as the complaint in the former action counted upon a title by prescription; but there is nothing to show that Steere in fact knew that his tax-title was void, though such knowledge is by the law imputed to him. The case, then, presents these features: Steere sues Dunlap upon a claim which he

knows to be false. He obtains an order for publication of summons based upon the two grounds that Dunlap has departed from the state, and cannot after due diligence be found within the state. His affidavit is in itself sufficient to justify a finding that these grounds exist; and a judgment entered upon Dunlap's default, after publication of summons, is not void, and cannot be set aside upon motion unless the motion is made within a year. Code Civ. Proc. § 473. Can it, then, be annulled by suit in equity after the year? I think it clear, on principle, that in a case where no rights of innocent third parties are involved a judgment so obtained ought to be set aside upon the ground that it was fraudulently obtained; the fraud consisting in taking a default judgment upon a claim made in bad faith against a defendant who, without any fault on his part, is prevented from interposing a perfect defense. The findings of the superior court, therefore, which are supported by the evidence, are themselves sufficient to support the judgment; and the order denying defendants' motion for a new trial should be affirmed.

McFarland, J.:

I dissent, and concur in the opinion of Commissioner Vanclef, prepared in department, a copy of which is hereto attached; and I desire to say further that, in my opinion, there is no sufficient evidence to support the latter part of the following finding of the court: "And the said John Steere was not then the owner of the said property, nor any part thereof, and had no right, title or interest of any sort therein, all of which he well knew." In Steere's complaint in the original action, he first averred ownership and possession of the land, and afterwards also averred adverse possession in himself and grantors for five years; and it fully appears that he relied upon paper title founded on a certain tax-deed, as well as upon adverse possession,—if, indeed, he introduced any evidence at all about adverse possession, which does not appear. In the present action, Dunlap avers that the only claim which Steere had was a certain tax-deed, which he sets out in full in his complaint together with the certificate of purchase which preceded it, in order to show that it did not, in law, convey title; the contention being that the deed, although good on its face, did not accomplish its purpose, because it did not follow the recitals of the certificate, and the recitals of the certificate showed an irregularity in the assessment. Assuming this to be the law, the attack upon Steere's deed is, at least, extremely technical; and it does not support the finding of fraudulent personal intent against him, viz., that "he well knew" that "he had no right, title, or interest of any sort" in the property described in his deed. The only other evidence tending to support the said finding relates to Steere's possession; and, assuming that it shows a want of adverse possession, under the views above expressed, there was no warrant for the general finding that he well knew that he had no right or interest of any sort. There are other reasons, why, in my opinion, the

former judgment should not be disturbed, but I consider further discussion unnecessary.

The following is the opinion of **Vanclef, C.**, in department:

"Action to quiet plaintiff's title to two lots in the town of Santa Monica, in the county of Los Angeles, and for this purpose to annul a former judgment of the same court between the same parties as to the same lots, and to enjoin its execution. Judgment passed for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial. The judgment was rendered September 24, 1898, and the appeal from it was taken July 18, 1890, and should, therefore, be dismissed; but the appeal from the order was taken within sixty days from the time the order was made.

"The principal question, and the only one that need be considered, is, Was the former judgment conclusive of the rights of the parties to the land in question? This question arises on the appeal from the order by defendant's exception to the sufficiency of the evidence. The former action was by the present defendant, Steere, against the plaintiff here, to quiet the alleged title of Steere to the lots in question; and the judgment therein was rendered against the defendant (plaintiff here) by default. The service of summons in that action having been made by publication, it is contended that the affidavit upon which the order of publication was made is defective and untrue in material particulars. The following is a copy of that affidavit: 'John Steere, being duly sworn, says: That he is the plaintiff in the above-entitled action. That the complaint in said action was filed with the clerk of said court on the 25th day of June, 1884, and summons thereupon issued. That said action is brought to obtain a decree of said court quieting the plaintiff's title to that certain tract or parcel of land lying and being situate in the county of Los Angeles, state of California, and particularly described as lots X and W, in block 198, in the town of Santa Monica, as designated on the map of said town. That in said decree it be declared and adjudged that plaintiff is the owner of said premises, and that the defendants, or either of them, have no estate or interest whatever in or to said land and premises. And affiant further says that said plaintiff is the owner in fee of said premises, and said plaintiff and his grantors have been for more than five years continuously in the open, notorious, and adverse possession of said premises claiming the same adversely to all the world. That the defendants claim some interest in said premises adverse to plaintiff, but the said claims of defendants are without any right whatever, and that the said defendants, or either of them, have no right, title, or interest in said land or premises, or any part thereof. Reference is had to the verified complaint of plaintiff on file herein, in which the cause of action is fully set forth. That said defendant R. T. Dunlap, cannot, after due dili-

gence, be found within this state. That the said R. T. Dunlap has departed from this state, and cannot after due diligence, be found within this state, and this affiant, in support thereof, states the following facts and circumstances: That the summons which was issued in said action was given to the sheriff of Los Angeles county, and said sheriff made diligent search for said defendant, R. T. Dunlap, but could not find him, and said sheriff informed affiant that he did not know where said defendant Dunlap was or where he could be found; that affiant has searched for said defendant, R. T. Dunlap, and has inquired of a great many of the citizens and residents of Los Angeles county—among them, M. B. Boyce, Wm. Flores, and John Milner—as to the whereabouts of said defendant, R. T. Dunlap, and as to his residence; that each of said persons so inquired of informed affiant that they did not know where said defendant, Dunlap, was, where he resided, or where he could be found; that said M. B. Boyce claims to be the agent of said R. T. Dunlap, but even he informed this affiant that he did not know where said Dunlap was, or where he could be found; that affiant does not know where said R. T. Dunlap resides, where he is, or where he can be found; that affiant has made diligent inquiry to find said defendant, but cannot, after due diligence, find him within this state; that this affiant therefore says that personal service of said summons cannot be made on said defendant, R. T. Dunlap, and prays for an order that service of the same may be made by publication. John Steere.' The order of publication was in the usual form, requiring the summons to be published two months in a proper newspaper, and it was published as required by the order. More than one year after the rendition of the former judgment the defendant (plaintiff in this action) moved the court in which it was rendered to set it aside, and for leave to answer, upon his affidavit, stating substantially the same facts alleged in his complaint herein. This motion was denied, and no exception was taken to the order denying the same, and no appeal has been taken therefrom. As one of the express objects of this action is to set aside the former judgment, and to enjoin its execution, that judgment is fully set out in the complaint, and the judgment roll in that action was introduced as evidence in chief by the plaintiff. The defendant also pleaded the former judgment as a bar to this action.

"1. It appears that the former action was commenced by H. K. S. O'Melveny, as attorney for plaintiff, and that his name was indorsed on the summons as attorney for plaintiff; that before the order of publication was made an order substituting Messrs. Wells, Van Dyke & Lee as attorneys for plaintiff was made; but that the summons was published as originally issued, with the name of O'Melveny indorsed thereon as attorney for plaintiff. It is contended by respondent that the name of Wells, Van Dyke & Lee should have been indorsed on the summons as published, and that the omission so to indorse them is a fatal defect in the

publication. The provision of the Code requiring the name of plaintiff's attorney to be indorsed on the summons relates to the summons as issued by the clerk, and was complied with in this case. As there is no requirement that the names of attorneys afterwards substituted for or added to the original attorney for plaintiff shall be indorsed on the summons, I think the summons was properly published in the form in which it was issued.

"2. No other defect in the form or substance of the affidavit is pointed out by counsel, and none is perceived; but it is alleged that the statements therein that Dunlap had departed from this state, and that, after due diligence, he could not be found within this state, are not true; and the court so found. The only evidence to sustain this finding is the testimony of the plaintiff, Dunlap, to the effect that, although he departed from this state in 1879, he returned to Inyo county, in this state, in the spring of 1881, where he openly and publicly resided and worked as a miner and farmer from that time until 1887; that he never during that time saw the newspaper in which the summons was published, nor had any actual notice of the publication of summons, or of the pendency of the former suit; that he left Mr. Boyce in charge of the lots when he departed from the state, but did not inform Boyce that he intended to leave, or where he was going; and that he never communicated with Boyce or any other person in Los Angeles county during his absence until 1887. This testimony has no tendency to prove that the affidavit was not made in good faith. The affidavit is sufficient to show that, 'after due diligence,' Dunlap could not be found 'within the state.' This, with the other facts therein stated, justified the order of publication. Code Civ. Proc. § 412; *Forbes v. Hyde*, 81 Cal. 348; *Ligare v. California S. R. Co.* 76 Cal. 610. The publication of the summons according to the order was service of it upon the defendant, having the same effect as if served by either of the other modes prescribed by the Code, (Code Civ. Proc. §§ 413, 416), except that in case of service by publication alone the defendant, on a proper showing, may be allowed to answer to the merits of the action at any time within one year after the rendition of the judgment. *Id.* § 473. After the expiration of one year the judgment by default, upon service of summons by publication, is just as conclusive as if it had been rendered upon personal service, and will not be opened or set aside by a court of equity except on the ground of fraud, accident, mistake, or surprise by which, without any fault or negligence on his part the defendant was prevented from making a meritorious defense. *United States v. Throckmorton*, 98 U. S. 68, 25 L. ed. 96; *Zellerbach v. Allenberg*, 67 Cal. 298; *Amador Canal & Min. Co. v. Mitchell*, 59 Cal. 179; *Mastick v. Thorp*, 29 Cal. 448; *Boston v. Haynes*, 33 Cal. 32; *Phelps v. Peabody*, 7 Cal. 52. Upon a sufficient affidavit the court found and determined that the defendant in the former action could not, 'after due diligence, be found within

the state,' and so recited in the order of publication. This judicial determination of the fact is conclusive as against the mere testimony of the plaintiff that he was in Inyo county in this state at the time the former action was commenced, and when the order of publication was made, and that in his opinion personal service might have been made upon him there by the exercise of due diligence. There is no pretense that the plaintiff in the former action knew or had any reason to believe that the defendant was in Inyo county. Nor is there any evidence tending to prove that the acts of diligence stated in the affidavit were not performed, or to show fraud or bad faith on the part of the plaintiff in that action in procuring the order of publication. Nor is there any averment or evidence of any mistake, accident, or surprise, in the legal sense of those terms, by which the plaintiff herein, without fault or negligence on his part, was prevented from making his defense in the former action. That service of summons by publication is proper in an action to quiet title to land in this state was expressly decided in the late case of *Perkins v. Wakeham*, 86 Cal. 580.

"It follows that, for aught that appears by the record in this case, the former judgment is conclusive evidence that the appellant is the owner of the lots in question, and that the findings of the trial court to the contrary are not justified by the evidence. I think the appeal from the judgment should be dismissed, that the order denying a new trial should be reversed, and a new trial granted."

Paterson, J.:

I dissent on the ground that the evidence does not justify the decision.

I recognize the correctness of the rule stated in the cases cited by *Mr. Justice De Haven*; but, to make it applicable, it should clearly appear from the evidence that the party charged with fraud deliberately commenced and prosecuted his action with the intent to defraud his adversary, and knowing that his claim was baseless in law and in fact. In this case the evidence, in my opinion, fails to show that the defendant, in prosecuting his action against Dunlap, acted in bad faith. His complaint was filed on June 25, 1884. Summons was issued on the same day, but the affidavit for publication was not made until February 7, 1885. This does not show great activity on the part of Steere in attempting to consummate the fraud with which he is charged. No wrong can be predicated upon the fact that the summons was published in the *Weekly Censor*. The judge decided the question as to the paper in which the summons should be published. The default of the defendant in that action was entered on May 18, 1885. This action was not commenced until November 30, 1887. Mr. Dunlap testified that he left Boyce in charge of the property at Santa Monica, as his agent, in January, 1878. There was a house on the property at the time, and the land was fenced. Plaintiff testified, also, that he received rent for the property only one year, and the reason why

he made no inquiries about it was because he had lost the address of Boyce. This is a singular excuse, and shows great negligence. The town of Santa Monica is so small that probably every man in the town knows every other inhabitant thereof; and it would have been easy to discover the whereabouts of his agent, if he had made any inquiry. Boyce testified that the "plaintiff left the property in his charge to sell, and meantime to collect the rents; that the last time he saw Dunlap was in January, 1878; that Steere took actual possession of the property, and made improvements on the house, in the fall of 1885. He testified further that Steere called upon him several times, and inquired very earnestly where Dunlap could be found; that he came to see about getting service on him; that Steere was inclined to push matters, and that he (Boyce) was a little indifferent about the matter; that Steere claimed to have a tax-deed for the property, and asked him (Boyce) how soon he could hear from Dunlap, and that he told him he thought he would hear from him in three, four, or five, weeks, probably. Milner, under whom Steere claims, paid the taxes on the property for the years 1879-80, 1880-81, 1882-83, 1883-84; and, when the defendant purchased from him, he repaid the amount of taxes which Milner had thus paid. Milner's certificate of sale from the tax collector was dated March 4, 1879. The evidence is entirely consistent with the theory of the good faith of Steere in the prosecution of his suit. The circumstances show that he believed himself to be the owner of the land. He paid a valuable

consideration for the tax-title, and he and his grantor paid the taxes assessed upon the land every year, except two, after 1878. If he had desired to perpetrate a fraud upon Dunlap, it is not at all probable that he would have importuned Boyce so often to discover the very fact which would have effectually prevented him from making the affidavit, and procuring the order for publication. It is said that it must be presumed he knew his tax-deed was invalid. I do not think any such presumption should be indulged; but, if it can, it certainly is not sufficient to convict him of a willful and deliberate attempt to defraud, when it is admitted or appears that he paid a valuable consideration for the tax-title, and endeavored in good faith to give the defendant in the action personal notice of the claim set up. The worst construction that can be fairly put on the conduct of Steere is that he had a doubt as to the validity of his title, and sought the aid of the court to settle the matter in his favor. This he had the right to do. He knew that plaintiff was claiming through his agent the right of possession, and to collect the rents. There is no evidence that any one ever advised Steere that his tax-deed was invalid. Probably not one man in a thousand, outside of the profession, would have known that the deed was void. The question of ownership, and the question whether one has held adverse possession, are questions so mixed with law that a statement in relation thereto by a layman should not be regarded with great strictness.

I concur: **Garoutte, J.**

RHODE ISLAND SUPREME COURT.

Charles U. COTTING, Exr., etc., of Mary M. Bourne, Deceased,
v.

Anna D. DESARTIGES *et al.*

(.....R. L.....)

- 1. The law of the domicile of the donor of a power given by will must govern as against the law of the domicile of the donee in determining whether or not the will of the latter is an execution of the power.**
- 2. The establishment by express statute both in England where a will was made and in New York where the testator was domiciled of the rule that a general devise is sufficient to execute a power of appointment cannot prevail in respect to a trust fund held under the will of the donor whose domicile was in Rhode Island as against the contrary rule which in the absence of a statute prevails in the latter state.**
- 3. An intent to execute a power of appointment does not appear in a will which makes no reference to the power although the**

bequests somewhat exceed the amount of the testator's estate and his relations with the donor are so intimate as to raise a presumption that he knew of the power.

(March 28, 1892.)

DILL in equity by Charles U. Coting for instructions as to the disposition of the residuary estate which had been given by Mary M. Bourne, deceased, to Charles Allen Thorndike Rice, for life, and which remained after his death.

The facts are stated in the opinion.

Messrs. William P. Sheffield and John E. Parsons as trustees of Mrs. Bourne's estate.

Messrs. H. B. Closson and John E. Parsons, for complainant, as executor of Rice:

According to the rules formerly prevailing in England and built up by various decisions of their chancery courts chiefly since our Revolution, Mr. Rice's will is not upon its face a sufficient execution of the power.

4 Kent, Com. p. 834; *Blagge v. Miles*, 1 Story, 426.

2 Chance, Powers, § 1597, states that it appears quite clear, however, at this day [1881], and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries, that the rule is

NOTE.—For note on execution of power to appoint by will, see *Patterson v. Lawrence* (Ga.) 7 L. R. A. 143.

For note on what law governs wills, see *Cook v. Winchester* (Mich.) 8 L. R. A. 623.

16 L. R. A.

See also 18 L. R. A. 458; 42 L. R. A. 140.

not thus confined. Indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case as well as in the other. What rule of law or construction would be thereby violated?

The will must be construed with reference to the condition of testator's estate at the time of his death.

Wigram, Wills, § 108; O'Hara, Wills, § 7; *Gold v. Judson*, 21 Conn. 616.

It is immaterial whether or not Mr. Rice at the time when he made his will knew of the existence of the power of the appointment.

The will speaks the testator's wishes and intentions at the time of his death. Whatever the language required to execute the power, if the will contains it the power is executed, and the relative dates of the creation of the power and the execution of the will are wholly immaterial.

Boyes v. Cook, L. R. 14 Ch. Div. 53; Redf. Wills, § 80, fol. 14, p. 387; 1 Jarman, Wills, *676; Bigelow's note; *Stillman v. Weedon*, 16 Sim. 26; *Livingston v. Gordon*, 84 N. Y. 136.

The question, What constitutes a sufficient execution of a power of appointment? is an open one in Rhode Island, and in this case the court is free to announce which rule is the law of this state.

See *Phillips v. Brown*, 6 New Eng. Rep. 710, 16 R. I. 279.

The court is enabled therefore, in announcing the rule to be followed here, to range itself on what is now on all hands admitted to be both the right and the victorious side in one of the most interesting struggles known to the law.

At a time subsequent to the American Revolution, prior to which time the law had been much more liberal, there were made in the English chancery courts a series of decisions which resulted in establishing for the first time the rule that a will was a good execution of a power only when the power or the subject of the power was referred to in explicit terms.

In 1837 an Act of parliament declared that a general residuary devise should, in the absence of anything to indicate a contrary intention, be held to have been intended to execute a power of appointment as well as to dispose of what alone was technically the testator's own property. The Act has been since followed with the utmost liberality of construction.

Boyes v. Cook, L. R. A. 14 Ch. Div. 53; *Coffield v. Pollard*, 3 Jur. N. S. 1203; *Patch v. Shore*, 2 Drew. & S. 589; *Hodsdon v. Dancer*, 16 Week. Rep. 1101.

In most of the states in which the courts declared themselves irremediably committed to the early English rule, the Legislatures came to their relief with statutes similar to the Act of parliament (1 Vict. chap. 26, § 27) already referred to.

It was in Massachusetts that the most interesting and successful struggle against the English doctrine took place.

Judge Story, sitting in the federal courts, had in the oft-cited case of *Blagge v. Miles*, 1 Story, 426, been disposed to bow to the weight of the English decisions.

In the Massachusetts courts, however, the 16 L. R. A.

question did not arise until *Amory v. Meredith*, 7 Allen, 397, and the court, in an elaborate opinion, refused outright to acknowledge the doctrine of the English cases to be the law of Massachusetts, and since that time in a most interesting series of decisions, has without any assistance from the Legislature, firmly established the law of Massachusetts on the subject of powers to be as liberal as that of England or New York to day.

In Connecticut alone it has happened that there having been an early case, in which, as the court said in a later one, "the rule was enforced without protest," and which the court, when in the later case the question came up for discussion reluctantly felt itself bound to follow, the Legislature has so far neglected to interpose its relief.

And even in this case (*Hollister v. Shaw*, 46 Conn. 248), the decision to adhere to the earlier one was by three judges only of the five, the other two dissenting.

The following are some of the authorities which are relied upon to substantiate the foregoing statements:

1 Vict. chap. 26, § 27; *Boyes v. Cook*, L. R. 14 Ch. Div. 53; *Re Comber*, 11 Jur. N. S. 969; *Re Mason's Will*, Id. 835; *Earle v. Barker*, 11 H. L. Cas. 280; *Wilkinson's Trust*, L. R. 8 Eq. 487, L. R. 4 Ch. App. 587; *Hawthorn v. Shelden*, 8 Sm. & G. 293; *Stillman v. Weedon*, 16 Sim. 26; 1 N. Y. Rev. Stat. 731, § 126; *White v. Hicks*, 33 N. Y. 383; *Hutton v. Benkard*, 92 N. Y. 295; *Mott v. Ackerman*, Id. 539; *Van Wert v. Benedict*, 1 Bradf. 114; *Hawkins, Wills*, 2d ed. p. 27, *Sword's note*; *Aubert's Appeal*, 1 Cent. Rep. 105; 1 Jarman, Wills, p. 676, Bigelow's note; 1 Redf. Wills, § 21, pl. 82, p. 271; Schouler, Wills, § 526; *Willard v. Ware*, 10 Allen, 263; *Sevall v. Wilmer*, 132 Mass. 181; *Cumston v. Bartlett*, 149 Mass. 243; *Funk v. Eggleston*, 93 Ill. 515, 84 Am. Rep. 136; *Andrews v. Brumfield*, 32 Miss. 108; *Dredell v. Collier*, 40 Mo. 287.

It must be by the law of New York, the testator's domicile, that his will must be construed to determine what was his intention in regard to the execution of the power.

1 Jarman, Wills, 5th Am. ed. p. 2, Bigelow's note; 2 Greenl. Ev. § 671; *Lapham v. Olney*, 5 R. I. 415; *Etnohin v. Wylis*, 10 H. L. Cas. 1; *Ford v. Ford*, 70 Wis. 19.

The execution of a power of appointment which is sufficient according to the law of the testator's domicile is sufficient everywhere.

D'Huart v. Harkness, 11 Jur. N. S. 633; *Re Alexander*, 6 Jur. N. S. 854; *Ela v. Edwards*, 16 Gray, 92; 1 Redf. Wills, § 80a, pl. 25, *411; *Story, Conf. L.* 9th ed. p. 655, § 473, note a.

Messrs. Francis B. Peckham, Middleton S. Burrill, John E. Burrill and George Zabriskie for respondents, heirs of Mrs. Bourne.

Stiness, J., delivered the opinion of the court:

The complainant, trustee under the will of Mary M. Bourne, late of Newport, deceased, brings this bill, practically a bill for instructions, for the distribution of the trust fund, and the case is submitted on bill, answer, and proofs. The will was dated September 30,

1879, and admitted to probate in Newport, January 16, 1882. The testatrix bequeathed one sixth of her residuary estate to the complainant in trust for the benefit of her grandson Charles Allen Thorndike Rice during his life, and upon his decease to transfer and pay over the same to his issue, if he should leave any, as he should appoint "by will, or instrument in the nature thereof, executed in the presence of three or more witnesses; and, if he leaves no issue, to and among such persons, and upon such uses and trusts, as he shall so appoint;" and, in default of such appointment and issue, to and among those who should then be heirs-at-law. The grandson died in New York, May 16, 1889, without issue, leaving a will executed in England, September 17, 1881, which was duly probated in New York, where he was domiciled at his death. The will did not specifically dispose of the trust fund, which was subject to Mr. Rice's appointment, nor make any mention of it. The complainant is both trustee under the will of Mrs. Bourne and executor of the will of Mr. Rice. In the latter capacity he claims the right to receive and distribute the fund, as one which passes by appointment to the legatees under Rice's will. On the other hand, the heirs of Mrs. Bourne contend that there is a default of appointment, and so, under her will, the fund goes to them. The issue now raised, therefore, is whether there has been an execution of the power by the general residuary clause of Mr. Rice's will. Upon this issue our first inquiry must be by what law the execution of the power is to be determined. It is admitted that both in England, where the will was executed, and in New York, where the donee of the power was domiciled, there are statutory provisions to the effect that a general devise or bequest will include the property over which the testator has power of appointment, and will operate as an execution of such power, unless an intention not to execute the power shall appear by the will. If, therefore, the question is to be determined either by the law of England or New York, the power has been executed. Clearly, the mere accident that Mr. Rice's will was executed in England while he was temporarily there awaiting a steamer cannot control its operation by impressing upon it the law of the place where it was made. It was neither the domicile of the testator, nor the *situs* of the property nor the forum where the question comes for determination. *Caulfield v. Sullivan*, 85 N. Y. 158. The property in dispute being personal property, which, strictly speaking, has no *situs*, the question must be decided either by the law of New York, the domicile of the donee of the power, or of this state, the domicile of the donor. The will is a Rhode Island will. It disposes of property belonging to a resident of Rhode Island. The trustee under the will is, in effect, a Rhode Island trustee, and jurisdiction over the trustee and the fund is here. The fund in question belonged to Mrs. Bourne, and never belonged to Mr. Rice. True, he had the income from it for life, and power to dispose of it at death,—practically the dominion of an owner,—and yet it was not his.

The fund, then, being a Rhode Island fund, disposable under a Rhode Island will, it fol-

lows, naturally and necessarily, that the fact of its disposition must be determined by Rhode Island law. The question is not what intent is to be imputed to the will of Mr. Rice, but what intent is to be imputed to the will of Mrs. Bourne. She authorized a disposition of her property by an appointment, and it is under her will that the question arises whether an appointment has been made. Her will is to be adjudged by the law of her domicile. So far as assumptions of intent may be made, it is to be presumed she intended the appointment to be made according to the law of her domicile, and not by the law of New York or England, or any other place where the donee of the power might happen to live. It is not the fact of Mrs. Bourne's ownership of the property, which points to the law of this state as the criterion, but the fact that her will is the controlling instrument in the disposition of the property. Precisely this question arose in *Sewall v. Wilmer*, 132 Mass. 181, where Judge Gray remarked that the question is singularly free of direct authority. In that case a Massachusetts testator gave to his daughter a power of appointment of certain property. The daughter lived in Maryland, where she died leaving a will devising all her property to her husband, but making no mention of the power. In Massachusetts this was an execution of the power, but in Maryland it was not; and the question arose, which law should govern? It was held that the will of the father was the controlling instrument, and hence that the law of his domicile was to apply. The same decision was made in *Bingham's App.*, 64 Pa. 845, which is cited in *Sewall v. Wilmer* with approval. In England, also, it has been held that the validity of the execution of a power is to be determined by the law of the domicile of the donor of the power. *Tatnall v. Hankey*, 2 Moore, P. C. 842; *Re Alexander*, 6 Jur. N. S. 854.

The principle on which these cases proceed is that to which we have already alluded, viz., that the appointer is merely the instrument by whom the original testator designates the beneficiary, and the appointee takes under the original will, and not from the donee of the power. The law of the domicile of the original testator is therefore the appropriate test of an execution of a power.

The case of *D'Huart v. Harkness*, 84 Beav. 824, 323, apparently holds the contrary, but, we think, only apparently. In that case property was held under an English will, with power of appointment, by will, in a woman domiciled in France. She died leaving a holograph, which was valid as a will in France, but not in England. Under the Will Act, it was admitted to probate in England, as a foreign will, which gave it all the validity of an English will. The probate in England was held to be conclusive that it was a good will, according to English law; and, being a will, it executed the power. The case was really decided by the law of England. While there are numerous decisions upon the general rule that a will is to be governed by the law of the testator's domicile, such decisions are not to be confounded with the present question,—which testator is the one to be considered in the case of a testamentary power? We know of no

case which applies the law of the domicile of the donee of the power without reference to that of the donor. For these reasons we think the law of the domicile of the donor of the power should control, and hence that the law of Rhode Island must govern in this case.

What is the law of Rhode Island relating to the execution of a power? In *Phillips v. Brown*, 16 R. I. 379, 6 New Eng. Rep. 710, the general rule of construction, laid down by Kent, both as to deeds and wills, that if an interest and a power coexist in the same person, an act done without reference to the power will be applied to the interest, and not to the power, was examined and followed. The same rule was also followed in *Grundy v. Hadfield*, 16 R. I. 579, and in *Brown v. Phillips*, 16 R. I. 612. In *Matteson v. Goddard* (R. I.) Index, HH. 98, it was held that a general residuary clause in a will did not execute a subsequently created power of appointment. While those cases are not decisive of this one, the reasoning upon which they rest is equally applicable, viz., where nothing appears to show an intent to execute a power the court cannot infer an intent to do so. This was the almost uniform rule prior to the adoption of statutes upon this subject. In New York and in England it was thought that the rule often defeated the intention of testators, who probably intended to dispose of everything they had power to dispose of; and so Acts were passed which carried property over which one had a power of appointment, by a general gift of his own property, unless an intention not to execute the power appeared. We do not see that the reason upon which such statutes are based is conclusive. It is equally open to conjecture that one who means to execute a power will signify in some way an intention to do so. If a computation could be made, it would doubtless appear that in the execution of powers a large majority of wills make proper reference to the power. The statute gives an arbitrary direction, against which, it seems to us, the reason is stronger than for it. The rule already recognized in this state is as applicable to wills as to deeds, and, in our opinion, it should be so applied. The same rule is laid down in *Mines v. Gambrill*, 71 Md. 80; *Hollister v. Shaw*, 46 Conn. 248; *Funk v. Eggleston*, 92 Ill. 515; *Bilderback v. Boyce*, 14 S. C. 528; and cases cited in our previous opinions.

The same rule also prevailed in England, New York, and Pennsylvania prior to the passage of statutes. In Massachusetts alone was a contrary rule adopted by the court. The law, therefore, has been practically uniform, except as it has been changed by statutes. It is urged that these statutes show a tendency of opinion which the court should follow by adopting the rule of the statutes. The opportunity to make law is alluring, but it tempts beyond the judicial path. As our province is to declare law, rather than to make it, we deem it our duty to adhere to the rule which is com-

mended to us by reason and precedent, until, as elsewhere, it shall be changed by legislative authority. If such a rule be the wiser one, the Legislature can enact it; but, outside of a statute, it is hard to see upon what ground a court can decree an intention to execute a power, when in fact no such intention is in any way evinced.

Applying to this case, then, the rule that to support an execution of a power something must appear to show an intent to execute it, we come to the inquiry whether such an intent appears. To solve this, we must look to the will itself, and not to extrinsic facts, except as they enter into and give color to the will. In the will there is no reference to the power, but it is urged that an intention to execute the power is to be inferred from its contents and the circumstances of its execution. It is claimed that Rice's relations with his grandmother were so intimate as to raise a presumption that he knew the contents of her will, especially in view of the fact that his bequests exceeded the amount of his own estate. Rice's will was made at Liverpool, pursuant to a suggestion from the complainant that, owing to the will of his grandmother, he ought not to cross the ocean without making his will. He received \$625,000 outright under his grandmother's will, besides the income of one sixth of the residuary for life, with the power of appointment. If he knew of this power, it is most natural that he would in some way have referred to it. If he knew the amount absolutely bequeathed to him, or expected a large bequest, it would account for all the legacies in his will. After he knew of the power of appointment, he did not change his will. Perhaps his mind so dwelt upon the legacy of \$625,000 that he gave no thought to a possible appointment of one fifth of that amount in the residuary clause; or perhaps, after hearing of the power, he intended some time to make a disposition of it. But, however it was, he gave no sign as to the power. The fact that at the time of his death his estate was somewhat less than his bequests is not significant; for evidently he was not a close financier, and gave little heed to the depreciation of his estate. The deficiency, however, is not so marked as to raise a presumption in favor of the execution of the power, even if we could properly look to that fact for that purpose. This and several other interesting legal questions have been raised and ably presented upon the point of intention, but we do not deem it necessary to pass upon them, inasmuch as we do not find from the facts any sufficient or satisfactory evidence of an intention to execute the power. We therefore decide that the fund in question did not pass so by appointment under the will of Mr. Rice, and therefore belongs to the heirs of Mrs. Bourne, according to the terms of her will.

Decrees accordingly.

MICHIGAN SUPREME COURT.

Theodore S. NICHOLS *et al.*, *Appts.*,ANN ARBOR & YPSILANTI STREET
R. CO.

(..... Mich.....)

1. Mere usurpation of corporate authority to construct a street railway will not entitle an abutting owner to maintain an injunction suit to prevent such construction.
2. On the question whether or not a railway operated by a steam motor in a public street is an additional burden which an abutting owner may enjoin, the court is divided, two in the affirmative, two in the negative, and one holding that it is not settled.
3. Compensation must be made to the owner of the fee before a railway can be constructed along a highway by cutting and filling, using ties and T-rails, and leaving a ditch on each side so as to practically block up for ordinary uses the portion of the highway where it is located.

(July 23, 1891.)

APPEAL by complainants from a decree of the Circuit Court for Washtenaw County in favor of defendant in a suit brought to enjoin the laying of rails in the street in front of complainants' premises unless compensation was made to them for the taking of their rights therein. *Reversed.*

The facts are stated in the opinion.

Mr. A. J. Sawyer, for appellants:

Where a compliance with the statute is a condition precedent to the formation of the corporation, then a corporation does not exist until it has complied with the statute, and the court will not recognize it as a corporation.

New York Cable Co. v. New York, 6 Cent. Rep. 56, 104 N. Y. 1.

No authority to form a corporation can be derived from a statute of this nature until the conditions upon which the authority is offered by the state have been complied with.

2 Morawetz, *Priv. Corp.* § 737; 1 Morawetz, *Priv. Corp.* § 57; *New York Cable Co. v. New York*, *supra*; *Manfield C. & L. M. R. Co. v. Drinker*, 30 Mich. 124; *Peninsular R. Co. v. Tharp*, 28 Mich. 506; *Tuttle v. Michigan A. L. R. Co.* 35 Mich. 247; *Atty-Gen. v. Hanchett*, 42 Mich. 436; *Doyle v. Mizner*, 42 Mich. 332; *Burton v. Schilbach*, 45 Mich. 504; *Moh v. Detroit Bldg. & Sav. Assn. No. 4*, 30 Mich. 511.

The dedication of a street to the public does not authorize it to be used for an ordinary railroad track, and the municipal representation cannot authorize it to be so used without compensation to adjacent owners.

Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 47 Mich. 893, 81 Am. Rep. 306; *Reidinger*

NOTE.—For notes on the right of abutting owners to damages for interference with their right of access to streets, see *Egerer v. New York Cent. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381; *Selden v. Jacksonville* (Fla.) 14 L. R. A. 370.

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v. Marquette & W. R. Co. 62 Mich. 29; *Reichert v. St. Louis & S. F. R. Co.* 51 Ark. 490; *Imlay v. Union Branch R. Co.* 28 Conn. 249; *Nicholson v. New York & N. H. R. Co.* 23 Conn. 73, 56 Am. Dec. 390; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Kucheman v. C. C. & D. R. Co.* 46 Iowa, 866; *Gray v. First Division of St. Paul & P. R. Co.* 18 Minn. 315; *Phipps v. Western Maryland R. Co.* 66 Md. 319; *Chamberlain v. Elizabethport S. C. Co.* 41 N. J. Eq. 43; *Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 609; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256.

If the track runs in the traveled track of the highway, and is made to conform to the grade of the street, and its ties and timbers are beneath the surface of the road, and its iron is on a level with the surface of the highway, then, in its mode of construction, it is a street railway.

C. L. § 3552, 3553.

The purpose is to operate this road, and it is operated with a steam motor, drawing trains of cars, running at twenty miles an hour, making regular hourly trips of sixteen to twenty miles each. We submit that does not come within the lines of a street railway, but is a steam commercial railway in all the essential features which constitute a commercial railway an increased burden.

East End Street R. Co. v. Doyle, 88 Tenn. 747; *Strange v. Hill & W. D. St. R. Co.* 54 Iowa, 669; *Stanley v. Davenport*, Id. 463; *Lahr v. Metropolitan Elec. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 288; *Hot Springs R. Co. v. Williamson*, 136 U. S. 121, 31 L. ed. 355.

An injunction is proper to restrain the continuous unlawful use of complainant's land by a railroad company until it has paid the damages.

Murdock v. Prospect Park & C. I. R. Co. 73 N. Y. 579; *Riedinger v. Marquette & W. R. Co.* 62 Mich. 29.

Mr. B. M. Thompson for appellee.

Long, J., delivered the opinion of the court:

The bill is filed in this cause to restrain and enjoin the defendant from placing ties and laying rails, and operating its railway, over and along the complainants' land, situate in the public highway, and running cars and trains of cars propelled by steam, or any other motive power, upon said highway, along and in front of complainants' premises. The bill sets forth substantially that two of the complainants reside in the township of Ann Arbor, Washtenaw county, and the complainant, Lucy L. Granger, resides in Bay City; that they are the children and only heirs-at-law of Erasmus D. Nichols, deceased, who was the owner in his lifetime of certain lands situate in that township, having a frontage on the highway of about 40 rods, and that complainants, as such heirs-at-law, are the owners of said lands; that on the 30th day of August, 1890,

the defendant railway company filed in the office of the secretary of state a paper purporting to be the articles of association of the Ann Arbor & Ypsilanti Street-Railway Company, and that said company purposed to run a railroad from Ann Arbor to Ypsilanti, upon and along the south side of the public highway between said cities, called the "Ann Arbor & Ypsilanti Road," and that it has graded along the south side of said road from the terminus of said road, in the city of Ypsilanti, to the city limits of the city of Ann Arbor, and is laying the ties and railroad track or iron thereon, excepting a few rods along and in front of premises owned by one John A. Bohnet in the township of Pittsfield, and the premises of the complainants, which lie adjacent to the city of Ann Arbor; that said grading and placing ties, and laying of the iron, is on the south side of said highway nearly the whole distance, except from what is known as the stone school-house to the limits of said city of Ann Arbor, over which last distance it is on the westerly side of said highway; that said grading along the line of said highway comes within three or four feet of the fence on the south and west sides of the same; that said defendant has completed the construction of said road, except along the premises of the complainants and said Bohnet, and purposes and intends, when the same is completed, to run trains of cars thereon, drawn by steam-engines, for the purpose of conveying passengers and freight upon and along and over said railway.

Complainants show by their bill, and charge, that the defendant, under its articles of association, if the same are valid, has the right to use on said railroad an engine or motor to be operated by steam; that under the said articles, if the same are legal and binding, the said company is not only permitted to carry passengers, but is authorized to use the said road for the transportation of freight and property. The complainant, Theodore S. Nichols, shows and charges in the bill that one William Campbell, claiming to act for the defendant or some other corporation, applied to him for his consent and permission to build its said road upon and along said highway, and that he signed some paper which was then and there presented to him by the agent of said company, giving his consent to the building of some railway; but avers that the said agent falsely and fraudulently represented to him that the proposed road was simply a street railway, and that the motive power to be used thereon was to be either electricity or animal power; and, in reliance upon the statements so made by the agent of the defendant, he subscribed the paper presented to him, the contents of which he is now unable to state, but avers that by reason of said false and fraudulent representations the said paper is and of right ought to be null and void, and of no binding force and effect whatever. The complainants Ella E. Nichols and Lucy L. Granger charged that they have given the defendant no consent or permission to construct and operate said railway in said highway in front of their premises, and that said railway has

obtained no lawful consent of the supervisor and commissioner of highways of said township, but that the same was obtained upon false and fraudulent representations; that the motive power to be used by said street-railway company was to be either animal or electricity, and that therefore, whatever consent was given by said commissioner or supervisor was of no binding force or effect whatever; that the paper purporting to give the consent of said supervisor and commissioner does not in any particular comply with the statute requiring the consent of the supervisor and commissioner; and that the acts and doings of the defendant, as set forth, have been done without warrant of law, and are not only an invasion of the rights of the complainants, but are also an unlawful appropriation of the public highway for railroad purposes; that the statute under which said pretended company was organized is no longer in force, and that there is no statute in this state which authorizes the formation of any such corporation as the said defendant claims to be; that the defendant, as a corporation, has no legal existence, and has no right to enter upon any of the highways of this state, and build thereon a railroad of any description; that the paper purporting to be the consent of said supervisor and commissioner to build said road was not executed in accordance with any action theretofore taken by the township board of said township, nor was the same made and executed at any meeting of said township board. Complainants claim by their bill that the construction and operation of said railway will cause a serious and lasting damage and injury to the said real estate, and that the corporation is not personally responsible for any judgment for damages; that the location of said track within two or three feet of the road fence, upon the west line of said highway, makes it necessary for them, in order to get into their fields or to their houses and barns situate thereon, to cross the track of said railway; that their houses front upon said highway, and are only a distance of ninety feet from the line of said highway, and that it will be impossible to hitch horses or other animals in front of their said premises without danger of their being killed or injured by the cars of the defendant; that the construction and operation of said railway will largely decrease the value of their real estate, and, if allowed to be constructed and put into operation, will occasion them irreparable injury to their use of the road over which said railway runs; that they are forced to come to Ann Arbor or Ypsilanti to market all the produce and crops from said farm; that the only highway over which they can pass to either city is this highway, and, if defendant is permitted to complete the construction and continue the operation of said road along said highway, it will be and remain a continuous cause of injury and damage to the complainants, and a permanent obstruction in said highway, and an object of fright to their teams while engaged in marketing their produce and crops from said farm; that the construction and operation of said rail-

road will decrease the value of complainants' property at least \$3,000. Complainants further charge that the defendant intends to proceed at once to the construction of said road along said highway, and to place thereon ties and railroad iron, and to run over and upon the same steam-engines and cars for the transportation of passengers and freight thereon, drawn by steam-engines, as often as one train every hour.

Defendant demurred to part of this bill, and answered as to the remainder. The causes of demurrer are: (1) That it appears upon the face of the bill that the defendant has been and is duly incorporated. (2) That this court has no jurisdiction in the cause to hear and determine the question of the incorporation of the defendant.

By way of answer, the defendant admits that it has graded its road-bed from a point in the city of Ypsilanti near the Michigan Central Railroad to the south boundary line of the city of Ann Arbor; that all of said road within the city of Ypsilanti is completed, and nearly the whole of said road from Ann Arbor to Ypsilanti has been tied and ironed, and is now ready to be operated as a street railway. The defendant denies by its answer that its said railroad is in any correct sense a commercial railroad for the transportation of passengers and freight upon which ordinary steam-engines operate, and passenger-cars are to be used and operated, and says it is strictly and simply a street railroad for the conveying of passengers to and from the cities of Ann Arbor and Ypsilanti and intermediate points, and that the insertion in its articles of incorporation of authority to carry freight was designed merely to authorize defendant to carry light articles of merchandise for the benefit and accommodation of its passengers and others who may desire to have light articles of merchandise, purchased in Ann Arbor or Ypsilanti, transported to their homes in said city, or on the line of said road; that the motor to be used on said road is no larger than a street-railway car, makes a less noise in operation than the electric car with overhead wires, emits little or no steam or smoke, and is as unobjectionable in every way as an ordinary street railway propelled by animal power. Defendant further claims by its answer that it has obtained the right to use said highway from the proper authorities; that it has also obtained a right of way from all the persons owning land upon the said highway on the south and west sides thereof, except for a distance of about 40 rods across lands owned by one John A. Bohnet; that it admits that it obtained said right of way for the construction and operation of a street railway, and not for a commercial road. Defendant further says by its answer that it obtained the right of way and consent to construct and operate its said road in said highway across the lands described in said bill as complainants' lands from the said complainant, Theodore S. Nichols, and it denies that in obtaining such consent and right of way it made any false representations whatever to said Theodore S. Nichols; that said complainant, Theodore S. Nichols, in 16 L. R. A.

giving the defendant such right of way and consent to construct and operate its said road, did so without restriction or limitation as to the rights of any other person who was an owner of said premises in common with himself; and that under and by virtue of such consent and right of way so given by the complainant, Theodore S. Nichols, it has a right of way for the construction and operation of its said road as to all of the complainants. The defendant denies by its answer that the construction and operation of said road will cause any damage whatever to the lands in said bill of complaint, but says that they will be greatly increased in value by the construction and operation of said road. Defendant further claims that it has expended in grading its road, tying and ironing the same, or become liable for, over \$50,000, and that all of such expense has been incurred by the defendant, acting upon the consent and agreement of the said Theodore S. Nichols, giving defendant the right of way across the premises described in the bill, and that, unless it is permitted to complete and operate its said road, it will thereby suffer great loss and damage, and that said loss and damage will amount to over \$10,000.

The testimony in the case was taken in open court before his honor, Judge Peck, then sitting in that court, who, upon the conclusion of the case, entered a decree dismissing complainants' bill, but without prejudice to the right of the complainants to proceed in an action for damages. From this decree complainants appeal.

The defendant corporation was organized under chapter 94, How. Ann. Stat. Its articles of association recite that the corporators desire to become incorporated under the provisions of chapter 94, How. Ann. Stat., being Act No. 148, Sess. Laws 1855, as amended by Act No. 91, Pub. Acts 1871, entitled "An Act to Provide for the Construction of Train Railways," as added to by Act No. 14, Sess. Laws 1861, as amended by Act No. 188, Sess. Laws 1867, which provides for "the incorporation of persons for the constructing, owning, maintaining, and operating of train railways or roads for the conveyance of persons or property to be operated by horse or other animal power, or by electric or other motive power, or by any combination of them, or by steam, as shall be determined by the board of directors, and for the purpose of constructing and operating railways through the streets of any town or city in this state, and to fix the duties and liabilities of such corporation."

Chapter 94, as it originally stood prior to the amendments, was Act No. 148, Sess. Laws 1855. As it originally was passed, it provided for the incorporation of train railway companies. In 1861, the Legislature, by Act No. 14 of that session, so amended the chapter that it provided for the organization of companies under the Act to construct and operate railways in and through the streets of any town or city within the state. The Act was again amended in 1867 by adding three new sections, to stand as sections 38, 39, and 40. Act No. 188, Sess. Laws 1867. By section 40 it was provided "that cars on

the street railway of any company organized under this Act may be operated by steam, or by any power other than animal power, whenever the municipal authorities of the city where such railway is situated shall authorize the same."

The question of the incorporation of street railways under this Act came before this court in *Taylor v. Bay City Street R. Co.* 80 Mich. 79, and in *Detroit City R. Co. v. Mills*, 85 Mich. 634. In the last-named case the constitutionality of this chapter and the several amendments was questioned, and the Act upheld. We shall not, therefore, discuss the constitutional questions raised as to the Act, or the proper and legal organization of the defendant company. If the defendant company is not legally and properly organized under the Act, or if the company is attempting to exercise corporate franchises not conferred by the Act, it is a matter between the defendant company and the state. The mere usurpation of corporate authority does not confer upon an individual the right to bring suit, to restrain an unlawful exercise of authority. If the state chooses to waive it, or permit the action, no others can complain, so long as personal or property rights of the individual are not invaded or affected.

The two principal questions raised by complainants' counsel are: (1) That the use of steam as a motive power is an additional burden or servitude upon their lands. (2) That the mode or manner of construction of the road-bed constructed by the defendant company is also an additional burden or servitude upon their lands.

The testimony shows that the motor used is what is known as "Porter's Noiseless Motor;" that it is operated by steam, and inclosed like an ordinary street-car, and about the same size, and makes less noise than an ordinary electric street-car with overhead wires. It is so arranged that the steam makes a continuous circulation, making no noise by emission of steam, and that the smoke is consumed. It was held in *Detroit City R. Co. v. Mills*, *supra*, that an ordinary street railway is not an additional burden or servitude where the fee of the street is in the abutting owner, and there is almost a consensus of judicial opinion in this direction. *People v. Kerr*, 27 N. Y. 188; *Clinton v. Cedar Rapids & M. R. R. Co.* 24 Iowa, 455; *New Albany & S. R. Co. v. O'Daily*, 18 Ind. 858; Dill. Mun. Corp. 723. It was also held in that case by this court that the use of electricity as a motive power did not create an additional servitude or burden upon the lands of the abutting owners. The manner in which the road of the defendant company is to be operated by the use of this steam-motor, as it is, is no more of a burden or servitude upon the lands of the abutting owners than an electric car with its overhead wires. It is no more obstruction to the street, and no more of an object calculated to frighten horses passing and repassing upon the highway. Section 40, Act 1867, above quoted, expressly provides for the use of steam as a motive power upon street railways operated in cities, whenever the municipal authorities authorize it.

16 L. R. A.

In *Briggs v. Lewiston & A. Horse R. Co.*, 79 Me. 363, 4 New Eng. Rep. 546, the use of steam as a motive power upon street railways was expressly recognized. We think the complainants are not entitled to the relief asked for by their bill, by reason of the use of steam as a motive power in the manner in which it is shown the defendant used it. It appears that before the defendant company was organized a company known as the "Ann Arbor, Ypsilanti & Detroit Street-Railway Company" had procured from the township board of the township of Ann Arbor the right and privilege to construct, maintain, and operate this street railway by reason of permission granted to it in writing by the supervisor and commissioner of highways of that township, granting permission and right to locate, establish, construct, and maintain its road over that highway, and to use thereon animal, motor, or electric power. Some question is raised by complainants' solicitor in this record as to the authority thus granted. Without entering upon that question at length, it is sufficient to say that we are satisfied that there was proper authorization by the township to construct, maintain, and operate this road by the defendant, and, unless the complainants are in some manner affected in their private and property rights, the defendant cannot be interfered with by them in the operation of its road.

The second question raises the important point in this case, and that is the manner or mode in which the defendant's road is constructed in and along the highway. A street railway, the rails of which are laid to conform to the grade of the surface of the street, and which is otherwise so constructed that the public is not excluded from the use of any part of the street as a public highway, carrying passengers, stopping at street crossings to receive and discharge them, is a street railway, whether it be operated by horses or electric power, or by steam-motor, such as is shown to be used by the defendant in this case. The testimony shows, however, that since issue was joined in this case, the defendant company has completed the construction of its road, which had been mostly completed at the time the bill was filed; that the road, as constructed, runs along upon the highway within two or three feet of the road fence upon complainant's land; that the roadbed does not conform to the grade of the street, nor pass over and along the surface of the ground next to the fence, but that the grade for the roadbed is made by cuts and fills. In some places the cuts are two feet in depth, and the fills as great. Ditches are dug along the side of the roadbed on either side. Upon the roadbed so constructed ties are placed to the number of from 2,000 to 2,800 to the mile. Upon these ties is placed a T-rail, such as is ordinarily used in the construction of a railroad for commercial purposes, except that the T-rail is somewhat lighter. The complainants claim that this is a use of their property not warranted by the Act under which the company is organized, and a taking of their private property for public uses without

compensation; that it depreciates the value of their lands, in that they are unable to pass over from the highway to their lands without crossing this roadbed at great inconvenience; and that they are unable to hitch horses or other animals along the highway fence. The complainants' lands have a frontage on the highway of about forty rods. The Act under which the defendant is incorporated confers no powers upon it to construct, maintain, and operate such a road without compensation to the property owners abutting thereon, and the township authorities could confer upon the defendant no such power. It is from its mode of construction in all essentials a commercial road, and not an ordinary street railway. It is not constructed as street railways are usually constructed, on a level with the surface of the street, so that vehicles may pass and re-pass over it. As constructed, it blocks up the highway so far as the complainants' use of it is concerned in going to and from their premises, and is an additional burden upon their lands. The rule is well established in this state that the dedication of a street to the public does not authorize it to be used for an ordinary railroad track and the municipal authorities cannot authorize it to be so used without compensation to the adjacent owners. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 47 Mich. 898, 31 Am. Rep. 306; *Riedinger v. Marquette & W. R. Co.* 62 Mich. 29. It was said by Mr. Justice Cooley in *Grand Rapids & I. R. Co. v. Heisel*, *supra*: "A street railway for local purposes, so far as constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel, instead of constituting an embarrassment. It is enough that the use of the street for a city railway is a proper use and therefore a lawful use." *Brooklyn City & N. R. Co. v. Coney Island & B. R. Co.* 85 Barb. 364; *Brooklyn Cent. & I. R. Co. v. Brooklyn City R. Co.* 83 Barb. 420; *People v. Kerr*, 27 N. Y. 188; *New Albany & S. R. Co. v. O'Daily*, 12 Ind. 551; *Brown v. Duplessis*, 14 La. Ann. 842; *Elliott v. Fair Haven & W. R. Co.* 82 Conn. 579; *Hobart v. Milwaukee R. Co.* 27 Wis. 194. Speaking further in that case, the learned justice said: "But we cannot say the same in the case of the ordinary railroad. In such case it cannot be questioned that the laying of the railroad track in the highway without first legally appropriating the land for the purpose, and without making compensation, is a legal wrong to the adjacent owner; the track to him is wrongfully laid."

In *Riedinger v. Marquette & W. R. Co.* *supra*, a bill was filed to restrain the defendant company from constructing a railroad

over and across Front and Superior streets in the city of Marquette. The bill was dismissed in the court below, and complainants appealed to this court, where, upon a hearing, a decree was entered for perpetual injunction against this use of the street, unless within six months measures should be taken to condemn the complainant's rights in the street, and compensate them therefor. Defendant contends, however, that the complainant Theodore S. Nichols is estopped from making this claim by reason of a release of the right of way over complainant's premises. The writing is not put in evidence, and complainant contends that it was procured by fraudulent representations; that at the time of its execution the defendant company represented to him that they were to build a street railway similar to that in the city of Ann Arbor; and upon this understanding he consented to the construction of the road in front of his premises. We think the complainant borne out by this record in that claim, and that the complainants are not estopped from insisting upon their rights here to have a road—if one is to be built at all by defendant—such as was represented to him would be built; that is, an ordinary street railway, conforming to the grade of the street. In view of these facts as to the mode in which the road is constructed, we are satisfied that the complainants are entitled to the injunction prayed.

The decree of the court below will be reversed, and decree entered in this court granting a perpetual injunction to the complainants, enjoining and restraining the defendant corporation from maintaining and operating its road in the manner in which it is constructed across the complainant's premises. Complainants will recover the costs of both courts.

Grant, J., concurred with **Long, J.**

Morse, J.: I think this case should be reversed, but I do not think that the law, as yet, has been settled in this state that an electric street railway is not an additional burden to the highway, and I am satisfied that a steam railway is such a burden. The injunction should be granted as prayed.

McGrath, J., concurred with **Morse, J.**

Champlin, Ch. J.: I concur in the reversal upon the ground stated in the opinion of Mr. Justice Long, but I do not concur in that part of the opinion which states that it is settled law in this state that a street railway, operated by steam or electricity, is not an additional servitude upon a street or highway.

Petition for rehearing and modification of opinion denied.

MINNESOTA SUPREME COURT.

George JOANNIN *et al.*, *Appts.*,
v.

David OGILVIE *et al.*, *Respts.*

(.....Minn.....)

- *1. There may be duress with respect to real property as well as personal, so as to render a payment on account of it involuntary, so that the money may be recovered back.
2. So held where a party filed a mechanics' lien against property upon an unfounded claim which the owner paid under protest, in order to clear the title of record, so that he might consummate a loan upon the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money.

(May 20, 1892.)

APPEAL by plaintiffs from a judgment of the District Court for St. Louis County in favor of defendants, in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

Defendants in their answer admitted the execution of the note and set up as a counterclaim that plaintiffs were indebted to defendant, Ogilvie, the principal debtor in the note, in a sum greater than the amount due on it, and stated as a ground for such indebtedness that Ogilvie was the owner of a lot of land in the City of Duluth, against which plaintiffs filed an illegal claim to a mechanics' lien; that because of the necessity upon defendant to clear up the title he paid the amount of the claim and that therefore he had a right to recover back the amount so paid. The trial court made the following finding of facts:

"1. That defendant, David Ogilvie, executed the note in words and figures set forth in plaintiffs' reply to defendant's answer, and that said note had the signature of defendant, F. H. Barnard, on the back thereof, when received by plaintiff. And that no part of the same has been paid.

"2. That said note was given for the sole and undivided debt of the defendant Ogilvie to the plaintiff, and that defendant, Barnard, received no consideration for his indorsement thereof and was in said transaction merely surety for Ogilvie.

"3. That the materials sold by the plaintiffs

to A. H. Thompson, which were used in the contracts of buildings of defendant, Ogilvie, were sold on the sole and individual credit of said A. H. Thompson, to be resold by him as retail dealer, and with no understanding on plaintiffs' part as to whom they were to be resold by said Thompson, or as to where they were to be used.

"4. That the said materials, furnished by Thompson to Ogilvie, were sold on open accounts, as called for, and at retail, with no understanding as to any particular price, or quantity to be sold, or time of delivery, or place in which they were to be used, and same were fully paid for by defendant, Ogilvie, prior to time of filing plaintiffs' lien statement, and without any knowledge on Ogilvie's part of any claim of plaintiffs on account of said material.

"5. That A. H. Thompson was neither contractor nor agent for defendant Ogilvie in the furnishing of any of said materials.

"6. That on January 31, 1890, plaintiffs filed in the office of register of deeds of St. Louis county a lien statement duly verified claiming lien against Lots 93 and 95, Block 47, Duluth proper third division for the said materials in the sum of \$682.50 and interest thereon from November 25, 1889, at seven per cent per annum, said lien statement being fully set forth in the answer of defendant herein.

"7. That on or about March 19, 1890, defendant Ogilvie paid to the plaintiffs \$698.50 for the purpose of procuring a release from the said records of said lien which sum was the full account of plaintiffs' claim.

"8. That defendant Ogilvie at the time of said payment was indebted in large sums of money to different persons on notes and accounts aggregating not less than \$20,000. What accounts were not due had been extended for a short time, on promise of payment out of loans then being negotiated by Ogilvie on the property against which said lien was filed. Those premises were incumbered by a past due mortgage for \$10,000, the owner of which was threatening foreclosure on default of immediate payment.

"Other of Ogilvie's creditors were threatening suit. Ogilvie had no available means or property by which to meet these various demands, except the property against which the said lien was filed. Prior to the filing thereof Ogilvie had perfected arrangements and executed mortgages for permanent loans on said property in the total sum of \$15,000, to be com-

*Head notes by MITCHELL, J.:

NOTE.—Duress by lien on real property.

The instances in which duress by exercise of authority over real estate is recognized are rare. One of the most common arises in cases of tax assessments and liens for a collection of authorities as to which, see *State v. Nelson*, 4 L. R. A. 300, and note, 41 Minn. 25.

The principal case presents a state of facts so peculiar that no similar decision has been discovered.

In *Gates v. Dundon*, 49 N. Y. S. R. 660, a contract for building a house was let to one who abandoned it before its completion. Persons who had furnished materials for it then threatened that if their

claims were not paid they would file liens against the building and that if they did so others would do the same which would embarrass the owner in procuring money to finish it. He therefore gave his note for the amount of the claim which in fact included materials used in other buildings. When suit was brought on the note a verdict was returned for defendant on the ground that the note was procured by duress and on appeal this verdict was permitted to stand.

For notes on what constitutes duress, see *Shattuck v. Watson* (Ark.) 7 L. R. A. 551; *De La Cuesta v. Insurance Co. of North America* (Pa.) 9 L. R. A. 631.

H. P. F.

pleted when title to the property appeared clear of incumbrance. Of these sums only \$2,000 had been advanced thereon and further sums were refused to defendant until and unless the plaintiffs' lien should first be cleared from the records. Defendant could not get the money anywhere else. These permanent loans were the only available resources defendant had with which to meet his said obligations and avoid suits and foreclosures of his property.

"9. Defendant, Ogilvie, protested to plaintiffs against the payment of their claim as unjust, illegal, and groundless, and demanded release of their lien as aforesaid, and plaintiffs refused to release same unless their claim was first paid in full. Defendant never admitting the justice of plaintiffs' claim, but solely to avoid greater and threatened losses to his property interests, and serious financial injury to himself, paid the same.

"10. Plaintiffs knew before filing their lien statement that Ogilvie was negotiating loans on said property, and that the same were not at that time completed, and that Ogilvie could not complete the same while their lien was of record or without payment thereof.

"11. That as security for the payment of the said note of defendant to plaintiffs, defendant Ogilvie transferred to plaintiffs thirty shares of the capital stock of the Northwestern Investment Company, certificate No. 287, dated March 25, 1891, and same is held by plaintiffs and is of the value of three hundred (300) dollars.

"That defendant Ogilvie otherwise transferred to plaintiffs two shares of the capital stock of the St. Louis Investment Company, dated May 28th, 1891, as security for payment of said note, and said stock is held by plaintiffs, and is of the value of two hundred (200) dollars."

As conclusions of law the court finds:

"1. That plaintiffs' said claim of lien against lots 93 and 95, block 47, Duluth Proper, third division, as in answer set forth, was invalid, and that they had no just or legal claim against defendant, Ogilvie, or his property.

"2. That the payment of plaintiffs' claim by defendant Ogilvie, was made under such stress and necessity as amounted to compulsion and made it involuntary, and that he is entitled to recover back the money so paid, and to offset against plaintiffs' claim on their note, the said sum of \$698.50, with interest thereon of seven per cent per annum from March 19th, 1890, and to have a judgment against plaintiffs for the sum of two hundred and sixty-four dollars, being the balance due after deducting the amount due on said note. Also for his costs and disbursements in this action, and for the cancellation of said note and the assignment and delivery to defendant, Ogilvie, of said stock, or for its value if not delivered on demand.

"3. Defendant, Bernard, is entitled to judgment against plaintiffs dismissing their action against him, and for his disbursements herein.

"Let judgment be entered accordingly."

Messrs. John H. Brigham and H. P. Greene for appellants.

Mr. J. B. Richards for respondents.

Mitchell, J., delivered the opinion of the court:

The findings in this case are so specific as to 16 L. R. A.

constitute a sufficient statement of the facts, and an examination of the record satisfies us that, on all material points, they are fully justified by the evidence. That plaintiffs' claim of a lien on the land of the defendant Ogilvie was wholly unfounded is conceded. *Merri-man v. Jones*, 43 Minn. 29. Therefore the only question is whether the payment of the claim was voluntary, or whether it was made under such compulsion or constraint that it is to be deemed in law involuntary, so that the money may be recovered back. In examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoiding of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand, and with the great liberality of the equity rule on the other. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force. The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice. *Pollock, Cont. 558.*

In *Fergusson v. Winslow*, 34 Minn. 384, this court held that "when one in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back, at least when such detention is attended with circumstances of hardship or of serious inconvenience to the owner."

Again, in *De Graff v. Ramsey County*, 48 Minn. 319, it was said: "There is a class of cases where, although there be a legal remedy, a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice; where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him

to comply with the illegal demand. In such cases his act will be deemed to have been done under duress, and not of his free will."

Fergusson v. Winslow, supra; *State v. Nelson*, 41 Minn. 25, 4 L. R. A. 300, and *Mearkle v. Hennepin County*, 44 Minn. 546,—are instances where the danger of irreparable or serious prejudice was considered so great and the legal remedy so inadequate as to practically leave the party no choice but to comply with the illegal demand, and hence to render the payment involuntary. It may be stated generally that whenever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience. *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. 297.

As was said as long ago as *Aslley v. Reynolds*, 2 Strange, 915, "plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be when the party has his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

It has been said that, to constitute a payment under duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." *Brumagim v. Tillinghast*, 18 Cal. 265; *Radich v. Hutchins*, 95 U. S. 210, 24 L. ed. 409. Beyond these and similar statements of general principles, the courts have not attempted to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or involuntary. From the very nature of the subject, this cannot be done, as each case must depend somewhat upon its own peculiar facts. The real and ultimate fact to be determined in every case is whether or not the party really had a choice,—whether "he had his freedom of exercising his will." The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line. For example, payment of an illegal tax, in order to prevent issuing a warrant of distress in the nature of an execution, and upon which the party has no day in court or opportunity to defend, is held not voluntary. Such were the cases of *Dakota County Comrs. v. Parker*, 7 Minn. 267 (Gil. 207), and *Preston v. Boston*, 12 Pick. 7. So, also, the payment of an illegal demand in order to obtain possession of personal property detained otherwise than by judicial process, and where the immediate want of the property was so urgent that an action of replevin "would not do the owner's business."

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Such was the case of *Fergusson v. Winslow, supra*. Also the payment of an illegal tax in order to get a deed on record, as in the case of *State v. Nelson, supra*; or the payment of illegal fees in order to secure the exercise of its jurisdiction by the probate court in the administration and settlement of an estate, where the delay was liable to result in serious loss, as in the case of *Mearkle v. Hennepin County, supra*. On the other hand, it is well settled that the mere refusal of a party to pay a debt or to perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities. Such was the case of *Cable v. Foley*, 45 Minn. 421; also *Miller v. Miller*, 68 Pa. 486; *Hackley v. Headley*, 45 Mich. 569; *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723, and *Silliman v. United States*, 101 U. S. 465, 25 L. ed. 987,—cited by plaintiff. It will be noted that in the last case referred to the party entered into the new contract, not for the purpose of obtaining possession of his property (the barges), but to secure payment of money due him from the government. So, also, the fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand will not render its payment compulsory, at least in the absence of fraud on the part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Taylor v. Board of Health*, 31 Pa. 78; *Oceanic Steam Nav. Co. v. Tappan, supra*. Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the state. To this class belong the following cases cited by plaintiffs: *Cook v. Boston*, 9 Allen, 398; *Emery v. Lowell*, 137 Mass. 138; *Mays v. Cincinnati*, 1 Ohio St. 268; *Custin v. Viroqua*, 67 Wis. 814. The same has been held as to money paid under threats of distress for rent, in the absence of fraud or any other fact, except that no rent was due. The theory seems to be that the party's remedy is to replevin, and try the question of liability at law. Such was the case of *Colwell v. Peden*, 3 Watts, 327, also cited by plaintiffs.

But all these cases in which the payment was held voluntary are clearly distinguishable from the case at bar. The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need. It was this active interference with the property, and not the necessitous

financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of a judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have interposed his defense in these proceedings. But this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it. But with a large indebtedness hanging over him, an overdue mortgage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, \$13,000 of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of *Fergusson v. Winslow*, *supra*, but that the payment would be held to have been made under duress. But while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property. It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, Was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. *Fraser v. Pendlebury*, 81 L. J. C. P. 1; *Pemberton v. Williams*, 87 Ill. 15; *Closs v. Phipps*, 7 Man. & G. 586; *White v. Heylman*, 84 Pa. 143; *State v. Nelson*, *supra*. Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

Judgment affirmed.

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Frederick W. STEEG, *Rept.*,

v.

ST. PAUL CITY R. CO., *Appl.*

(.....Minn.....)

- *1. The servants of a street-car company who control the movements of its cars are bound to use due care in starting the same so as to allow passengers a reasonable opportunity to get safely on board, regard being had to the circumstances of each case.
2. Evidence held sufficient to warrant the submission of the case to the jury and to sustain the verdict rendered.

(June 10, 1892.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling its motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry J. Horn for appellant.

Mr. O. E. Holman, for respondent:

As a carrier of passengers for hire the defendant was bound to exercise the highest degree of care and diligence consistent with the nature of his undertaking, and it is responsible for the slightest neglect.

Smith v. St. Paul City R. Co. 82 Minn. 2.

A carrier must allow his passengers a reasonable time in which to get on and off; and a person who is feeble or infirm is entitled to more than the ordinary time for this purpose, taking into account also the distance and other difficulties of access to the vehicle. As soon as a passenger has fairly entered the vehicle the carrier may start, without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of a coach. The carrier must also use prudence in starting, and not set off with a sudden and violent jerk.

2 Shearm. & Redf. Neg. 4th ed. § 508.

The instruction was proper.

2 Shearm. & Redf. Neg. §§ 508, 520; *Nichols v. Sixth Ave. R. Co.* 38 N. Y. 181, 97 Am. Dec. 780; *Bucher v. New York Cent. & H. R. R. Co.* 98 N. Y. 128; *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 25 Am. Rep. 171.

Vanderburgh, J., delivered the opinion of the court:

This action is for damages for the alleged negligent management of a street-car, by reason of which plaintiff claims to have suffered personal injuries. The accident occurred while the plaintiff was in the act of getting on, or just after he had got on, to the car, and before he had taken his seat, and he claims that he

*Head notes by VANDERBURGH, J.

NOTE.—As to duty to see that passenger reaches a place of safety before starting street-car, see *Akerslot v. Second Ave. R. Co.* (N. Y.) 15 L. R. A. 489.

was thrown off, or caused to slip off, the car, by a sudden and premature movement of the car caused by the carelessness of defendant's servants in charge of it. The accident occurred on the Selby avenue cable line in the city of St. Paul, and on the "grip car," with which was connected a passenger coach or "trailer." The grip car in question was provided with a step or foot-board running lengthwise of the car, by means of which passengers could reach the platform at each end of the car or the seats between. On this occasion the plaintiff attempted to reach the platform upon the front end of the car, so as to take an empty seat there. The plaintiff's hands were both incumbered with packages, and his testimony shows that as soon as he stepped upon the foot-board the car started, and, feeling his footing insecure, he hastily laid down the packages on the platform and caught hold of the front post of the grip car, when, through a sudden jerk of the car, he lost his balance and slipped off, and was dragged a short distance along the side of the car, whereby he received the injuries complained of. The plaintiff testifies that he did not have an opportunity to reach the platform before the car started, and he was unable to save himself from falling off. He is substantiated in the main by other witnesses; but witnesses on the part of the defendant, who observed the accident, testify to a different state of facts, and their evidence is in sharp conflict with that of the plaintiff, and tended to prove that the plaintiff had actually reached the platform, and, after the car was in motion, of his own accord stepped down upon the foot-board to arrange his tools, and while so doing slipped and fell off. The question whether the car was started up before the plaintiff had time to get safely on board the car was then one for the jury. It appears that the conductor and the "grip man" who had control of the movements of the train observed plaintiff before and while he was getting on, and knew the circumstances attending his attempt to board the car, and the fact that his hands were full. The question whether they exercised due care in starting and handling the cars to assure his safety was one for the jury. This disposes of the first and most important assignment of error.

The counsel for defendant asked the court to charge the jury that passengers riding on the platforms or steps of a street-car assume the additional risk of any accident therefrom. There was no prejudicial error in the court's refusal to give the instruction as asked, because the court had already clearly charged the jury on the subject, and the instruction given was specially pertinent to the evidence presented to the jury. The instruction also asked, that the sudden movement or "jerk" of a street-car in starting was not negligence if it necessarily resulted from the appliance of the grip, had no basis in the evidence, as there was no evidence tending to show that it was necessary or usual, and defendant's witnesses denied that it in fact took place in this instance.

The court also instructed the jury that "the trainmen were bound to allow plaintiff a reasonable time to get safely upon the car, and, the plaintiff having packages in his hands, they were bound to conduct themselves in starting the train in reference to that fact. These trains are not, of course, ordinarily expected to make long stops. But if anything is apparent in the condition of the passenger, so that he would be likely to be thrown or injured by a motion of the car, then proper regard for his safety might require a train to be held in position to avoid it. Care and negligence, in any case, depend upon the circumstances of the particular case. The care, both by the plaintiff and defendant, must depend largely upon the circumstances." There was no error in the instruction as given. The defendant, as a common carrier, was legally obliged to exercise extreme diligence and care, and was bound to allow the plaintiff a reasonable time and opportunity to get safely on board, and it was negligence to start the train sooner. The fact that his movements were somewhat incumbered by packages in his hands might reasonably require more delay and care in starting the train in order to assure his safety, as in the case of aged or infirm persons. 2 Shearm. & Redf. Neg. § 508. No further questions in the case require to be noticed.

Order affirmed.

OHIO SUPREME COURT.

PITTSBURGH, CINCINNATI & ST.
LOUIS R. CO., *Pff. in Err.*,

v.

STATE OF OHIO.

(.....Ohio St.....)

***The Act of April 15, 1889** (Rev. Stat. § 251a),
requiring "every corporation or company oper-

*Head note by the COURT.

NOTE.—*Constitutionality of laws charging the expense of police regulations on the business to be regulated.*

A very recent decision of the United States Su-
16 L. R. A.

ating a railroad or any part of a railroad within this state," to pay to the commissioner of railroads and telegraphs a "fee" of \$1 per mile for each mile of track operated by it within this state, contravenes sections 2 and 5 of article 12 of the Constitution of this state.

(March 2, 1892.)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas, in

premise Court decides that electric companies are not deprived of due process of law by requiring them to pay the salaries of the sub-way commissioners as provided in the New York statutes, and that such a requirement does not violate the 14th

favor of the state in a proceeding brought to compel payment by defendant of certain statutory fees. *Reversed.*

Statement by **Bradbury, J.:**

On May 1, 1890, the state of Ohio by its attorney-general, in an action theretofore begun and then pending in the court of common pleas of Franklin county, filed the following amended petition:

"The plaintiff says: That the defendant is a corporation duly incorporated under the laws of the state of Ohio, having its principal office in the city of Columbus, in said state, and that on the first day of September, 1889, it operated two hundred and seventy-four and sixty-three hundredths (274.63) miles of railroad within the state of Ohio.

"That on the 16th day of October, 1889, said defendant filed its annual report, duly verified, for the year ending on the 30th day of June, 1889, in the office of the commissioner of railroads for this state.

"That it was the duty of the defendant to have filed said report on the first day of September, 1889, and to have paid on that day to the commissioner of railroads, a fee of one dollar (\$1) per mile for each mile of track operated by it within the state of Ohio; but that the defendant failed and refused, and still fails and refuses, to make said payment, or any part thereof, to the commissioner or anyone for him.

"Plaintiff says that by reason of the failure of the defendant to make said payment, or any part thereof, there is due it from the defendant the sum of \$274.63, for which it asks judgment, with interest from the first day of September, 1889.

"David K. Watson, Attorney-General."

To this amended petition a demurrer was interposed by the railway company which was overruled by the court, and the railway company not desiring to plead further, a judgment was rendered against it for the amount claimed with interest, which judgment was affirmed by the circuit court in a proceeding brought in that court by the railway company to obtain its reversal; whereupon the present proceedings were begun in this court to reverse the judgment of both of said courts.

Messrs. Watson, Burr & Livesay and *J. H. Collins* for plaintiff in error.

Mr. David K. Watson, Atty-Gen., for defendant in error.

Bradbury, J., delivered the opinion of the court:

The constitutionality of the Act of the General Assembly of the state of Ohio, passed

April 15, 1889 (86 Ohio Laws, 351), is involved in the determination of the case. That Act reads as follows:

"Section 1. *Be it enacted by the General Assembly of the state of Ohio,* That section 251 of the Revised Statutes be supplemented as follows:"

"Sec. 251a. At the time of filing the report required by section 251, every corporation or company operating a railroad, or any part of a railroad, within this state, shall pay to the commissioner a fee of \$1 per mile for each mile of track, whether main, branch, double or side track, operated by them within this state. Any corporation or company failing to pay such fee at the time prescribed shall forfeit and pay a sum of not less than \$1,000 and not more than \$5,000. All fees received by the commissioner under this section shall be paid by him into the state treasury, upon an order from the auditor of state."

Section 251, Revised Statutes, to which the section above quoted is supplementary, requires the president, etc., of any railroad situate in whole or in part within this state, to file in the office of the commissioner of railroads and telegraphs, a report containing a minute and elaborate account of its business and transactions for the preceding year.

The constitutionality of the section imposing a fee of \$1 per mile of track, is assailed on two distinct grounds: (1) That it contravenes section 2, article 12, of the Constitution of this state, which provides that "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments . . . and also all real and personal property, according to its value in money. . . ." (2) That it violates section 5 of the same article (12) which provides that "no tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only it shall be applied."

If this exaction from railroad companies imposed according to trackage, is a tax, within the meaning of the Constitution, then it falls within the inhibition of both of those sections of our Constitution. Within the inhibition of section 2, because the railway property, including tracks, within the state, is taxed by the general taxing laws of the state, at its true value in money, and the tracks of a railroad, being part of its property, is subjected to a burden not imposed upon any other property within the state, and not imposed "according to its true value in money;" and within the inhibition of section 5, because it fails to state the object for which the tax is levied. The question of the constitutionality of the section,

Amendment of the United States Constitution. People v. Squire, 145 U. S. 175, 36 L. ed. 666.

This was an affirmation of the decision of the New York Court of Appeals in 10 Cent. Rep. 437, 107 N. Y. 383.

So it was held by the same court that charging the expenses of a railroad commission upon the several railroads within a state according to their gross income proportioned to the number of miles in the state did not violate such constitutional provisions. *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 36 L. ed. 1061.

The same court had previously held that a statute requiring railroad companies to pay the fees for

the examination of railroad employes in respect to color blindness did not deprive them of property without due process of law as it merely imposed upon them the expenses necessary to ascertain whether their employes possessed the physical qualifications required by law. *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352.

So the requirement by state law of a fee from each vessel passing a quarantine station to pay for examination as to her sanitary condition is lawful and is not a tonnage tax in violation of the Federal Constitution nor a regulation of commerce. *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237. B. A. R.

therefore must depend upon whether it shall be held to levy a tax or not, within the meaning of the Constitution, and counsel direct their argument in great measure, to the discussion of this point.

Counsel for the state contends at one stage of his argument, that the exaction is not a tax, but, instead, partakes more of the nature of, and should be treated as, an assessment levied according to benefits, which, it is claimed, accrue to the railroads operated within the state, by the provisions of the Act creating the office and prescribing the duties of the commissioner of railroads and telegraphs.

We are so accustomed to associate the doctrine of assessments, levied upon property according to the benefits that may accrue to it, with its usual subjects of application, some improvement of a local character, such as sidewalks, grading and paving highways, and constructing and maintaining ditches and the like, that the two are with difficulty separated in our mental operations; but, nevertheless, there may be no such necessary connection between them as to forbid a far wider extension of the principle, and its application to many other and perhaps widely variant subjects. But, however this may be, it is not necessary to pursue the speculation further, for the sum exacted is an arbitrary one, having no apparent connection with any benefits conferred by the Act itself, or that to which it is supplementary, and the law fails to attempt, in any manner whatever, to provide a method by which any relation between the benefits and burdens that it confers or imposes can be ascertained; but simply provides for the payment of a fixed sum which is to be applied solely to swell the general revenues of the state. None of the features heretofore present, in all Acts of the Legislature which provide for assessments upon property according to the benefits it receives from the operation of law, are discernable in the Act under review, and it cannot be assigned a place in that class of legislation.

The power of the Legislature to levy special exactions to be applied in payment of the expense of governmental supervision over certain lines of business, which the state in the exercise of its police powers may supervise, was maintained by this court in the case of *Cincinnati Gas Light & C. Co. v. State*, 18 Ohio St. 237. That case involved the constitutionality of an Act of the General Assembly of this state, passed April 6, 1866, 63 Ohio Laws, 164, (Swan & S. Stat. 158), providing for the inspection of gas-meters. The Act provided for the appointment of an inspector, and prescribed his salary; provided also for the purchase of such apparatus as might be required in the performance of the duties of his office, and for the purpose of paying the salary of the inspector and the cost of the necessary apparatus to enable him to perform his duties; provided that a sufficient sum therefor should be assessed against the several gas companies of the state according to their respective appraised valuation. In 18 Ohio St. 237, the power of the Legislature to levy the exaction imposed upon gas companies by the Act above-mentioned was assailed, upon the ground that it contravened the constitutional rule of equality in levying taxes, prescribed by section 2, of 16 L. R. A.

article 12, of the Constitution. This court, however, sustained the Act. The opinion of the court was delivered by Judge Brinkerhoff; and while it may be contended that some illustrations are found in the opinion of that learned judge, not strictly apposite to the case, yet the opinion, taken as a whole, clearly shows that the decision was put upon the ground that the exactions levied upon the several gas companies were not a tax within the constitutional meaning of that term. This view is supported by the following quotation from that opinion: "It is settled by the repeated decisions of this court, in *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Reeves v. Wood County Treasurer*, 8 Ohio St. 883, and *Baker v. Cincinnati*, 11 Ohio St. 534,—that the section of the Constitution just referred to is only applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township, or municipal corporation purposes.

"Now, although the assessment or charge upon the gas companies of the state imposed by the statute in question may be a tax, in the widest import of the word, it certainly is not a tax for purposes of general revenue. It is the assessment of a charge for a special purpose growing out of the exercise of the supervisory power of the government over the business in which these companies are engaged."

It is true that an examination of the Act above-mentioned, providing for the inspection of the gas meters, will disclose provisions highly beneficial to the gas companies, and it is contended that therein it differs from the Act providing for a commissioner of railroads and telegraphs; the latter Act, it is said, imposes burdens on the railroads of the state instead of conferring benefits. An inspection of this latter Act will disclose provisions, some of which are burdensome while others are beneficial; but whether the one or the other predominate, we do not think it material to inquire in this connection, for we apprehend that the question whether the Act before-mentioned, relating to the inspection of gas-meters, etc., was upon the whole beneficial, rather than burdensome, to the gas companies of the state, did not bear materially upon the decision of the court in 18 Ohio St. 237. The ground upon which that decision was put, we think, was that the business of manufacturing and selling gas was one that fell within the police, or supervisory, powers of the state, and that the expense necessarily attending upon its supervision could lawfully be charged against the gas companies, because the exaction made for that purpose was not a tax within the constitutional meaning of that word.

It cannot, we think, be denied that the business of transporting passengers and freight by the railroads within this state is as clearly within the supervisory, or police powers, of the state as is that of making and vending gas; but while this is so, it does not aid in upholding the statute now under consideration, for that statute does not attempt, as the gas inspecting statute did, to provide a fund to be directly applied to liquidate the expenses attending the supervision.

What is this statute? Its constitutionality must be determined by its operation. It pro-

vides in terms that there be placed upon each mile of railroad track within this state an exaction of \$1 per annum; the statute calls it a "fee," but its nature is not affected by the name that may be assigned to it. It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum, levied upon all the farmers of the state, for each acre of land of which they may be seised, or each head of horses or other live stock that they may own. In both instances the tax is levied upon property, but it is neither levied "according to its true value in money" nor uniformly upon all property; both of which are constitutional requirements (sec. 2, art. 12), if it is a tax within the constitutional meaning of that word. That it is such a tax, we think, there can be little, if any, doubt. A tax is "a pecuniary burden imposed for the support of the government. . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes." 2 Bouvier, Law Dict. 705. The money raised by this section

under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the Act to which it is supplementary, to indicate a purpose that the fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the Legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue.

Judgment of the circuit court and court of common pleas reversed, and petition dismissed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

C. T. DANIEL, Admr., etc., of Robert Daniel, Deceased,

CHESAPEAKE & OHIO R. CO., *Plff. in Err.*

(..... W. Va.)

- *1. When a conductor, in charge of a railroad train, with a right to command and to control its movements, leaves his engine and train standing on the track of the main line, along which a train, due, and expected by him, has a right at that time to pass, and such conductor fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman being without fault or the means of preventing such negligence, or of avoiding its consequences, such brakeman is not the fellow servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner.
2. A yard master, in lawful command and control of a train as a conductor for the occasion, is a conductor within the meaning of the rule.

(April 2, 1892.)

ERROR to the Circuit Court for Summers County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

*Head notes by HOLZ, J.

NOTE.—For notes on the question who are fellow servants as affected by the superior rank of one of the servants, see *Ell v. Northern Pac. R. Co.* (N. Dak.) 12 L. R. A. 97; *Hunn v. Michigan Cent. R.* 16 L. R. A.

The facts are stated in the opinion.

Messrs. Simms & Enslow and J. E. Chilton for plaintiff in error.

Mr. William R. Thompson for defendant in error.

Holt, J., delivered the opinion of the court:

This is a suit in the circuit court of Summers county, brought the 31st of March, 1890, by plaintiff below against the railway company, defendant below, for causing the death of Robert Daniel, plaintiff's intestate, by its negligence, while the decedent was a servant in the railway company's employ, which resulted in a verdict for \$3,750 damages, which the court refused to set aside, but gave judgment thereon. To this ruling and various other rulings made on the trial the defendant company excepted, and has obtained this writ of error.

The suit is based on section 5, chap. 103, Code, p. 725, ed. 1891: "Whenever the death of a person shall be caused by wrongful act, neglect, or default," etc.—the West Virginia form of the Lord Campbell Act. The declaration contains three counts. The first charges that plaintiff's intestate was in the railway company's employ as a brakeman, and while in discharge of his duties, defendant, by its recklessness, carelessness, and negligence, then and there caused the death of plaintiff's intestate. The second count alleges as the defendant's act or neglect and default that it carelessly left standing on its line, one mile from any station or side track, a train of cars, into which the deceased brakeman's train, without warning, was run, without any fault on the part of the running train, which caused the brakeman's death, etc. Third count sets out the facts of the accident in great detail, aver-

Co. (Mich.) 7 L. R. A. 500; *Murray v. St. Louis Cable & W. R. Co. (Mo.)* 5 L. R. A. 736; *Hussey v. Cogor (N. Y.)* 8 L. R. A. 559; *Muhlman v. Union Pac. R. Co. (Colo.)* 2 L. R. A. 192.

ring that they resulted in the brakeman's death, directly caused by the wrongful act, neglect, and default of defendant; thus giving plaintiff, by reason of the premises, a right of action for \$10,000, the damages sustained (the maximum fixed by law). The demurrer was properly overruled, because the court could have given judgment on either count according to the very right of the cause, and according to law; the case as alleged being proved. On the plea of "not guilty" the issue was made up and tried by the jury.

The facts are as follows: Robert Daniel, plaintiff's intestate, was at the time of the accident a brakeman in the employ of defendant on section 2 of No. 78, a freight train on defendant's road. His run was from Sewell to Hinton and back. Freight train No. 78, between these points, was run in two sections. J. W. Spease was assistant yardmaster of the railway company at Hinton. On the 26th day of March, 1890, section 1 of defendant's freight train had reached Hinton. Spease took charge of it, to break up the train, distribute the cars, etc., according to his duty, and for this purpose the cars were at some point uncoupled. On these cars, thus left to stand until Spease had disposed of the others, Sweno, the brakeman, had neglected to set the brakes; so that, when Spease uncoupled and moved off with engine and front cars, the four rear cars ran back by gravity down the tracks to the mouth of Tug creek, a mile and a half west of Hinton towards Sewell. Here they stopped. Spease was engaged in shifting the front part of section 1 about fifteen or twenty minutes, and when he returned with his engine he found that the rear portion of the train, which had been left, had escaped, and ran back down to Tug creek, as already described,—a point between one and a half and two miles from Hinton, on the main line. As soon as Spease found the cars had escaped, he started with the engine in pursuit, having with him the engineer, the yard shifter locomotive, and a brakeman, and workman, all under Spease's control. They found the runaway cars at Tug creek. It was proven that J. M. Spease had as full command and charge of section 1 of No. 78, and of the part which escaped and ran back to Tug creek, as a conductor has while in charge of his train and running it on the road, and the like power of control and command over the escaped part while it stood at Tug creek. Spease also knew that section 2, on which Daniel was engaged as brakeman, was following section 1 of No. 78, and was then due at Hinton. When Spease reached the escaped cars at Tug creek, Spease's brakeman immediately began to try to couple up the escaped cars to the cars brought down with the engine from the yard at Hinton; that he had two couplings to make, and attempted to make one of them some 15 times, but the link was bent, and he failed, and was still attempting to couple them when the engineer on the coming section No. 2 of No. 78 blew down brakes just before the collision occurred. The time was 3:30 in the morning. It was dark and foggy. There were two brakemen,—Robert Daniel, the one killed by the collision, and another on said second section of train No. 78,—and, if both had been standing at the brakes and applied them

immediately when the signal sounded down brakes, the accident could not have been averted. The train was a freight train, running at the rate of eighteen or twenty miles an hour. Spease had charge of the train, including the escaped cars, and had with him under his control the engineer, brakeman, and a workman from the roundhouse, and no one else was present. Spease, as the rules of the company required, went back in the direction from which section 2—the coming train—was expected, for the purpose of flagging or to signal it to stop, but he went back from the rear of his own train standing on the track at Tug only some 50 or 100 yards, instead of 1,200 yards, as required by the rules of the company. He had ample time to have gone back the distance required to flag, if he had desired to do so, before the expected train came. A red light is used and required by the rules for the purpose of flagging; but Spease on this occasion had a white light. He overtook the escaped cars more than thirty minutes before the accident occurred, and had at least thirty minutes in which to have gone back to flag the expected train, and if it had been flagged 600 yards from the rear of Spease's train, the expected train could have been stopped, and the accident averted. It was also proved that at the time of the collision and wreck it was the duty of the conductor to flag between stations, and the duty of the brakeman to flag at stations, and that, when a train was stopped by accident or obstruction, the flagman must immediately go back with danger signals, to stop any train moving in the same direction. At a point 600 yards he must place one torpedo on the rail. He must then continue to go back at least 1,200 yards from the rear of his train, and place two torpedoes on the rails, ten yards apart; then return to a point 900 yards from the rear of his own train, and there remain until recalled by the whistle of his own engine; but if a passenger train is due within ten minutes he must remain until it arrives, etc. See Rule 99 in Schedule 357. Instead of this, the conductor for the occasion—the yardmaster—went back but 50 or 100 yards, with a white light instead of a red one. The morning (3:30) was dark and foggy. The coming train rushed on at a speed of eighteen or twenty miles an hour. The engineer sounded down brakes, reversed his engine, and sprang off just in time to save himself. All escaped by jumping off except front brakeman Daniel, who was at the time of the collision standing at the rear of the tank attached to the rear of the locomotive, and had no duty to perform in the engine cab except to keep out of the weather, and by the rule he was not permitted to ride on the engine cab, except when called there by some duty, without a written order from the proper authorities, and it does not appear whether he had such permit or not. Daniel was caught in the wreck and killed; the others escaped by jumping off the train. Seven or eight of the front cars of the second section were by reason of the collision shattered, broken up, and derailed. If the expected train had been flagged at a point 700 or 800 yards from the obstructing train standing on the main line, the train could have been stopped in time to avoid the

collision. The deceased was a young man of good habits, sober, frugal, and industrious, 21 years old, and earning from \$50 to \$65 per month. Thereupon the following instructions were given for the plaintiff:

No. 1 given for plaintiff: "The court instructs the jury that if they believe from the evidence that on the 26th day of March, 1890, one Spease was in the employ of the defendant as assistant yard master at Hinton, and that as such assistant yard master said Spease was in charge of a train of cars, or part of a train of cars, belonging to the defendant, known as the 'First section of No. 78,' at a point on the line of the said railroad of defendant between one and two miles west of Hinton; and that said Spease, as to such train of cars then in his charge, had all the rights and authority, and was charged with all the duties of a conductor in charge of one of the trains of cars of the defendant; and that the plaintiff's decedent, R. Daniels, was in the employ of the defendant on one of the defendant's trains of cars known as 'Second section of No. 78,' and that said Spease knew that at the time he was in charge of said train of cars known as 'First section of No. 78,' standing on the main line of defendant's railroad at Tug creek, that said train of cars known as 'Second section of No. 78' was liable at any moment to come along said railroad on its way to the yards at Hinton on the same track upon which the train of cars of which said Spease was then in charge was standing; and the said Spease also knew that said train of cars, or part of the train of cars, of which he, the said Spease, was then in charge as aforesaid, could not be moved immediately in the direction of the yards at Hinton because of the said train of cars not being coupled together, and that said Spease undertook to flag said second section of train No. 78, upon which plaintiff's decedent, R. Daniels, then was as a brakeman, and failed to go back in the direction from which said second section of No. 78 was approaching, more than 50 or 100 yards, and that said Spease had ample time, and could have gone back a sufficient distance to have warned said section of No. 78 of the obstruction of the railroad track in time for said second section of No. 78 to have been stopped, and to have prevented the accident which did occur; and, if the jury further believes that this conduct on the part of Spease was negligence, and was the immediate and proximate and direct cause of the accident and the death of plaintiff's decedent, R. Daniels,—then the negligence of said Spease is the negligence of defendant, and the jury must find for the plaintiff."

Instruction No. 2 given for the plaintiff: "The court instructs the jury that if they believe from the evidence that plaintiff's decedent, R. Daniels, was in the cab of the engine attached to the second section of train No. 78 on the morning of March 26, 1890, at the time the accident occurred, and that said R. Daniels had no right to be there, but should have been at the brakes on the cars in said train, and that his being in said cab contributed to the accident which occurred and resulted in his death, yet, if the jury further believe that said conduct upon the part of said Daniels was not the direct, immediate, and proximate cause of said

accident and his death, and that the defendant could, by the exercise of ordinary care and diligence, have avoided the accident, and prevented the death of said R. Daniels, and that defendant failed to exercise and use such ordinary care and diligence to avoid said accident and prevent said killing of said R. Daniels, then the defendant is liable for said killing, and plaintiff is entitled to recover in this case."

The following instructions were given for defendant: Instruction No. 1 given for defendant: "The court instructs the jury that a servant entering the employment of a master assumes all the ordinary risks of such employment and service, and one of such ordinary risks so assumed by the servant is that of liability to negligence of a fellow servant in a common employment of such master." "No. 4. The court instructs the jury that, if they believe from the evidence that Robert Daniels and Frank Sweno were fellow servants in the defendant's employ, then the defendant is not liable in this suit for any injury done the said Robert Daniels by the negligence of the said Sweno in discharging his duties as such fellow-servant." "No. 10. The court instructs the jury that if they believe from the evidence that Frank Sweno and R. Daniels were brakemen in the employ of the defendant, and had the same duties to perform, and did the same work for the defendant, except they ran on different trains, and neither had any authority over the other, and neither had any duty to perform for the other which should have been performed by the defendant, and that the negligence of the said Sweno in the performance of his duties as such brakeman was the immediate cause of the death of said Daniels while in the discharge of his duties as such brakeman, and that the negligence of D. W. Spease, another employe of the defendant, was the remote cause of said Daniels' death, then the jury will find for the defendant." "No. 12. The court further instructs the jury that before they can find for the plaintiff in this case they must find from the evidence that the plaintiff's decedent, Robert Daniels, came to his death by reason of the negligence of the defendant, or some of its employes, who were not fellow servants of said Daniels in the defendant's employ, and that, if the jury believe that the negligence of the defendant or some of its employes was the remote cause of the death of said Daniels, and contributed to his death, and that the negligence of the said Daniels was the proximate, direct, and immediate cause of his death, then the defendant is not liable, and the jury will find for the defendant." "No. 16. The court instructs the jury that they cannot in this case assess against the defendant vindictive or punitive damages; and by such 'punitive damages' is meant damage to punish the defendant for any wrong; and by 'exemplary damages' is meant damages which may be assessed to make an example of the defendant, and set it on example. Damages for neither of said purposes can be assessed against the defendant in this case. No. 17. The court instructs the jury that in case they find for the plaintiff, they will assess plaintiff's damages at any sum, so as not to exceed \$10,000, which, in the judgment of the jury, may be 'just and right,' and that in assessing such damage to the plaintiff they can-

not take into consideration the sorrow of his relatives because of the death of R. Daniels, or the loss of his society and company from the plaintiff and his relatives, and that the true measure of damages in this case is the pecuniary loss to the estate of R. Daniels, by reason of his death. No. 18. The court instructs the jury that, in case they should find for the plaintiff, they will assess his damage at such sum as they may deem just and right, so as not to exceed \$10,000, and they may assess said damage at any sum under \$10,000 which they may deem just and right, and that in assessing such damages the true measure of the plaintiff's damage is the pecuniary damage to the estate of R. Daniels, by reason of his death, and that such pecuniary damage is what should govern the jury in assessing the plaintiff's damage in this case. No. 19. The court further instructs the jury that in assessing the damage in this case they cannot take into consideration the sorrow of R. Daniels' friends and relatives because of his death, or their sorrow at his loss; nor can the jury in this case assess damages for the purpose of making an example of the defendant, or teaching the defendant a lesson."

Instructions Nos. 2 and 8, as modified by the court, and then given for defendant, are as follows: "No. 2. The court further instructs the jury that all servants of the same master, engaged in a common employment, and who have no authority or superiority over each other, and who are working together, and have equal opportunities to control and influence the conduct of each other, and to none of whom has been delegated the performance of any duty owing by the master to such servant, are all fellow servants in such employment." "No. 8. The court instructs the jury that if the defendant had in its employ one Frank Sweno as a brakeman on one of its trains, and that it was the duty of such brakeman to assist in running said train from Sewell to Hinton, and that the defendant also had plaintiff's decedent, R. Daniels, in its employ as a brakeman on another of its said trains running between said points, and that the duties of said Daniels and said Sweno were the same, and they performed the same work and were in the same service for the defendant, but on different trains, and that the negligence of said Sweno in the performance of his duty as such brakeman on his train caused the death of the said Daniels while engaged in his duties as such brakeman, and that the said Sweno had no authority over the said Daniels, and had no duty to perform, due from the defendant to said Daniels, which the said Daniels did not likewise have to perform for him, the said Sweno, and were so far working together as to be practically co-operating, and to have opportunity to control and influence the conduct of each other, and had no superiority the one over the other, then the jury will find for the defendant."

And the court refused the following instructions, asked for by the defendant. "No. 3. The court instructs the jury that all brakemen in the employment of the defendant company, whether on the same or different trains, are fellow servants, and that one brakeman of the defendant cannot recover damage from the defendant because of any injury sustained by

him by reason of the negligence of any other brakeman in discharging his duties as such brakeman." "No. 5. The court instructs the jury that the assistant yard master in the defendant's employ on its yard at Hinton and all brakemen on the defendant's trains are fellow servants. No. 6. The court further instructs the jury that, if they believe from the evidence that one Spease was employed by the defendant company as the assistant yard master on its yards at Hinton, and that his duties as such required him to receive and take charge of all trains run on to such yards, and to overlook and care for such trains, and to have control of them while on such yards, and that plaintiff's decedent, R. Daniels, was a brakeman on one of defendant's trains, which run to and from the said yards, and that said Spease and said Daniels were both engaged in their respective positions in running and caring for defendant's trains, and that the said Spease had no authority over the said Daniels, and that the defendant had not delegated to the said Spease the performance of any duty it owed the said Daniels as its servant, then the said Spease and the said Daniels were fellow servants of the defendant; and, if the said Daniels was killed while in the service of the defendant as such brakeman by reason of the negligence of the said Spease in the performance of his duties as such assistant yard master, the defendant is not liable for the death of said Daniels, and the jury will find for the defendant. No. 7. The court further instructs the jury that if they believe from the evidence that one Frank Sweno was in the employ of the defendant company as a brakeman on the first section of one of its freight trains, and as such brakeman it was a part of his duties to set sufficient brakes on such first section of said train before leaving it on the yards at Hinton to hold it thereon, and that he neglected such duty, and failed to set any brakes on said train, and that by reason of the failure of said Sweno to set the said brakes a part of the cars in said train got loose, and run on the main line of defendant's railway, on which main line there was another train of the defendant, about two miles below where such cars got loose, and thereby caused a collision of such other train, and in such collision the plaintiff's decedent, R. Daniels, was killed, and that at the time said R. Daniels was so killed he was on such other train in the defendant's employ as a brakeman thereon, and that the direct and immediate cause of the said collision and the said killing therein of said Daniels was the negligence of the said Sweno in failing to set the said brakes on said first section, then the jury will find for the defendant." "No. 9. The court instructs the jury that if they believe from the evidence that Frank Sweno and R. Daniels were employed by the defendant as brakemen on its trains, and were employed as such brakemen on different trains of the defendant running between Hinton and Sewell, and that their duties as such brakemen were the same, and one had no authority over the other, and that the defendant had in its employ one D. W. Spease as an assistant yard master on its yards at Hinton, and that the duty of said Spease was to care for and look after all trains while on said yard, and that the

said Spease had no control or authority over either the said Sweno or Daniels, and had no duty to perform which the defendant owed the said Daniels, and all of said parties were engaged by the defendant in handling, caring for, and running its trains on its said road, and that the said Daniels, while so employed as such brakeman, was killed by reason of the joint negligence of the said Sweno and Spease in each failing to perform his duties in his respective position, then the jury will find for the defendant." "No. 11. The court instructs the jury that if plaintiff's decedent, R. Daniels, was killed by the negligence of D. W. Spease, and that at the time said Daniels and Spease were in the defendant's employ, and the duties of the said Daniels were that of brakeman on one of defendant's trains running between Cannelton and Hinton on defendant's railway, and the duties of the said Spease was to take the control, care, and management of defendant's trains while on its yard at Hinton, and that by reason of the carelessness of the said Spease in discharging his duties in taking care of and managing the trains and cars on said yard, certain cars got away from him, and caused the death of said Daniels, and that the death of said Daniels was caused by the negligence of said Spease, then the jury will find for the defendant, unless the jury further find that the defendant owned the said Daniels some duty which it had delegated the said Spease to perform, and which he failed to perform, and that by reason of such failure to perform such duty the said Daniels was killed. And the jury are the judges from all the facts and evidence before them whether or not the defendant had so delegated the said Spease to perform any duty it owed said Daniels as its servant, and, if he did fail to perform such duty, if such failure caused the said Daniels' death." "No. 13. If the jury believes from the evidence that Robert Daniels was in the employ of the defendant as a brakeman on one of its freight trains, and that as such brakeman it was the duty of such Daniels to be on the cars and attending to his duty as such brakeman, and the said Daniels, in violation of the rules of the defendant, left his place as such brakeman, and went into the cab of the locomotive of such train, and by reason of his being in said locomotive received injuries which resulted in his death, then the plaintiff cannot recover in this suit. No. 14. The court instructs the jury that if they believe the plaintiff's decedent, R. Daniels, was a brakeman in the defendant's employ, and as such brakeman there was a rule of the defendant 'that prohibited the said Daniels from going into the cab of the locomotive, excepting when necessary,' and that said Daniels knew of such rule, and that he was engaged on one of defendant's trains as such brakeman, he went into the cab of the locomotive pulling such train when it was not necessary; and, further, that the said Daniels violated the said rule when he so went into said cab, and that the said Daniels was killed while so in said cab, and that the fact that the said Daniels was in said cab contributed to causing his death,—then the jury can take such action of the said Daniels in going in said cab in consideration in assessing the damage against the defendant

for the death of said Daniels. No. 15. The court instructs the jury that if they believe from the evidence that the plaintiff's decedent, R. Daniels, was in the employment of the defendant as a brakeman on one of its freight trains, and that the said Daniels' place as such brakeman was at the brakes on the cars in such train, and that said Daniels, in violation of the rules of the said defendant, left his place on said cars, and went into the cab of the locomotive pulling such train, and that the said Daniels at such time knew it was a violation of the rules of the defendant to go in said cab, and that while the said Daniels was in said cab he was injured and killed by reason of the negligence of the defendant or its servants, and that the said Daniels being in said cab contributed to his injuries and death, then the jury may consider the said fact that said Daniels was in said cab in assessing the damage they may give in this case against the defendant, and may consider such fact in mitigation of the damages they may assess herein against the defendant."

It is not necessary to discuss the question whether the injury was the direct result of the negligence of his fellow servant,—the brakeman at the yard by whose neglect to set brakes the cars escaped and ran down to Tug creek, where they were found. That was the occasion of the accident,—the negligence of the yard master in charge and conduct of the train at Tug creek was the cause, direct and proximate; so that the only real question is, Was such yard master, under the circumstances, a vice-principal of the master, or only a fellow servant of the deceased brakeman? Upon this point the main controversy seems to turn, and the arguments on both sides are directed to the question, What are the test or tests to be applied to the breach of duty complained of, to determine whether it is violation of a personal duty of the master to the servant, and done by his vice-principal, in which case he would be liable, or a violation of a nonpersonal duty, in which case he would not be liable? because the yard master as a conductor, would then be a fellow servant with the deceased brakeman, and the risk of injury by him one of the risks assumed by the brakeman as incident to the employment. The counsel have concentrated their arguments around four cases, treated as a group, which have attained much more than a local consideration, especially the "*Madden Case*." These, taken in the order of time, are *Cooper v. Pittsburgh, O. & St. L. R. Co.* 24 W. Va. 37; *Riley v. West Virginia Cent. & P. R. Co.* 27 W. Va. 145; *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610; *Crinnell v. Pittsburgh, St. L. & C. R. Co.* 80 W. Va. 798. We are also referred to *Hoffman v. Dickinson*, 81 W. Va. 142; *Humphreys v. Newport, N. & M. V. R. Co.* 83 W. Va. 185; and especially the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787, called the "*Ross Case*." See also *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 261.

We are referred to two text-books, and two only. I mention them because of the reference to them, and quotations made from them. (1) Bishop, *Non-Cont. Law*, chap. 82, "Master to Servant, Fellow Servants," where

the author, under the subhead of "Fellow-Servants," has brought together a vast array of cases on this perplexing and tangled subject, and within a narrow compass has treated the doctrine with his usual orderly arrangement, and in his clear and condensed style. I mention him now because I know his books to be reliable, and have drawn largely on his useful labors, even when not citing him or quoting literally. (2) The recent work of McKintney on Fellow Servants, whose former labors in editing and annotating American & English Railway Cases, and in contributing the article on fellow servants in 7 Am. & Eng. Encyclop. Law, p. 821, has well qualified him to give the profession this useful work.

In this day reliable text-books have become an indispensable help to the courts as well as to the bar. The touchstone we apply to the act of the employé to determine whether it is the negligent act of a vice principal, and, therefore, of the master, or the act of a fellow servant of the injured party, is the nature of his duties. See Bishop, Non-Cont. Law, 665. He who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow servants. But there are certain duties which the master owes to the servant. These he must perform in person, or by his agent, appointed for the purpose, called a "middleman" or "vice-principal." For the breach of these duties by the vice-principal, no matter what his place or grade of service, high or low, the master is responsible to the injured servant who has not directly contributed to and in part caused the injury. Now we have reached the test, What are these personal duties which the master owes the servant as distinguished and set apart from the nonpersonal duties which comprehend the residue, and which Dr. Bishop calls the "assignable duties?" So far these personal duties have no well-defined common earmark of an inherent kind, and so far can only be safely ascertained for practical use by enumeration and analogy; and that has produced discord. All we can say is that the personal duty depends upon its own nature, and not upon the agent or servant who performs it.

In the cases already mentioned we have for us an authoritative enumeration of most, if not all, the well-settled personal (nonassignable) duties which the master owes his servant, no matter by whom performed. In the *Madden Case*, 28 W. Va. 610-617, (1886,) Judge Snyder, delivering the opinion, says: "The duties of the master or employer may be summed up as follows: (1) To provide safe and suitable machinery and appliances for the business, (including a safe place to work). This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and in making proper inspections and tests. (2) To exercise like care in providing and retaining sufficient and suitable servants for the business, (and instructing those who, from newness or age,

evidently need it). (3) To establish proper rules and regulations for the service, and, having adopted such, to conform to them."

In Bishop, Non Contract Law, § 688, he defines the liabilities of the master by giving connectedly and with certain qualifications the following statement of these personal duties of the master: "The doctrine is that the master is not the insurer of his servants against accident in his service; yet he owes to them the duty of carefulness to a degree reasonable in the particular instance in providing for them, and keeping in safe repair, appliances, and a safe place to work, in selecting suitable fellow servants, and in giving the needed instruction to those who are new to the business, or of immature capacity; and for an injury which, through negligence in this duty, comes to a servant who is not himself contributively negligent he is responsible, but not for injuries from defects in the appliances or place not discoverable on due examination, or for the negligence of carefully selected servants, or for injuries from situations and appliances the risks whereof the servant has assumed." Again, in § 691 the author says: "The leading principle around which the others cluster is that the master shall exercise in the carrying on of his business all the watchfulness over his servants, and employ all the safeguards, which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, he (the master) is answerable to him. But for casualties not traceable to any neglect or to any other wrong in the master he is not responsible." So that we see that the doctrine of fellow servant, as far as it has gone, where no statute prevails, has been built up, we are to presume, by the application of the common-law principles of common sense, common justice, common convenience, public policy, and private right, by gathering together the points of law thus adjudged by the application of these principles to particular facts, into rules more or less general, to be applied to new cases as they arise. So that in the formative process of any branch of the law they are not mere glittering generalities, incapable of useful application. One of the best illustrations of the locality of this dividing line, as far as ascertained between the personal and remaining nonpersonal duties of the master, is furnished by the case of *Collins v. St. Paul & S. O. R. Co.*, 30 Minn. 81: "If a railroad servant is injured because there is no headlight, the road is responsible; if because the headlight is not lit, it is not responsible." Bishop, Non-Cont. Law, § 672. The personal duties of the master are due in supplying the ways and means and appliances, keeping them safe and in repair by constant watchfulness and supervision. The residue of his duties—the nonpersonal—relate to the execution of the work, and breaches thereof by co-servants are included in the risks incident to the employment.

This brings us to the point involved called the "Ohio and Kentucky Doctrine," to some extent adopted (by a divided court) by the Supreme Court of the United States in the *Ross Case*, found also in the English Employer's Liability Act, and in the Acts of some of our states, and understood to be sanctioned and

adopted in this state, especially in the *Madden Case*. This may be also regarded as cognate with the master's personal duty of superintendence. A superintendent is defined in the English Act as a person whose sole or principal duty is that of superintendence, and who is ordinarily not engaged in manual labor. See McKinney, *Fellow Servants*, p. 226. It is what we may call the "commanding (superior) servant," personal duty of the master, or limitation of the master's nonpersonal duties. The same English Act enumerates these vice-principals as follows: "Any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railroad." See McKinney, *Fellow Servants*, p. 220. In these particulars the Massachusetts Act of 1887 corresponds with the English Act. It is significant as tending to show that both regard themselves as having gone astray in holding the conductor of the railway train as a mere fellow servant. They put it upon no expressed ground, but impliedly upon the ground that it is the duty of the master to conduct the train in person or by agent, making a vice-principal of the servant or agent who has charge or control of the locomotive engine or train upon a railroad, each making the employé thus injured one not in the service of the master *quoad* his right of recovery against the master.

This brings us to the *Ross Case* and *Madden Case*. In the *Ross Case*, 112 U. S. 877-390, 28 L. ed. 787-792, (1884.), Justice Field says: "A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative (vice-principal) of the corporation for whose negligence it is responsible to subordinate servants. . . . In no proper sense of the terms is he the fellow servant with the fireman, the brakeman, the porters, and the engineers;" seeming to put it on the ground of control. But he returns to the duty of having a vice-principal present as the only means of having the company (the master) present, regarding his presence in some way on a running train as a thing to be taken for granted. "We agree with them [the Ohio and Kentucky cases] in holding, and the present case requires no further decision, that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible." But, again returning to the idea of the personal duty of the master to be in some way present, he adds: "If such a conductor does not represent the company, then the train is operated without any representative of its owner." The *Cooper Case*, 24 W. Va. 37, (1884.), gives a full enumeration of the personal duties of the master already given; that the master cannot render such duty nonpersonal, no matter to what servant it may delegate this duty by vesting him with controlling or superior authority in regard thereto. The negligence of such servant is the neg-

ligence of the company, giving the nature of the duty as the test of its being the personal or nonpersonal duty of the master, and holding that the instructor and master mechanic, charged with the duty of keeping the appliances in repair, is the vice-principal of the master as to such duty, and not the fellow servant of the brakeman. But the importance of the case for the matter in hand is the distinct personal duty of the master to exercise continued supervision over the appliances, and keep them in good and safe repair, which of course implies the presence in some way of the master.

In *Riley's Case*, 27 W. Va. 145, the court still deals with the performance of some personal duty of the master by some superintendent, foreman, or other employé of the company; a duty "which the master has impliedly contracted, or which rests upon him as an absolute duty." Here the personal duty of the master of continued supervision and to keep the same in good and safe repair and condition is this time applied to the railway and track for the use of its employés. The brakeman on a train consisting of one engine and tender was struck by a stump standing by the side of the railway. It was the negligence of a foreman who was intrusted with the personal duty of the master in keeping the road in repair. The *Criswell Case*, found in 80 W. Va. 798, was decided in 1888. Here the plaintiff's intestate who received the injury was at work for defendant in repairing defendant's railroad, and when killed was on a hand-car, going to the place of work. Foutz was his foreman in repairing the track, who stood in the place of the master in controlling and discharging those working under him. It was by his negligence that the deceased was injured. In the opinion the liability is placed on the ground of the *Madden Case*: "That two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty of the master." There was collision of a hand-car on the track, moving under the control of the foreman, with an extra train, by the negligence of such foreman, which caused the death of plaintiff's intestate. Here the foreman was in fact clothed by the master with the power to perform its duties to the servant injured, and the power conferred on the foreman was determined by the rules of the company.

We now return to our leading case upon the point here involved, — *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 610, (1886). An engineer upon one train of a railway company was injured by the negligence of a conductor of another train running in an opposite direction. Held, the engineer is not the fellow servant of said conductor. The court put it distinctly on the ground that the conductor, in controlling and running his train, is the vice-principal of the master; and the master is liable for injury to its servants, caused by the negligence of the conductor in running and conducting its train. But Snyder, J., delivering the opinion of the court, on page 618 says: "The rule deduced from these principles and authorities would seem to be that two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty due from the master; and

the master is liable for any injuries to the subordinates caused by the carelessness or negligence of the superior." Reading the head note as given above with this deduction given in the body of the opinion, the conclusion may be drawn that the conductor in control of the railway train is, as to certain duties, the vice-principal of the master, and not the fellow servant of the brakeman and other employes of the common master. The negligence in this case was by negligently obstructing the track with his own train, so as to cause a collision with another train, causing the injury of its engineer.

We have now looked briefly at the *Ross Case* and at the group of which the *Madden Case* may be regarded as the center, severally and separately, with reference to their peculiar bearing on the case in hand. Before I go back and put together the details I have been in search of, and put into juxtaposition this group represented by the *Madden Case* and the *Case of Ross*, I wish to preface it with a matter of common observation. I have seen a few among the very many criticisms on the *Ross Case*. The leading one is based not on a denial of one of the principles impliedly put by the majority at the bottom of the ruling, but upon a misapplication of it, based upon a mistake, it is said, in the matter of common observation. It is a matter of common observation,—the care they take, (the railroad company,) the extreme and continual care and watchfulness, to make and keep the way safe before the coming and going trains. The moving train and the way are by eminence, literally as well as in figure of speech, "the ways and the means" to which their personal, as distinguished from their general, nonpersonal energies and efforts are directed. In the *Cooper Case*, the first of the group, the learned judge in his opinion takes continual supervision and watchfulness as the keynote of the railway company's duty in regard to the appliances. The same thing, in the common law proper, as compared with statute law proper, to some extent justly made the subject of animadversion, may be of advantage during growth; and all living things must grow. The common-law rule is not tied down and hampered by a fixed phraseology, so that time need not be wasted in quibbling over words; but that is within the rule which is within the meaning of the rule, and the meaning is determined by common reason and common justice. In a word, the spirit is not killed by the letter. Hence, in the *Madden Case*, the safe way, as well as the safe appliances, were adjudged to be within the rule requiring continued supervision and watchfulness. Dr. Bishop, as any one familiar with his method may see who will take the time and trouble to examine with some care his chapter on fellow servants, entered the maze of fellow servant cases, and marshaled them over and over again to find the leading string, and a test of a rule which would not offend our common reason and our common sense of right and wrong, which would do right by the company, the master, as well as by the servant. His last word upon the subject is: Watchfulness of ways and appliances is the central duty around

which cluster all the personal (nonassignable) duties due the servant from the master.

Returning now to the *Ross Case* and *Madden Case*, and leaving out of view the reason of the rule as resting alone on the fact of superiority and subordination in control, if we take the facts of the case and the reason given impliedly by *Justice Field* and by *Justice Miller* (a venerable name, we may now say) and others who concurred, we find it to be the duty of constant watchfulness of the way and appliances, especially at the moving time and place, at the very moment of its supreme importance, when the great danger to the appliance was the running of it, and the great danger of the serious obstruction of the way was from the trains themselves, monsters of power when moving with the momentum of 500 tons and more, multiplied by more than the speed of the race horse, and a fearful obstruction to encounter when standing still, or when, as in these two cases, they were running together, one or both out of time or out of place by the fault of somebody. *Justice Field* seems to take it as a concession that in these supreme needs of watchfulness and care as they arose from second to second in passing time, and from foot to foot in change of place, the master was surely present; and, if present, why not select the conductor as the one in control as his personal representative, and, in subordination to him, the engineer, too, if need be, both helping for the occasion, together with the operator at the distance, in the constant careful watchfulness in general; the one with his cunning hand on the lever, and his steady eye to the front; the other, passing through the appliances from end to end constantly. And *Judge Snyder*, in the *Madden Case*, and *Judge Green*, quoting it with approval in the *Orinell Case*, held the conductor to be the one in authority, discharging the personal duty of the master, and by that test also, as well as by the test of "superior servant," the doctrine of fellow servant did not come into play. In both cases there was negligence; in the *Ross Case* on both trains. *Justice Field* takes the negligence found on the going train, and restricts the head note to that. *Judge Snyder* applies it in effect to both.

This brings us to the case in hand, the facts of which do not require for the resolution of the point of law involved that we shall put the rule of the *Madden Case* upon the one ground or the other,—superiority in isolated commands, or the nature of the duty to be discharged. Both existed in the *Madden Case*, as there held, and both exist here. Whether we call the yardmaster a conductor simply, or a conductor *pro hac vice*, is not important. He was on the ground in command of the train. It was his duty to remove it, as dangerously barring the way of the coming train, which he knew must be close at hand; and to warn and give notice of the dangerous obstruction to the expected train, according to the rules. We have already shown, and it is not necessary to repeat, the railway master cannot, by the requirement of its rules, shift the burden of a personal duty to other shoulders, and thus make the doctrine of fellow servant apply, because it has no power to amend the general law. How far it may be regulated by contract,

express or implied, the facts of this case do not require us to inquire. This, I take it, is the least settled of all. See Bishop, Non-Cont. Law, § 874. "If in words or by implication the servant has undertaken to assume a risk, he cannot have compensation of the master for an injury resulting therefrom."

In the case of *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 5 West. Rep. 785, Owen, Ch. J., says: "The policy of our law (as to the superior servant rule) being well settled, it only remains for us to inquire whether the railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they (the railroad company) shall not be held to a liability for the negligence of their servants which public policy demands shall attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and its foundation in public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."

This brings us to the instructions respectively given and refused.

Plaintiff's No. 1. This instruction states hypothetically, but correctly, what the evidence certified tended to prove, with the rule of the *Madden Case* correctly applied.

Plaintiff's No. 2. This proceeds upon the supposition, and the facts and nature of the circumstances show the facts supposed to be true,—that is, if plaintiff's intestate had been right at his brake he could not possibly have prevented the collision, and that, if his thus being out of place did not directly contribute to the injury, then plaintiff's right to recover, if any, was not thereby barred. This is the law, as laid down in the *Riley Case*, 27 W. Va. 145, and in many other cases.

Defendant's No. 1. This was properly given for defendant, and there is no one to complain.

Defendant's No. 2. This was properly refused, because it is not in accordance with the law laid down in the *Madden Case*, and, if the court in that case put the master's liability, not upon the single fact that the conductor of the train, as such, was performing a personal duty of the master as the superior in control, but also required that the conductor should be in discharge of some other personal duty, then it at the same time held that, so far as by running his train he obstructed the track to the hurt of another and subordinate servant, he was, as vice-principal *pro hac vice*, in discharge of the master's duty of watchfulness and care in keeping the track clear. Besides, the instruction given by the court in amendment of No. 2 was all that defendant could ask on this head.

Defendant's No. 3. This instruction may or may not be correct, and it was properly rejected, there being no evidence fairly tending to show that the injury directly and proximately resulted from the negligence of the other brakeman; and even if it did, it did not do so without the direct, intervening, proximate help of the negligence of the conductor.

Defendant's No. 4. This is No. 3 in another form.

Defendant's No. 5. This is abstract in one

view and incorrect in the other, as already shown.

Defendant's No. 6. In the *Madden Case* the engineer on one train was injured by the negligence of the conductor of another train.

Defendant's No. 7. This, in one part, assumes the fact in dispute,—that the negligence of the other brakeman caused the collision,—while the evidence shows that it was but the occasion, nor is there any evidence tending to show that it was the cause.

Defendant's No. 8. This instruction is based on the theory that the negligence of the brakeman on the other train was the one direct, efficient, proximate cause of the injury. It was properly refused as abstract if for no other reason; and, as amended by the court, and then given, defendant has no ground to complain of it.

Defendant's No. 9. This is based on the theory that, upon the facts such as there was evidence tending to prove, the two brakemen and the conductor were fellow servants. If there had been any evidence tending to support this theory, it would have been enough, whether the transgressors acted jointly or severally.

Defendant's No. 10. This has been already disposed of. There is no evidence tending to show that the negligence of the other brakemen was the immediate cause of the death of plaintiff's intestate, and the negligence of Spease, the conductor, the remote cause. The tendency of all the evidence is to show the reverse.

Defendant's No. 11. The uncontradicted evidence shows that it was the duty of yardmaster Spease to take and conduct a train down to Tug creek, and bring back the run-away cars, and that brings him, for at least the only occasion here material, within the rule in the *Madden Case*. The latter clause of this instruction may have been correct, but it need not be examined, because the court was not asked to consider it separately.

Defendant's No. 12. The ground of the first branch of this instruction was sufficiently covered by instruction No. 1 given for plaintiff, and that of the second branch by plaintiff's instruction No. 2.

Defendant's No. 13. This one, also on contributory negligence, was covered in a practical, concrete way by instruction No. 2 given for plaintiff.

Defendant's No. 14. The evidence shows affirmatively that the death of the brakeman on the coming train was not caused contributorily or otherwise by Daniels' violation of any rule, whether he knew it or not, but by the negligence of the conductor in not observing the rule which required him to give Daniels' expected train warning that the track was obstructed by his, the conductor's, own train.

Defendant's No. 15. This was properly disposed of by instruction No. 2 given for plaintiff, which covered the same point of law, which has been held to be correct in substance. Besides, it is abstract, there being no evidence that the brakeman's own conduct contributed in any degree to his death.

Defendant's Nos. 16, 17, 18, and 19 were given. If either of them should happen to be

wrong in any particular, (they seem to be correct,) plaintiff is not to blame for it.

In conclusion, although counsel should have full liberty to manage their cases in their own way, present all points of law for instruction that may arise, and the same point in different

phases out of abundant caution, still they should consider that the time of the circuit court is precious, and that too much caution might tire out the most patient temper.

Judgment affirmed.

RHODE ISLAND SUPREME COURT.

Paul LAVALLE

v.
SOCIÉTÉ ST. JEAN BAPTISTE DE
WOONSOCKET.

(.....B. L.....)

The unlawful expulsion of a member of a mutual benefit society will not give him a right of action for damages as such action is based on an acquiescence in the expulsion and a waiver of the illegality which must be counted a waiver of the entire cause of action. Other reasons against the action are found in the lack of any fund from which damages can be paid and in the impossibility of measuring the damages. The proper remedy is mandamus to restore him to membership.

(April 23, 1902.)

EXCEPTIONS by plaintiff to a ruling of the Court of Common Pleas for Providence County sustaining a demurrer to his declaration in an action brought to recover damages for his alleged illegal expulsion from membership in defendant society. *Overruled.*

The facts are stated in the opinion.

Mr. Livingston Scott, for plaintiff:

The fact that mandamus lies does not preclude the existence of a remedy by action.

The existence simply of another remedy will not defeat mandamus unless it is such a remedy as will place the party demanding it in the same situation as he was in before the act complained of, or will give him relief substantially equivalent to the specific relief that mandamus affords.

Kitheridge v. Hall, 7 Port. (Ala.) 47; *McCullough v. Brooklyn*, 23 Wend. 461; *Re Trustees of Williamsburgh*, 1 Barb. 34; *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *Ang. & A. Corp.* 712.

If these interests in the insurance funds were the only interests of the plaintiff in the corporation, the case could not then be distinguished from the ordinary case of interference by a corporation with the rights of a shareholder in a moneyed stock company.

In the case of a stock company, when the corporation refuses to transfer stock to a purchaser, the courts refuse to restore by mandamus on the ground that a remedy by action will give him relief substantially adequate and equivalent to the specific remedy of mandamus.

Wilkinson v. Providence Bank, 8 R. I. 22; *Hart v. Frontino & B. S. A. G. Min. Co. L. R.* 5 Exch. 111; *Smith v. Maine Boys Tunnel*

Co. 18 Cal. 111; *Bond v. Mount Hope Iron Co.* 99 Mass. 505, 97 Am. Dec. 49

In this case the court can give relief in damages in this action for the loss of interest in the two insurance funds, entirely adequate and equivalent to specific relief by mandamus, and it ought not to refuse to do it simply because the right of the plaintiff in the general property of the corporation cannot be exactly estimated in the same action.

The nature of the plaintiff's right in the general property is the same as that of a stockholder.

As respects the membership rights, irrespective of the rights in the insurance funds, the plaintiff has suffered legal damage by the interference with his rights as a member by the act of expulsion.

Ashby v. White, 2 Ld. Raym. 955; *Washington Ben. Soc. v. Bachar*, 20 Pa. 425.

And he may waive his right as a member to reinstatement, and elect to consider these rights as lost, and sue for damages for such loss and injury.

State v. Lipa, 28 Ohio St. 665; *Ludowski v. Polish R. O. St. S. K. Ben. Soc.* 29 Mo. App. 337; *Grosvenor v. United Society of Believers*, 118 Mass. 78; *Hardin v. Second Baptist Church*, 51 Mich. 187, 47 Am. Rep. 555.

The existence of this remedy by action has been often recognized and alluded to by courts in other cases as an existing remedy concurrent with mandamus.

Sperry's App. 8 Cent. Rep. 215, 116 Pa. 391; *Com. v. Pike Ben. Soc.* 8 Watts & S. 247; *Black & W. S. Soc. v. VanDyke*, 2 Whart. 309.

It does not lie in the mouth of the defendant to say that the plaintiff has suffered no damage because the action of the society was illegal.

Delacy v. Neuse River Nav. Co. 8 N. C. 274, 9 Am. Dec. 686; *Medical & S. Soc. of Montgomery v. Weatherly*, 75 Ala. 248; *McLafferty v. Sweeney* (Pa.) 7 Cent. Rep. 895; *Harman v. Tappenden*, 1 East, 562; *Washington Ben. Soc. v. Bachar*, 20 Pa. 425; *Webb v. Portland Mfg. Co.* 8 Sumn. 197; *Paul v. Sloan*, 22 Vt. 238, 54 Am. Dec. 75; *Embrey v. Owen*, 6 Exch. 368; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695.

If the plaintiff cannot maintain the action for damages for the loss of his membership rights for the reason that, the act of the society being illegal, he is to be considered still a member, *volens volens*, and therefore has not lost his right of membership, yet he certainly may as a member maintain the action for dam-

NOTE.—The opinion and briefs seem to exhaust the authorities on the exact question involved in the above case.

For notes on power of court to review suspension 16 L. R. A.

sion of member of mutual benefit association, see *Connelly v. Masonic Mut. Ben. Assn.* (Conn.) 9 L. R. A. 428; *Carnfield v. Knights of Maccabees* (Mich.) 13 L. R. A. 625.

ages for the interference with his rights and his exclusion from the enjoyment of them, and for the injury to his reputation which his expulsion has caused, and for the public disgrace and mental and bodily distress which the unlawful act of the society has inflicted upon him.

Washington Ben. Soc. v. Bacher, supra; People v. German U. E. St. S. Church, 53 N. Y. 103; *Ludowski v. Polish R. O. St. S. K. Ben. Soc. and McLafferty v. Sweeney, supra.*

Mr. Edwin Aldrich, for defendant:

The vote of expulsion is invalid and altogether void.

Ang. & A. Corp. § 420, and note, § 422, and cases cited; *Rez v. Faversham Fishermen*, 8 T. R. 856; *Harman v. Tappenden*, 1 East, 562; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Pratt v. Taunton Copper Co.* 123 Mass. 112, 25 Am. Rep. 37; *Com. v. Pennsylvania Ben. Inst.* 2 Serg. & R. 141; *Loubat v. LeRoy*, 40 Hun, 546.

Such a vote is a mere nullity, and does not expel the plaintiff. He is therefore upon his own showing still a member of defendant society, and has been deprived of no rights or privileges therein.

See *People v. German U. E. St. S. Church*, 53 N. Y. 103; *Innes v. Wylie*, 1 Car. & K. 257; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 870.

If the plaintiff still remains a member of the defendant society, and has been deprived of no rights or privileges of membership, he cannot maintain this action, because he has suffered no damage.

See *Wood v. Wood*, L. R. 9 Exch. 190.

No action of the case can be maintained for any act however tortious which does not occasion "temporal damage."

Oliver, Precedents, 847, and cases cited; *Fuller v. Plainfield Academic School, supra.*

Where a member has been wrongfully expelled from a society or corporation, mandamus is the proper remedy to compel the society or corporation to restore him to membership.

See Am. L. Rev. July-August, 1890, p. 551, § 13, and cases cited; 1 Morawetz, Priv. Corp. § 277, and cases cited; *Fuller v. Plainfield Academic School, supra; Sibley v. Carteret Club*, 40 N. J. L. 295; *People v. Fire Department of Detroit*, 81 Mich. 458, *Savannah Cotton Exchange v. State*, 54 Ga. 668; *People v. Medical Soc. of Erie County*, 32 N. Y. 192; *Com. v. Pike Ben. Soc.* 8 Watts & S. 247; *Sleeper v. Franklin Lyceum*, 7 R. I. 527; *People v. New York Ben. Soc.* 8 Hun, 361.

Stiness, J., delivered the opinion of the court:

The plaintiff seeks in this action to recover damages for an illegal expulsion from membership in the defendant corporation. The declaration sets out that the corporation is a benevolent organization, of the kind now generally known as a "mutual benefit society," having a relief fund for the benefit of its sick members; that the plaintiff was a member in good standing, and had performed all his duties and obligations as such member, yet the defendant, at a regular meeting, in the absence of the plaintiff, without lawful cause, without

notice of any charges against him, without any trial or examination of any charges, and without affording him any opportunity to be heard, expelled the plaintiff from membership, whereby he lost his privileges as a member and his right and interest in and to the property of the corporation, and was also greatly injured in reputation. To this declaration the defendant demurred in the court of common pleas, where the demurrer was sustained, and the case comes before us on exception to the ruling of the court below in sustaining the demurrer.

It is obvious, if the defendant is liable to suit at all on such a cause of action, that the declaration sets out the cause of action with sufficient fullness. The elements of an illegal and highhanded violation of the plaintiff's rights are fully stated. Indeed, the defendant takes the ground that the declaration sets forth an act so clearly illegal that it is void *ab initio*, and so there has been no expulsion, and consequently there is no damage and no right of action. No society should be admitted to shield itself in such a way. If the position is taken in good faith, a proper acknowledgment of the error will be evidenced by a restoration of the injured member to the privileges of the society; otherwise, continuing to hold out a member who has been wrongfully expelled is as bad as the original wrong itself. It amounts to saying to the member: "We have illegally expelled you; but so long as you do nothing about it we will let the expulsion stand and keep you out, but if you call us to account for it we will say we have not done it at all, because we did not do it right." Such a defense cannot commend itself to a court of justice. Cases which lay down such a doctrine cannot be followed by this court. The demurrer cannot be sustained on this ground. As the case stands upon the demurrer, a corporation for benevolent purposes has expelled a member without a trial, who thereupon sues for damages for the illegal expulsion, and the issue raised is, Can such an action be maintained? There is no question that a member who has been illegally expelled has the right to apply to the court to be restored to membership by a writ of mandamus.

There is also no question that while a corporation like this is not one which gives a member an indefeasible interest or property right, like shares of stock, still the benefits are a sort of money interest, in regard to which the member is entitled to protection. If he is lawfully expelled he loses these benefits altogether. If he is not lawfully expelled he is entitled to be restored to them; but is he also entitled to maintain an action for damages for the pretended expulsion? It is manifest that the most exact and complete remedy is by restoration, for in this way one is not only vindicated in his character and standing, but also re-established in the very rights which belong to him, without being obliged to take something else as a substitute for them. And evidently he cannot have both remedies at the same time, for restoration implies a correction of the error, and damages, compensation for it. They are incompatible; they cannot stand together.

Thus, in *State v. Lipa*, 28 Ohio St. 665, it was held that bringing an action for damages

was a waiver of the right to a mandamus for restoration to membership. It is now well settled in cases of this kind, involving, as they do, a sort of right in property, that mandamus will lie; and we have only to consider whether an action may lie in lieu of mandamus. Decisions of this question have not been numerous, owing to the fact that the multiplication of these societies is of recent date, and the decisions that have been given are diverse. We have been referred to one case only, and we have found no other, which squarely sustains the right of action. *Ludowski v. Polish R. C. St. S. K. Ben. Soc.* 29 Mo. App. 387. It is to be regretted that the court in that case simply declares that the right of action exists, without stating the ground upon which it rests. In other cases there are dicta that an action may be maintained for illegal expulsion, but these, too, lack a discussion of the right of action. It is assumed to be in compensation for an injury caused by a violation of right. *Washington Ben. Soc. v. Bacher*, 20 Pa. 425; *People v. German U. E. St. S. Church*, 58 N. Y. 108.

State v. Lipa, *supra*, was a petition for mandamus, which was refused on account of a pending action in error, on which a judgment had been recovered. On the other hand is the recent case of *Peyre v. Mutual Ben. Relief Soc.*, 90 Cal. 240, which denied the right of action upon the ground that it would punish those who voted against the expulsion as well as the majority who voted in favor of it. The question cannot yet be regarded as settled upon authority. Upon principle we do not think the action should be sustained. It assumes an illegal expulsion, for which, the wrong being waived, compensation is demanded. If the illegality is waived and the expulsion acquiesced in by the member, we see no reason why it should not be taken for what it implies. The waiving of illegality implies and recognizes a legal expulsion. There is no escape from this. But if the member has been legally expelled there is no ground of action. The waiver of the illegality, therefore, is a waiver of the entire cause of action; for, if the action be not illegal and in violation of the plaintiff's rights, there is nothing to complain of. There are cases in which a tort can be waived and an action of assumpsit for damages sustained, but those cases are radically different from the case at bar. They rest upon the principle that an act done, which is in itself a tort, may be treated by the injured party as having created a contract upon which he may recover; this remedy being of a milder character, and so no disadvantage to the defendant. But no case can be found where a plaintiff is allowed to waive a tort for the purpose of putting the defendant in a worse position than he would be in for the tort itself. Much less should one be allowed to waive a tort for the purpose of maintaining an action which, without the tort, would have no foundation. For example, suppose one wrongfully takes the goods of another. He may be sued in trover; or the tort being waived, and the taking considered as lawful and so carrying the title, a promise to pay may be implied. Here, outside of the tort, there is something upon which the implication of a contract may act, namely, the payment for the plaintiff's goods which the defend-

ant has in possession. But in the case at bar there is no chance for the implication of a contract. There is no right to the fund except in a member; and a member may be lawfully expelled, and thereby lose that right altogether. In the ordinary case of waiving a tort one simply foregoes an advantage which he might press by reason of the wrongful act; but, in the matter of expulsion, if he foregoes the wrong he foregoes everything. Suppose, in an action for assault and battery, one could waive the tort, what would be left to sue for? Yet such a case would be analogous to the case at bar. The reasonable view is that if one waives the illegality of an act, and acquiesces in it as a legal and accomplished fact, he must take it with its consequences; and the consequences of an expulsion, with the element of illegality dropped out of it, would be a valid deprivation of membership, for which no action could lie. See Cooley, *Torts*, 2d ed. 108-111.

There is another reason why an action like this should not be maintained. Ordinarily these societies have no fund except that which is contributed for the benefit of the members, according to the regulations agreed upon. Each society is a sort of trustee of such a fund, and has no right to apply it to any other purposes. If one can take it on a judgment for damages he diverts it from the benevolent objects for which it was contributed, and that, too, possibly, to the injury of members who have not been in fault. Irrespective of the question of jurisdiction over such a fund as trust fund or a charity, a court ought not to make such a diversion possible if it can be reasonably avoided. If resort cannot be had to such a fund, a judgment against a corporation which accumulates only such a fund, and acquires no other property of account, would be a barren remedy to offer. The more difficult question of the measure of damages shows the impropriety of allowing the action.

In *Ludowski v. Polish R. C. St. S. K. Ben. Soc.* *supra*, only nominal damages were given. To establish a right of action for the mere purpose of allowing one to recover nominal damages is a course not to be commended. But what rule can be laid down by which to gauge a larger measure of damages? The members of these benefit societies have no severable interest in the fund. They can receive no benefit from it except as members who continue to pay their assessments, and then only in case of sickness. How can it be determined whether any member would continue to pay dues in the future; whether he would be sick during his membership, so as to derive benefit from the fund; whether the amount which he would be required to pay in may not exceed the amount he might receive as a benefit, and thus prove to be no loss at all? All of these questions enter into the determination of the amount of damage sustained by expulsion. They are incapable of proof. They are matters of pure speculation and guess, and too uncertain to form the basis of a judgment. If a member wrongfully expelled desires to enforce his rights, exact justice can be done by reinstating him. Great injustice may be done by an award of damages based upon conjecture or possible prejudice.

But the plaintiff urges that, if the action

cannot be maintained for the loss of membership rights, yet he may recover for the exclusion from the right to enjoy the use of the common property and the privileges of membership. While such a recovery would not be objectionable for inconsistency, and would be less objectionable for uncertainty in the elements of damage, we nevertheless think that an action is not maintainable on this ground. The plaintiff had the right to an immediate restoration to participation in the affairs of the society. What he has suffered by exclusion therefrom is due to his own neglect to seek his remedy. Upon no principle of justice can he allow the exclusion to run on for the purpose of accumulating damages. There might be a brief interval of exclusion between the vote of the society and the enforcement of the remedy, but that would be too small a matter for

a court to allow as a ground of action. Mistakes and illegalities are liable to occur in all sorts of societies, and the remedy which a court can give cannot always be absolutely adequate. Courts must deal with these matters sensibly, and to recognize every error which may to some extent infringe the rights of a member, as a cause of action, when that error can be speedily corrected, would be a manifest stretch of the administration of the law. The grievance may be regarded as an incident to membership in a society, and, at any rate of too trivial a character to require compensation in damages when the substantial remedy of restoration is at hand. In our opinion the plaintiff is not entitled to maintain this action, and the demurrer to the declaration is sustained.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Thomas A. SCANLON, by Next Friend,

v.

Benjamin M. WEDGER.

Willis E. BURNHAM, by Next Friend,

v.

SAME.

George MASON, Admr., etc.,

v.

SAME.

Henry AR FOON, by Next Friend,

v.

SAME.

(.....Mass.....)

A voluntary spectator of a display of fireworks in a highway must be held to assume the risk of injury from accident without negligence although the show is unauthorized.

(Morton and Knowlton, JJ., dissent.)

(June 21, 1892.)

REPORT from the Superior Court for Suffolk County for the opinion of the Su

preme Judicial Court, after verdict in favor of defendant, of actions brought to recover damages for injuries inflicted by the bursting of a mortar which was being used in displaying fireworks, and which was alleged to have been caused by defendant's negligence. *Judgments for defendant.*

The facts are stated in the opinions.

Mr. C. W. Turner, for plaintiffs:

As defendant was not protected in firing said bombs by any license, his acts in so firing them were unjustifiable and wrongful and a public nuisance, and independent of any question of care on his part, he was liable for the trespass so committed by him to such persons as, being lawfully near and in the exercise of due care, suffered from the consequences of such acts.

Yostburgh v. Moak, 1 Cush. 453, 48 Am. Dec. 618; *Cole v. Fisher*, 11 Mass. 187; *Moody v. Ward*, 18 Mass. 299; *Barker v. Com.* 19 Pa. 418.

The act of exploding fire-crackers in a public highway is held to be wrongful and unlawful, independently of any statute, in *Conklin v. Thompson*, 29 Barb. 218; *Thompson, Highways*, 4th ed. 287.

In *Jenne v. Sutton*, 43 N. J. L. 257, 89 Am. Rep. 578, which is in its facts very similar to the case at bar, it was held that the use of a

NOTE.—Liability for injuries caused by the discharge of fireworks.

Contrary to the doctrine of the main case it was held in a Missouri case not to be contributory negligence for a person to be present to witness a display of fireworks in a public square. *Dowell v. Guthrie*, 99 Mo. 558.

So in *Bradley v. Andrews*, 51 Vt. 530, the presence of a person on a public street in a crowd which had been invited there by an exhibition of fireworks was held, in direct conflict with the main case, not to be contributory negligence.

The decisions of the subject of liability for injuries by fireworks present quite a variety. The above Missouri decision holds that the discharge of fireworks at suitable places when not prohibited by statute or municipal regulation is not unlawful, but that the circumstances may be such as to make the act of discharging fireworks culpable negligence. *Dowell v. Guthrie*, *supra*.

It was there held that it was not unlawful or 16 L. R. A.

wrongful to shoot off sky-rockets from a courthouse in the center of a public square where the troughs were so arranged that the rockets would pass over the people assembled. *Ibid*.

There was evidence, however, in that case of negligence in the way the fireworks were scattered about so that they caught fire and were shot off accidentally. *Ibid*.

But in a New Jersey case the court declared that the explosion of fireworks in a public street constituted a public nuisance *per se*. In that case the president of a political club who ordered a display of fireworks in a public street in front of a building where a meeting of the club was being held, and who paid for the fireworks from money raised by individual subscriptions, was held liable for injuries occasioned by the discharge of fireworks by a person whom he hired to explode them. *Jenne v. Sutton*, 43 N. J. L. 257, 89 Am. Rep. 578.

The same principle has been decided in several other cases. Thus in New York the explosion of

public highway as a place in which to fire a bomb was illegal and *per se* constituted a public nuisance, and that all persons concerned in such an act were responsible for the injuries done to an innocent person.

Every person who indulges himself, even on the Fourth of July, in the discharge of fireworks in a highway or in any place to which he has not a private right, is liable for an injury caused to another.

Shearm. & Redf. Neg. 3d ed. p. 670.

Bombs belong to the class of articles denominated in the text-books "dangerous things," the use of which even when in a lawful place subjects the actor to strict responsibility.

Pollock, Torts, 407.

Mr. A. D. Bosson for plaintiff Ar Foon.

Mr. S. Z. Bowman for plaintiff Mason.

Messrs. Charles S. Lincoln and Charles P. Lincoln, for defendant:

The defendant, in firing off the mortar, was in the prosecution of a lawful act. The license of the board of aldermen under which he acted gave the right to display the fireworks, and a place was designated for the purpose by the police.

Mass. Pub. Stat. chap. 102, § 55.

In *Cushing v. Boston*, 122 Mass. 178, it was held that a special Statute of 1884, chap. 16, § 3, which provided that no door-steps shall project into any street more than one twelfth of the width thereof, and in no case more than

three feet, though negative in form, implied authority to occupy the street to the extent indicated, and that steps so constructed did not constitute a defect or nuisance. This defendant, therefore, was lawfully engaged and cannot be liable *prima facie* without some proof of negligence or fault on his part.

Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 872; *Searles v. Manhattan R. Co.* 2 Cent. Rep. 442, 101 N. Y. 661; *Brown v. Kendall*, 6 Cush. 292; *Willett v. Rich*, 2 New Eng. Rep. 672, 142 Mass. 356, 56 Am. Rep. 684, *Tourtelot v. Rosebrook*, 11 Met. 462; *Rockwood v. Wilson*, 11 Cush. 226; *Nitro Glycerine Case*, 82 U. S. 15 Wall. 537, 21 L. ed. 206.

The liability of the defendant does not depend on the illegality of his act, but upon his want of due care.

Steele v. Burkhart, 104 Mass. 61; *Shearm. & Redf. Neg.* 37.

In order to hold this defendant liable for the alleged injuries, there must be some evidence of want of reasonable care on his part.

Pollock, Torts, *120, 121; *Stanley v. Powell*, 89 Week. Rep. 78.

It is true that the courts have held persons using dangerous things to a greater degree of care than in the use of ordinary things. Yet it is still a question of reasonable care (a relative phrase) for a jury, who, having all the facts before them and the instructions of the court to guide them, will determine their ver-

fire-crackers by a boy on a public street of a city on the 4th of July, which so frightened a horse that he died, was held to be wrongful and to make the boy, although a minor, liable for the damages. *Conklin v. Thompson*, 29 Barb. 218.

So in Vermont a boy thirteen years old who shot off a roman candle on a Saturday evening for the purpose of amusement and the celebration of the 4th of July, which came the next day, was held liable for injuries thereby resulting to another person. *Bradley v. Andrews*, 51 Vt. 580.

And in Louisiana a father was held liable for an injury caused by the negligent discharge of a roman candle by his 6-year-old boy who discharged it downward from the gallery of his house in the direction of children in the street during a Christmas celebration. *Mullins v. Blaise*, 37 La. Ann. 92.

In a Massachusetts case the fact that plaintiff, who was injured by the negligent discharge of a sky-rocket, belonged to the same political club with the defendant, and that both had contributed to defray the expenses of the display, was immaterial. *Flak v. Wait*, 104 Mass. 71.

But one on whose grounds an exhibition of fireworks is given for a 4th of July celebration was held not liable for an injury to a spectator by a ball from a roman candle in the hands of his son which was supposed to have been exhausted, where it is not shown that he procured the fireworks or invited any spectators, although he did prevent the firing of them from one place on his grounds and pointed out another from which the display could be made and was present at the display. *Wairrel v. Harrison*, 37 Ill. App. 823.

In the old and well-known *Squib Case* (*Scott v. Shepherd*, 2 W. Bl. 362), a person who threw a lighted squib into a covered market place where a large concourse of people were assembled was held liable for the loss of an eye by a person whom it finally struck after being thrown about by several other persons in self-defense. The only question on which the court had any difficulty was as to the form and not the substance of the action.

In *King v. Ford*, 1 Starkie, 421, it was said by Lord 16 L. R. A.

Ellenborough that a school-master would be liable for injury to a scholar by the use of fireworks if he was negligent in not preventing their use when he knew they were to be used. But in that case it was decided that under the pleadings there could be no recovery on the facts shown.

On the principle that a municipal corporation is not liable for lack of diligence in enforcing police regulations it has been held that a town is not liable for an injury by the discharge of fireworks in violation of an ordinance, although the council and officers and a majority of the citizens actively participated therein and no attempt was made by the officers to prevent it. *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805.

A city is not liable for injury such as the destruction of property by fire caused by an explosion of fireworks, although it had expressly suspended a general ordinance prohibiting such explosions within the city. *Hill v. Charlotte*, 72 N. C. 55.

In a Massachusetts case, without determining the question whether a city could be held liable if it authorized a display of fireworks, the city was held not responsible to a person wounded by a sky-rocket which was bought by a committee of the city council appointed to celebrate the 4th of July, and which was negligently fired under their direction during the celebration. *Morrison v. Lawrence*, 98 Mass. 219.

In a later Massachusetts case it was held that a city, in celebrating the 4th of July exclusively for the gratuitous amusement of the public, is not liable for personal injuries sustained by a person from the discharge of fireworks during the celebration. *Tindley v. Salem*, 137 Mass. 171, 60 Am. Rep. 289.

In this case the fact that a statute authorized appropriations of money for such purposes to a limited amount was regarded as implying an intention not to impose a further liability growing out of the celebration.

But, on the contrary, the city court of Brooklyn has just held that a city is liable for damages from fireworks for which it has given a permit. *Speir v. Brooklyn*, 46 N. Y. S. R. 561.

B. A. R.

dict upon all the circumstances and exigencies of the case.

Sullivan v. Scripture, 8 Allen, 566; *Brown v. Kendall*, and *Stanley v. Powell*, *supra*; *Cunningham v. Hall*, 4 Allen, 276; *Holly v. Boston Gas Light Co.* 8 Gray, 181, 69 Am. Dec. 238.

The plaintiffs, in attending the exhibition, voluntarily exposed themselves to its risks, and in the absence of negligence on the part of the defendant he cannot be liable.

Pollock, Torts, *143, 144; Cooley, Torts, pp. 589, 594; Smith, Neg. 158, Appendix, B.

Allen, J., delivered the opinion of the court:

The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway square on that evening, under Pub. Stat., chap. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant, in firing the bomb, exercised reasonable care. The case comes to us on a report, which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the superior court for the assessment of damages; otherwise judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travelers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of the square about 40×60 feet was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. . . . The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care." The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air, and display colored lights. They were apparently a common form of fireworks, such as has long been in use. The ground on which the plaintiffs place their several cases is that Pub. Stat., chap. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that, therefore, the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed either by the defendant or by anybody else

that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks. Under this state of things, it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable. *Vosburgh v. Moak*, 1 Cush. 453, 48 Am. Dec. 618; *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Conradt v. Clavre*, 93 Ind. 476, 47 Am. Rep. 889. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. See Pollock, Torts, 138-144. In the opinion of a majority of the court, the entry must be, *judgments for the defendant*.

Morton, J., dissenting:

I dissent from the opinion of the majority of the court. The majority regard as immaterial the question whether the license was valid or not. It may be treated, therefore, as void, as I think it was. If it is void, then the defendant, Wedger, was using the highway for a purpose that was dangerous, unlawful, wrongful, and unjustifiable as against anybody lawfully in the highway and in the exercise of due care, as it is expressly found that the plaintiffs were, and is liable for any injury caused to them by the explosion, whether they were travelers or not, unless they participated or aided in the display, or contributed by their own conduct to their injuries, or assumed the risk of injury. It is not claimed that there is any evidence that they participated or aided in the display. There is no evidence that they were guilty of contributory negligence. It is said, however, that they assumed the risk. What are the facts? Merely that a political meeting was being held in the square, to which a considerable number of persons had been attracted, and that bombs and other fireworks were being discharged there; and that at the time of the explosion the plaintiffs were near the rope that inclosed the space that had been roped off for discharging the fireworks, but were lawfully there, and in the exercise of due care. There is no evidence that they knew or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were charged with an explosive more powerful than ordinary gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption. The most that can be said of them is that they were voluntary spectators of the display. But be-

fore they can be held to have assumed the risk it must appear that they knew all the facts material to the risk, and appreciated and understood it. *Fitzgerald v. Connecticut River P. Co.* (Mass.) 29 N. E. Rep. 464; *Anderson v. Clark* (Mass.) 29 N. E. Rep. 589; *Mahoney v. Dore* (Mass.) 30 N. E. Rep. 366. It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful, and unjustifiable business that he used due care in it. Due care is predicated of something which a person may lawfully do, but which by his negligent manner of doing it may become injurious to others; not of something which he has no right whatever to do. Further, the question of assumption of the risk is ordinarily one of fact for the jury. *Cases supra*. The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say as matter of law upon the facts stated that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears, they might have been travelers stopping for a moment on their way through the square, or detained by the crowd. It is difficult to see what the plaintiffs' supposition (if they did suppose it) that the exhibition was a lawful one had to do with their assumption of the risk; and still more difficult to see it if the exhibition was, as it proved to be, unlawful. I understand the question submitted to this court by the report to be whether, upon the facts therein stated, and upon the finding of the jury as to reasonable care on the part of Wedger, the plaintiffs were entitled to recover. I think they were, and that no other conclusion is warranted on principle or by authority. *Vosburgh v. Monk*, 1 Cush. 453, 48 Am. Dec. 618; *Cole v. Fisher*, 11 Mass. 187; *Moody v. Ward*, 18 Mass. 299; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, Id. 84, 72 Am. Dec. 495; *Cohen v. New York*, 118 N. Y. 532, 4 L. R. A. 406; *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Fletcher v. Rylands*, L. R. 1 Exch. 265, 279 *et seq.*

As the opinion of the majority does not consider the matter of the release set up by the defendant Wedger, I have not done so, but have assumed that nothing which occurred operated to release him. I think, therefore, that, in accordance with the terms of the report, the entry should be, cases remitted to the superior court for the assessment of damages.

Knowlton, J., concurs in this opinion.
16 L. R. A.

ATTORNEY-GENERAL, *ex rel.* BOARD
OF GAS & ELECTRIC LIGHT COM-
MISSIONERS,

WALWORTH LIGHT & POWER CO.

(..... Mass.)

A statute forbidding any other electric company to "lay or erect wires" for the purpose of carrying on its business over or under any street without consent of the authorities in any city or town in which a company is already engaged in furnishing electric light impliedly forbids the maintenance or use as well as the laying or erection of such wires in streets, and the prohibition extends to wires in a street which were lawfully laid by a predecessor of the company, to those laid by a company and sold to its customers as well as to those which were laid and owned by the customers themselves, where these are mere devices to evade the statute and the wires outside of the street lines are owned by the company.

(June 24, 1902.)

REPORT by the Supreme Judicial Court for Suffolk County (Morton, J.) for the opinion of the full bench of information filed by the attorney-general to enjoin defendant from maintaining certain electric wires. *Injunction granted.*

This was an information in equity filed by the attorney-general at the relation of the board of gas and electric light commissioners, against the defendant corporation, to compel it to desist and refrain from maintaining or using certain wires for electric lighting over and under the streets of the city of Boston, and from laying or erecting any wires over such streets, and to compel it to take down and remove all wires heretofore laid or erected by it over or under the streets of Boston.

The defendant was organized for the purpose of furnishing electric light and steam heating and power to customers in Boston, and it was so organized after the passage of chapter 882 of the Statutes of 1897, which provides that "in any city or town in which a company is engaged in or organized for the purpose of the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes, and highways of such city or town for the purpose of carrying on its business, without the consent of the mayor and aldermen of such city or selectmen of a town, after a public hearing and notice to all parties interested."

The defendant had never obtained any consent or authority of the mayor and aldermen of Boston pursuant to the provisions of this statute. At the time of the organization of the defendant, as well as at the time of the hearing, two other electric light companies were engaged in business in Boston. At the time of the hearing, the defendant was furnishing

NOTE.—This case is interesting as a novel construction of a statute which is likely to be enacted in other jurisdictions as time goes on and the demand for electricity for domestic use increases, and which would be of little value if it could be evaded in the manner shown in this case.

electric light or electricity for lighting over a considerable number of wires crossing the streets of Boston.

The defendant succeeded, by purchase, to a business that had already been established. Two wires lying under Hawley street were placed in a tunnel which the predecessors of the defendant had been authorized by the mayor and aldermen to construct for the purpose of carrying a shaft and steam through, and were placed in the tunnel by such predecessors, who sold them to the defendant. No permission had ever been given by the mayor and aldermen to the defendant, or its predecessors, to lay wires for electric lighting in the tunnel or to lay them under or erect them over Hawley street. Of the wires over which, at the date of the hearing, the defendant was furnishing electricity for lighting, it appeared that only two, through their entire length,—those in the tunnel under Hawley street,—belonged to it. Of the others, several lines belonged, through their entire length, where they crossed the streets and where not, from the station to the lamps, to customers who had put them up at their own expense. All the other wires except where they crossed the streets, belonged to the defendant. When these last-named wires crossed the streets they belonged to customers from the fixture on one side of the street to that on the other, or from eave to eave of the buildings on the opposite sides of the street. In some cases, the treasurer of the defendant corporation, acting for and on behalf of the corporation, at the request of the customers, procured the wires to be erected across the street and the customers paid the defendant therefor; and in other cases, the customer himself procured the wire to be erected across the street.

In the case of arc lights, the defendant owned the lamps used by its customers and took care of them and replaced the carbons as they burned out. In the case of the incandescent lamps, the practice varied. In some instances the defendant owned and furnished everything, except so much of the wires as crossed the streets; and in others, where the customers owned the entire line, the defendant only furnished the globe-bulbs, the customer buying them of the defendant as he would of any other party having them to sell.

The defendant had erected no poles in the streets, and the wires in question crossed the streets at heights varying from 80 to 90 or 100 feet. There were many other wires also crossing the streets in the same localities not belonging to or used by the defendant or its customers.

The information was filed by the attorney-general after a written notice to him and the defendant from the Board of Gas & Electric Light Commissioners, pursuant to the provisions of the Statutes of 1885, chap. 814, § 12, and the Statutes of 1887, chap. 882, § 2.

Messrs. Everett W. Burdett and Charles A. Snow, for petitioner:

The wires as maintained by defendant are within the prohibition of the statute.

An information is the appropriate remedy in this case.

Atty-Gen. v. Metropolitan R. Co. 125 Mass. 16 L. R. A.

515, 28 Am. Rep. 264; *Atty-Gen. v. Woods*, 108 Mass. 490, 11 Am. Rep. 890; *Eastern District Atty. v. Lynn & B. R. Co.* 16 Gray. 242; *Atty-Gen. v. Cambridge*, 16 Gray. 247; *Atty-Gen. v. Boston Wharf Co.* 12 Gray. 553; *Rouse v. Granite Bridge Corp.* 21 Pick. 347; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 183 Mass. 861; *Atty-Gen. v. Tarr*, 2 L. R. A. 87, 148 Mass. 309; *Atty-Gen. v. Bay State Brick Co.* 115 Mass. 481; *Atty-Gen. v. Consumers Gas Co.* 2 New Eng. Rep. 816, 142 Mass. 417; *Atty-Gen. v. Algonquin Club*, 11 L. R. A. 500, 153 Mass. 447, and cases cited.

Injury to the public from a nuisance may be redressed by information in equity as well as by indictment at law. "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance."

Carlton v. Rugg, 5 L. R. A. 193, 149 Mass. 550; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Atty-Gen. v. Tarr*, 2 L. R. A. 87, 148 Mass. 309; *Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 183 Mass. 861; *Atty-Gen. v. Woods*, 108 Mass. 490, 11 Am. Rep. 890; *Com. v. King*, 18 Met. 115; *Dillon, Mun. Corp.* § 660, note 4.

It cannot be objected that the Statute of 1887 is unconstitutional upon the ground that, in effect, it tends to create a monopoly or monopolies in the use of the streets for electric-lighting purposes.

That the creation of such a monopoly is within the constitutional powers of the Legislature is well established.

New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516.

Such a statute is a valid exercise of the police powers of the state.

Western U. Tele. Co. v. New York, 38 Fed. Rep. 552; *Oushing v. Boston*, 128 Mass. 880, 35 Am. Rep. 383; *Budd v. New York*, 148 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, and cases cited; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 598; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27.

No valid objection to the constitutionality of the statute can be urged upon the ground that it delegates the regulation of the use of the streets to the mayor and aldermen, or to a state board.

Com. v. Plaisted, 2 L. R. A. 142, 148 Mass. 875.

Holmes, J., delivered the opinion of the court:

This is an information by the attorney-general, under Stat. 1887, chap. 882, and Stat. 1885, chap. 814, § 13, to restrain the defendant from maintaining or using certain wires over which the defendant furnishes electricity for lighting. The defendant was incorporated since the passage of Stat. 1887, chap. 882. By section 8 of that Act, "in any city or town in which a company is engaged in . . . the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes, and highways of such city or town, for the purpose of carrying on its business, without the consent of the mayor and aldermen," etc. There were companies in

Boston engaged in the manufacture and sale of electric light at the date of the Act, and the defendant has not obtained the consent required by it. The wires in question are of three classes—*first*, two wires in a tunnel under Hawley street, laid without license by a predecessor of the defendant, and now belonging to the defendant, *second*, wires put up by the defendant, and still belonging to the defendant throughout their entire length, except where they cross the streets; the portions which cross the streets having been sold by the defendant to its customers, or put up by the defendant for its customers in some instances, in others having been put up by the customers, these devices being intended by the parties to evade the statute; *third*, wires put up by customers, and belonging to them, the intent presumably being the same as in the last case. The question is whether these wires fall within the statute.

The Legislature may think that a business like that of transmitting electricity through the streets of a city has got to be transacted by a regulated monopoly, and that a free competition between as many companies and persons as may be minded to put up wires in the streets, and to try their luck, is impracticable. Without wasting time upon useless generalities about the construction of statutes, it is enough to say that the statute before us had that consideration in view, and must be construed accordingly. We agree that we cannot supply a *casus omissus*. But the fair scope and meaning of the words used and the number of cases included will vary more or less according to the purpose of the Act. To take an example a little different from those before us, we think it plain that, if somebody else put up a wire, and then the company bought it and used it for the business of furnishing and selling electric light, the case would be within the meaning of the words used, although the company did not erect the wire in a literal sense, or cause it to be erected. In other words, the reason why the statute forbids laying or erecting wires is to prevent wires being maintained in the streets. If they vanished as soon as erected, the Legislature never would have prohibited the mere act of putting them there. But when the Legislature forbids erecting wires for the express purpose of preventing their being maintained, it impliedly forbids their being maintained. We are of opinion that the case is not changed by the wires having been laid by a predecessor who was not within the prohibition of the statute, if that be the fact as to the wires in Hawley street.

We are of opinion that similar reasoning applies with greater force to the use of the second class of wires by the defendant. It seems to us quite out of the question to say that a company may escape the prohibition of the statute by turning over to a customer so much of each wire as crosses a street, and then continuing to use the wire. If it is forbidden to erect, it is forbidden to use wires which it has erected. And it is within the words of the Act, as well when it erects a wire technically, as a servant of its customer, with intent to use the wire for the purposes of its business, but to evade the Act, as when it erects it on its own behalf. We agree that we cannot order wires

to be taken down, the owners of which are not before us. But we can order the defendant not to use them.

With much more hesitation we have come to the same conclusion about the wires put up by customers. If a use of them by the company for the purposes of its business is permitted, the statute is made nugatory by an easy evasion. It was suggested that in some of these cases the company did not sell electric light, because it did not own the device at the customer's end by which the electricity furnished took the form of light; that the company only sold electricity. We think it quite clear that the Legislature took no such nice distinctions, and that a wire which is prohibited when used to furnish electric light is prohibited equally when used to furnish electricity for the purpose of conversion into light at the end of the wire.

Injunction accordingly.

COMMONWEALTH of Massachusetts

v.

Marcy F. ROBERTS.

(.....Mass.....)

1. The placing and maintenance of water-closets in buildings which are designed for habitation and are so situated that they can be connected with public sewers, may be compelled by the state under its police power, although the buildings were lawfully erected without them.
2. An Act providing that buildings designed for habitation shall have sufficient water-closets connected with the public sewers, and imposing a penalty on "any person violating any provision" of it, applies to violations which continue after its passage as well as to those which then come into existence.
3. A water-closet within the meaning of an Act providing that every building designed for habitation shall have sufficient water-closets connected with the sewer and shall not have a cess-pool or privy, is an arrangement with a permanent water supply which can be used systematically and regularly for carrying whatever is deposited therein to the sewer and does not include a privy vault which although connected with the sewer can be flushed only by a rain-storm or from a hydrant.

(January 6, 1892.)

REPORT from the Superior Court for Suffolk County for the opinion of the Su-

NOTE.—While the constitutionality of the statute involved in the above case does not seem to be open to serious question, the case is worthy of notice as presenting an advanced exercise of police power. With the increasing size of cities and of closely crowded districts where poverty and degradation seem to make either bodily or moral health impossible, the necessity increases for legislation which will compel a comparatively decent and safe mode of living. The modern advance in legislation concerning boards of health and their powers is recognized everywhere as a constitutional exercise of police power. And mere hazard, danger, or peril to health from an alleged nuisance is held enough to bring it within the powers of such a board without an absolute certainty that it

preme Judicial Court of a prosecution against defendant for the maintenance of a nuisance after a verdict of conviction had been rendered. *Judgment on the verdict.*

The facts are stated in the opinion.

Messrs. Lund, Jewell & Welch for appellant.

Messrs. A. E. Pillsbury, Atty-Gen., and C. H. Harris, Asst. Atty-Gen., for the Commonwealth.

Lathrop, J., delivered the opinion of the court:

This is a complaint under the Statutes of 1885, chap. 893, § 2, as amended by the Statutes of 1889, chap. 450, § 2, charging that the defendant on May 15, 1890, kept and maintained a dwelling-house on a certain street in Boston, in which street there was a public sewer, and that said dwelling-house "did not then and there have sufficient water-closets connected with the sewer in said street as aforesaid, nor any water-closets connected with any sewer whatever." The Statute of 1885, chap. 382, § 1, provides that "every building in the city of Boston used as a dwelling, tenement, or lodging-house, or where persons are employed, shall have at all times good and sufficient water-closets, earth-closets, or privies, as the board of health of said city may determine." Section 2 of the same chapter, as amended by the Statutes of 1889, chap. 450, § 2, reads as follows: "Every such building situated on a public or private street, court, or passageway, in which there is a public sewer, and every building connected with any sewer, shall have sufficient water-closets connected with the sewer, and shall not have a cess-pool or privy, except where, in the opinion of the board of health, it can be allowed to remain temporarily, and then only as said board shall approve." At the trial in the superior court on appeal it was admitted that the defendant's house was a dwelling-house situated on a public street in Boston, and was built in 1861 or 1862; that there was a public sewer through said street, built in 1861; and that there was no water-closet in the house. It was further admitted that at the time the house was built a small wooden building was erected in the yard of the house, and about twenty-five feet distant therefrom; that in this building was a seat, with a hole in it, and beneath the building was an excavation in the earth, about six feet deep and five feet square, bricked up, and connected with the public sewer by a 6-inch pipe, which pipe had a trap; that water from the

roof of one half of the house and from the yard flowed into this excavation when it rained; and that the excavation could be flushed by a hose attached to a hydrant in the house, and was flushed from time to time by a man sent by the defendant for that purpose; and that the hose was accessible to the defendant's tenants on application to her or to the man. This excavation was also admitted to have been made in accordance with the ordinances of Boston then in force, and which now are in force, unless they have been modified by the statutes above referred to.

1. There can be no doubt that the statute in question is within the constitutional powers of the Legislature as a police power. It is an Act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage. As said by Morton, *J.*, in *Nickerson v. Boston*, 181 Mass. 306: "It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances, and to preserve the general health. The authority of the Legislature to pass laws of this character is too well settled to be questioned." See also *Com. v. Certain Intoxicating Liquors*, 115 Mass. 155, and cases cited; *Bancroft v. Cambridge*, 126 Mass. 438.

2. The defendant contends that the Act was not intended to apply to houses already built when the Act went into operation. But while the Act is broad enough to apply to all buildings, the language of the section imposing a penalty on "any person violating any provision of this Act" (Stat. 1885, chap. 893, § 22) is prospective in its operation, and applies to violations which continue after its passage, or which then come into existence. *Pickett v. Durham*, 119 Mass. 159; *Com. v. Homer*, 153 Mass. 843, and cases cited. The defendant, however, contends that, as her structure was lawful when built, an Act of the Legislature which would render its use unlawful would be unconstitutional,—citing *Com. v. Alger*, 7 Cush. 53, 103. The statutes there in controversy related to harbor lines in Boston, and were not police regulations affecting the public health; and the language of *Chief Justice Shaw* in that case does not apply to a case like that now under consideration. *Salem v. Eastern R. Co.* 98 Mass. 441, 443, 96 Am. Dec. 650; *Watertown v. Mayo*, 109 Mass. 815; *Train v. Boston Disinfecting Co.* 144 Mass. 528, 530, 4 New Eng. Rep. 487; *Rideout v. Knox*, 148 Mass. 365, 374, 2 L. R. A. 51.

3. The only other question argued by the

would cause disease. *State v. Neidt* (N. J.) Jan. 7, 1890.

The same principle manifestly applies to laws for preventing adulteration of food which are clearly established to be within the police power by numerous decisions among which are *State v. Marshall*, 1 L. R. A. 51, and *note*, 64 N. H. 549; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Walker v. Pennsylvania*, 127 U. S. 699, 32 L. ed. 261; *Com. v. Miller*, 6 L. R. A. 633, and *note*, 181 Pa. 118.

Somewhat similar to the main case above is the English case of *St. James & St. John Vestry v. Feary*, L. R. 24 Q. B. Div. 703. An order of the vestry was enforced requiring proper doors and coverings to a water-closet. Boards of health have 16 L. R. A.

been often called upon in this country to take action in reference to such closets, but for the most part at least on the ground that they were nuisances to neighbors.

Certainly the constitutional powers of the Legislature according to the whole current of decisions concerning the police power allow, and the public welfare demands, much new legislation touching many particulars of life in crowded districts which will prevent the overcrowding not only but also many other vicious conditions which threaten the public morals and health in almost equal degree. For *note* on supremacy of police power see *State v. Schlemmer* (La.) 10 L. R. A. 153 B. A. R.

defendant is whether the structure existing in the defendant's yard is a water-closet, within the meaning of the Act. We are of opinion that it is not. The Legislature, by the use of the word "water-closet," intended an arrangement then in common use, connected with a sewer, and having a permanent water supply, which can be used systematically and regularly

for carrying whatever is deposited therein to the sewer, and not a privy-vault, which, although connected with a sewer, has no water supply for flushing it, except such as depends on chance. The case comes before us on the report of a justice of the superior court, after a verdict of guilty, and the entry must be, *judgment on the verdict.*

MICHIGAN SUPREME COURT.

Theron F. GIDDINGS, *Relator*,

v.

Robert R. BLACKER, Secretary of State.

(.....Mich.....)

1. An objection that a private citizen as relator in a petition for mandamus has not made any application to the attorney-general to institute the proceeding is not valid where the attorney-general is shown to be adverse to the application by his appearance for the respondent.
2. The discretion of the Legislature in making an apportionment of senatorial districts must be honestly and fairly exercised so as to preserve the equality of representation as nearly as may be, otherwise the apportionment will be unconstitutional.
3. In holding an apportionment of senatorial districts unconstitutional where the prior apportionment which had been acquiesced in for three elections was also subject to the same constitutional objections and was brought in question by the petition asking that notices be ordered to be given under it, the notices were ordered to be given under a still earlier Apportionment Act the validity of which was not brought in question in those proceedings.

(July 23, 1892.)

PETITION for a writ of mandamus to compel the secretary of state to give out notices for election of state senators under the Apportionment Act of 1885 and to disregard the Act of 1891. *Relief granted.*

The facts are stated in the opinions.

Mr. F. A. Baker, with *Mr. Moses Taggart*, for relator:

The question presented to the court is not one of a political character, but of constitutional construction.

State v. Cunningham (Wis.) 15 L. R. A. 561. Jurisdiction to examine and pass upon such questions is expressly recognized in *State v. Newark*, 40 N. J. L. 299; *State v. Campbell* (Ohio) June 16, 1891; *State v. Van Duyn*, 24 Neb. 588, and *Prouty v. Stover*, 11 Kan. 285.

And in *Opinion of Justices*, 18 Me. 468, it is held by *Judge Shepley*, that legislative apportionment, "if made in manifest disregard of the constitutional provision, would, like other unconstitutional enactments, be void, and not binding upon the people or a subsequent Legislature."

NOTE.—As to the power of the court to set aside a legislative gerrymander, see *State v. Cunningham* (Wis.) 15 L. R. A. 561, and *note*.
16 L. R. A.

We make no question that certain discretion is given to the Legislature, where it is fairly a matter of opinion as to the best method of arrangement of senatorial districts, and that such discretionary action of the Legislature is conclusive. The apportionment may vary the basis of population in different districts, but when it is apparent that the constitutional provision has been ignored, we might say *defied*, in many of the districts created by the action of the Legislature, then it is not only the right but the imperative duty of the court to intervene and declare such action unconstitutional and void.

State v. Cunningham (Wis.) 15 L. R. A. 561; *State v. Riordan*, 24 Wis. 484; *State v. Newark* and *State v. Van Duyn*, *supra*.

When an Act can only operate by violating a provision of the Constitution, it cannot be replied to on the ground that the object contemplated by the Legislature was different.

People v. Holshan, 29 Mich. 116.

When the Constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition.

Cooley, Const. Lim. p. 78.

The record shows, however, that many districts have been formed in violation of the fundamental law of the state. The object of the legislation being to provide a system for the state, and the formation of one senate district being dependent upon the formation of others, it must stand or fall as a whole.

Skinner v. Wilhelm, 6 West. Rep. 867, 63 Mich. 568; *Brooks v. Hill*, 1 Mich. 118; *Campau v. Detroit*, 14 Mich. 276; *Cooley*, Const. Lim. 5th ed. p. 213.

The right to take full and equal part with other electors, in the selection of a state senator is, under the 14th Amendment of the Federal Constitution, a "privilege" which the state is prohibited from abridging in whole or in part.

Virginia Cases, 100 U. S. 339, 25 L. ed. 676.

M. A. A. Ellis, *Atty-Gen.*, for respondent:

The 14th Amendment of the Constitution was passed and finally ratified in 1868. It has no reference or application whatever to extending the right of suffrage, and does not attempt in any manner to bestow the right of suffrage on any person.

Minor v. Happersett, 88 U. S. 21 Wall. 163, 23 L. ed. 627. See 2 Story, Const. 678.

The power of Congress to legislate at all upon the subject of voting at state elections

rests upon the 15th Amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such election is because of his race, color, or previous condition of servitude.

United States v. Reese, 92 U. S. 215, 23 L. ed. 568.

It is not necessary that every state law should have equal force and effect in every district in the state. The right to stand equal before the law does not mean that each citizen of a state shall have the same rights and privileges of every other citizen who resides in some other locality.

Missouri v. Lewis, 101 U. S. 81, 25 L. ed. 992; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 529, 24 L. ed. 787; *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620; *Kentucky R. R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414; *Barbier v. Connolly*, 113 U. S. 82, 28 L. ed. 925.

The clause that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," has no application whatever to the controlling of the elective franchise of the citizens of a state, or to the abridgment in any manner of the rights of a citizen of the state.

Minor v. Happersett, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *Slaughter House Cases*, 88 U. S. 16 Wall. 74, 21 L. ed. 408.

If Act 175 of the Public Acts of 1891 is unconstitutional and void because it does not divide the territory equitably among the several counties and districts of the state, by the same reasoning and for the same assumed equity the Apportionment Act of 1885 is also unconstitutional and void, and likewise the Apportionment Act of 1881 is unconstitutional and void.

Courts will take judicial notice of the census whether taken under the authority of the state or the United States.

State v. Cunningham (Wis.) 15 L. R. A. 561; *State v. Jackson County Ct.* 89 Mo. 287; *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 201, note; *Gerahty v. Ashland County* (Wis.) Dec. 15, 1891; *State v. Keaough*, 68 Wis. 142.

The court will take judicial notice of the location, general boundaries, and juxtaposition of the several counties, towns, and wards mentioned in the Act in question, and of the Acts of 1885 and 1881, and of matters of common knowledge.

Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; *King v. Gallun*, 109 U. S. 101, 27 L. ed. 871.

Hence the equity and constitutionality of all of these Acts are before the court.

It is held by some courts that the matter of apportionment belongs to the legislative department of the government, that it is vested in them, and they are accountable only to the people for the abuse of that authority.

Wise v. Bigger, 79 Va. 282; *Opinion of Judges*, 10 Gray, 618; *Opinion of Justices*, 18 Me. 458.

And this court in the case of *Wellman v. Chicago & Grand Trunk, R. Co.* 83 Mich. 593, held in substance that where a question of reasonableness was left to the Legislature, it was a legislative not a judicial question.

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In *State v. Campbell* (Ohio) June 16, 1891, the court said: "Hence it is not sufficient in this proceeding that we might be of the opinion that we could make a better apportionment than has been made by the board. To authorize this court to interfere and command the board to make another apportionment, the apportionment made must so far violate the rules prescribed by the Constitution as to enable us to say that what has been done is no apportionment at all, and should be wholly disregarded."

An apportionment cannot be overthrown because the representatives are not distributed with mathematical accuracy according to the population.

Proby v. Stover, 11 Kan. 261. See also *State v. Francis*, 26 Kan. 787.

There is no showing or pretense in the application in this cause that the relator has ever made application to the prosecuting attorney of his county or any other public officer to apply to this court for mandamus touching the matter here at issue, and he has no standing in this court.

State v. Cunningham (Wis.) 15 L. R. A. 561. See *People v. Regents of University of Michigan*, 4 Mich. 98; *People v. State Prison Inspectors*, 4 Mich. 187; *People v. Kent County Supra*, 88 Mich. 423; *Whiting v. Butler*, 29 Mich. 122.

With the question of the motive which influenced the Legislature in making the apportionment, this court has nothing to do.

Ex parte McCordle, 74 U. S. 7 Wall. 514, 19 L. ed. 265; *Dorr v. Continental Ins. Co. of New York City*, 94 U. S. 541, 24 L. ed. 151; *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1145.

Grant, J., delivered the opinion of the court:

The Constitution of Michigan contains the following provisions, found in article 4: "Section 1. The legislative power is vested in a Senate and House of Representatives. Sec. 2. The Senate shall consist of thirty-two members. Senators shall be elected for two years, and by single districts. Such districts shall be numbered from one to thirty-two, inclusive, each of which shall choose one senator. No county shall be divided in the formation of senate districts, except such county shall be equitably entitled to two or more senators." "Sec. 4. The Legislature shall provide by law for an enumeration of the inhabitants in the year 1854, and every ten years thereafter, and at the first session after each enumeration so made, and also at the first session after each enumeration by the authority of the United States, the Legislature shall rearrange the senate districts according to the number of white inhabitants and civilized persons of Indian descent not members of any tribe." Acting under these constitutional provisions the Legislature passed the Senatorial Apportionment Act, No. 175, Pub. Acts 1891. By the census of 1890, the population was 2,093,889. The ratio of each district would therefore be 65,434. Eight of the districts under this Act contain populations as follows: Seventh, 91,420; tenth, 82,697; fourteenth, 88,678; eighteenth, 86,129; twen-

tieth, 84,694; twenty-fifth, 82,556; twenty-seventh, 97,830; thirty-first, 82,213. These are the eight largest districts. Eight other districts contain populations as follows: Twelfth, 41,245; eleventh, 42,110; sixteenth, 46,626; twenty-second, 42,546; twenty-third, 89,727; twenty-eighth, 43,701; twenty-ninth, 40,033; thirtieth, 53,088. Under this apportionment eight senators would represent constituencies numbering in all 695,717, while eight other senators would represent constituencies numbering in all only 349,056. The county of Saginaw is given two senators, although it contains a population of only 82,273. The twenty-seventh district is composed of nine counties, with a population of 97,830, while the twenty-ninth, with eight counties, five of which adjoin a like number of counties of the twenty-seventh, contains a population of only 40,033.

The relator is a citizen and an elector in the seventh district, composed of the counties of Kalamazoo, St. Joseph, and Branch, with a population of 91,420, and prays for the writ of mandamus to restrain the respondent, the secretary of state, from giving notice of the election of senators, under the Act of 1891, and to compel him to give notice under the Apportionment Act of 1885. The petition also contains a prayer for general relief. The basis upon which relief is sought is that the power delegated by the above provisions of the Constitution to rearrange the senatorial districts is limited; that this limitation was wholly disregarded by the Act in question, and the Act is therefore unconstitutional and void. It appears conceded by the learned attorney-general that the Legislature is not in the exercise of a political and discretionary power when acting under these constitutional provisions, for which it is only amenable to the people, and that this court has jurisdiction, in a case properly before it, to determine the constitutionality of the Act in question. The Constitution of this state provides: (art. 6, § 8.) "The supreme court shall have a general superintending control over all inferior courts and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only." The general jurisdiction of this court to determine the constitutionality of legislative enactments is not limited so as to exclude laws involving political rights. The Constitution of Wisconsin, in conferring jurisdiction upon its supreme court, is nearly identical in language with the Constitution of this state. The Supreme Court of Wisconsin has recently most ably and thoroughly discussed and determined the jurisdiction of the court in a case similar in principle and its facts to the present one. *State v. Cunningham* (Wis.) 15 L. R. A. 561. The authorities in support of the jurisdiction are there collated, and citations made from them. Were the power conferred upon the Legislature one of absolute discretion, then the express mandate, "shall rearrange according to the number of inhabitants," would be void of any force or meaning, except that it 16 L. R. A.

might be regarded as expressive of the opinion of the framers of the Constitution that such method would be equitable and fair. We have no doubt of the jurisdiction of the court.

But it is insisted by the attorney-general that, inasmuch as the relator is a private citizen, having no interest in the matter above every other citizen, he has no standing in court, because, prior to filing his petition, he made no application to the prosecuting attorney of his county, the attorney-general, or other public officer, to apply to this court for a mandamus touching the matter here at issue. In support of this claim he cites *People v. Regents of University of Michigan*, 4 Mich. 98; *People v. State Prison Inspectors*, Id. 187; *People v. Green*, 29 Mich. 121; *People v. Kent County Suprs.* 88 Mich. 423.

In *People v. Regents of University of Michigan* the application was to compel the regents to appoint a professor of homeopathy in the medical department of the university. The court expressed its conviction that that was a case in which the action of the attorney-general would have been proper and necessary, at the same time saying: "We do not intend to say that a case may not arise in which this court would allow an individual to file such a complaint, particularly if the attorney-general were absent, or refused to act without good cause."

In *People v. State Prison Inspectors* a private citizen applied for the writ of mandamus to restrain the respondents from teaching to convicts in the state prison the mechanical trade of wagonmaking. The main question was disposed of upon its merits, the court expressing some doubt whether the relator had such clear legal right and special interest as to entitle him to make the application.

In *People v. Green* the application was to compel the county clerk and register of deeds to keep his offices at a certain place to which he claimed the county seat had been lawfully removed. His convenience in having access to the office was the ground of his petition. It was held that he had shown no such special interest as to authorize him to proceed without application to the proper officer.

In *People v. Kent County Suprs.* the application was to compel the allowance of claims alleged to be owing from the county to the city. The city authorities were of course the proper party to institute the proceedings.

In *People v. State Auditors*, 42 Mich. 423, this precise objection was made, and the court said: "In the present case the officer whose duty it usually is to enforce the rights of the state in this court has, in the performance of his official functions as adviser of the state officers, placed himself in an adverse position, and appears for the respondents on this application." The present case comes directly within that decision. The law does not require unnecessary things to be done. When the attorney-general appears for a respondent it certainly follows that he is adverse to the position of the relator, and that an application on the part of the relator to him to commence the proceedings would

be met with noncompliance. This court, as appears from the authorities above cited, has taken care to prevent officious intermeddling by the use of this discretionary writ, and at the same time has swept away technicalities where public interests are involved, and prompt action is necessary. We have quite uniformly overruled this objection in cases of the latter class. The unconstitutionality of the Act is clear. The county of Saginaw, with only 16,839 inhabitants in excess of the ratio, is divided into two senatorial districts, one having 24,189 less than the ratio, and the other having 23,384 less than the ratio. There is no basis, constitutional or otherwise, for such an apportionment. It is contemplated by the Constitution that the ratio shall govern as far as it is practical. This is apparent from the provision that "each county hereafter organized, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation." The Constitution of the United States provides that "the number of representatives shall not exceed one for every 30,000, but each state shall have at least one representative." Under the first census, which showed the total number of free persons, with three fifths of the slaves, to be 3,606,897, Congress fixed the number of representatives at 120, being one for every 30,000. In the apportionment, Massachusetts was entitled to 15 representatives, with an excess of 25,327, for which she was given an additional representative. Other states with a similar large excess were treated likewise, while those states which had a small excess received no additional representation therefor. President Washington, by the advice of Jefferson, Randolph, and Madison, vetoed the bill as unconstitutional, giving the following reasons: "*First*. The Constitution has prescribed that representatives shall be apportioned among the several states according to their respective numbers; and there is no one proportion or divisor which, applied to the respective members of the states, will yield the number and allotment of representatives proposed by the bill. *Second*. The Constitution has also provided that the number of representatives shall not exceed one for every 30,000, which restriction is by the context and by a fair and obvious construction to be applied to the separate and respective numbers of the state, and the bill has allotted to eight of the states more than one for every 30,000."

A county having an excess of only about one fourth of the ratio is not, in the language of the Constitution, "equitably entitled to two or more senators," while the district composed of eight counties, and containing nearly two and a half times the population of each district into which the former county is divided, receives but one senator. Equity has no definition applicable to such a case. It was never contemplated that one elector should possess two or three times more influence, in the person of a representative or senator, than another elector in another district. Each, in so far as it is practicable, is, under the Constitution, pos-

sessed of equal power and influence. Equality in such matters lies at the basis of our free government. It is guaranteed, not only by the Constitution, but by the Ordinance of 1787, organizing the territory out of which the state of Michigan was carved. *State v. Cunningham, supra*.

Aside from considerations of equity and justice, it is apparent that the framers of the Constitution understood that a county, to be entitled to two senators, must have a ratio, and a moiety of a ratio, of population. Constitutional Debates of 1850, pp. 119, 123, 361, 368, 374, 886, 113. The state cannot be divided into senatorial districts with mathematical exactness, nor does the Constitution require it. It requires the exercise on the part of the Legislature of an honest and fair discretion in apportioning the districts so as to preserve, as near as may be, the equality of representation. This constitutional discretion was not exercised in the Apportionment Act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can make the demonstration plainer. There is no difficulty in making an apportionment which shall satisfy the demand of the Constitution. It is not the purpose or province of this court to inquire into the motives of the Legislature. Courts will not discuss the motives of legislative bodies except as they appear in the public acts or journals of such bodies. The validity of an Act does not depend upon the motive for its passage. The duty of a court begins with the inquiry into the constitutionality of the law, and ends with a determination of that question. The petition prays that the respondent be directed to give notice of the election under the Apportionment Act of 1885. The constitutionality of this Act is therefore directly involved in the controversy, unless it be held to be removed from question by the fact that the people have acquiesced in its validity by acting under it for three elections. It must be conceded that this Act is affected with the same constitutional infirmity as the Act of 1891. It is unnecessary to determine whether such infirmity exists to an equal or a greater or less degree. It is sufficient to say that it is not in accord with the Constitution, and for the same reasons which apply to the Act of 1891. It is therefore insisted with great force by the attorney-general that no election should be ordered under the former Act, and he also urges in consequence that no relief can be granted. It is also said by him that, so far as he has examined other Apportionment Acts, they are all subject to the same objection. Under his reasoning it would follow that, if the Act of 1891 is held to be void, there is no remedy except the executive of the state decides to call a special session of the Legislature. In such case there would be no apportionment law under which the people might elect a Legislature. While the Constitution requires the Legislature to rearrange the districts at the next session after each enumeration, yet we are of the opinion that each Apportionment Act remains in force until it is supplanted by a subsequent valid Act. It was my opinion

that the respondent should be directed to give notice under the Act of 1886, inasmuch as the people have acquiesced in its validity by so long acting under it. But I yield my opinion to that of my brethren, who are of the opinion that the notice should be given under the Law of 1881, the validity of which is not here brought in controversy, unless the executive should call a special session of the Legislature.

Our conclusions therefore are:

1. That the petition is properly brought into this court by the relator.
2. The court has jurisdiction in the matter.
3. The Apportionment Acts of 1891 and 1885 are unconstitutional and void.
4. The writ of mandamus must issue restraining the respondent from issuing the notice of election under the Act of 1891, and directing him to issue the notice under the Apportionment Act of 1881, unless the executive of the state shall call a special session of the Legislature to make a new apportionment before the time expires for giving such notice. No costs will be allowed.

Long and Montgomery, JJ., concurred with **Grant, J.**

Morse, Ch. J., concurring:

It is evidently contemplated by the Constitution that the county shall be the essential factor in the formation of senatorial districts. "No county shall be divided in the formation of senatorial districts unless such county shall be equitably entitled to two or more senators," is the prevailing idea of the organic provision. It is further contemplated that such districts shall be arranged according to the "number of white inhabitants and civilized persons of Indian descent, not members of any tribe." This equality of representation, however, is secondary to and hampered by the fact that no county can be divided, and a part of it attached to another county, or the part of another county, in order to make the districts equal, or nearly so, in population. This express inhibition against the division of a county gives, necessarily, great latitude to the legislative discretion, and the senatorial districts must of necessity not be as equally divided as to population as might be done if county lines could be disregarded. The Legislature undoubtedly could take a partisan advantage by making choice of different counties, and joining them together in one senatorial district, when such counties were contiguous; so that one Legislature of one political complexion might put, for instance, Macomb and St. Clair in one district, while another of a different political complexion might join Macomb with Lapeer, and St. Clair with some other adjoining county, and not violate any constitutional rights of the electors of such districts. But, as shown by *Mr. Justice Grant*, the Legislature in the senatorial apportionment of 1891 went far beyond any legitimate discretion, and violated the rules of equity when it was not necessary, or even proper, to do so, because of the fact that a county could

not be divided. The twenty-seventh and twenty-ninth districts lie contiguous to each other, so that there was no excuse for putting 97,830 in one and only 40,038 in the other. The senatorial apportionment of 1891 and 1885, which are before us, so that we are compelled to examine them, were neither of them arranged in view of the Constitution or the rights of the electors of this state.

While it is true that the motive of an Act need not be inquired into to test its constitutionality, I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering which has become so common, and has so long been indulged in, without rebuke, that it threatens, not only the peace of the people, but the permanency of our free institutions. The courts alone, in this respect, can save the rights of the people and give to them a fair count and equality in representation. It has been demonstrated that the people themselves cannot right this wrong. They may change the political majority in the Legislature, as they have often done, but the new majority proceeds at once to make an apportionment in the interests of its party, as unequal and politically vicious as the one that it repeals. There is not an intelligent school boy but knows what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the Constitution, and in utter disregard of the rights of the citizen. Take our own state for example. In the election of 1884, the Republican candidate for secretary of state had a plurality of 4,883 out of a total vote of 401,308. The Republican majority in the Legislature of 1885 arranged the senatorial districts so that upon the vote of 1884, twenty-one were Republican and eleven were Democratic. In eight districts a population of 316,578 were given the same representation in the Senate as are 582,222 people in eight other districts. The upper peninsula, with Emmet and Mackinac counties added, is given three senators, when it is only entitled to two; the population of the three districts—thirtieth, thirty-first, thirty-second—combined, being 124,680, and the ratio 61,125. In 1890 the Democratic candidate for secretary of state received a plurality of 2,704 over the Republican candidate in a total vote of 398,611, and the Democratic majority in the Legislature of 1891 apportioned the senatorial districts so that on the basis of the vote of 1890, 21 were Democratic and 11 Republican. As shown by *Mr. Justice Grant*, these districts were so divided that in eight of them a population of 349,056 has the same representation as 695,717 in eight other districts, and in order to aid this inequality, the county of Saginaw is divided into two districts, when it was only entitled to one under the Constitution. It will thus be seen that upon a plurality of less than 5,000 in a total vote of about 400,000, each of these political parties has so gerrymandered these senatorial districts that each has twenty-one senatorial districts to eleven of the other. If permitted to con-

tinue in this kind of business, the next Legislature, to apportion senators, if its political complexion should be different from the last, following in the footsteps of its predecessors, will easily change the figures about again, and give its party twenty-one senators and the other the eleven. It is time to stop it. And the citizen has the right to appeal to the court in defense of his most sacred rights under the Constitution. He cannot be obliged to wait for prosecuting attorneys or the attorney-general. It is as well a public as a private grievance, and the individual elector can invoke the aid of the court in his own behalf, and call attention also to the existence of a great public wrong. There is no higher privilege granted to the citizen of a free country than the right of equal suffrage, and thereby to an equal representation in the making and administration of the laws of the land. Under our state Constitution the right of the elector is fixed. To him equal representation is a right, as well as a privilege, of which the Legislature cannot deprive him. These wrongs have been committed for partisan purposes. Their object and effect have been to deprive the majority of the people of their will in the administration of the government. The greatest danger to our free institutions lies to-day in this direction. By this system of gerrymandering, if permitted, a political party may control for years the government, against the wishes, protests, and votes of a majority of the people of the state, each Legislature, chosen by such means, perpetuating its political power by like legislation from one apportionment to another. We have been obliged, under the issue here made, to investigate but two apportionments—those of 1891 and 1885. Both are tarred with the same stick. We do not care to go further, since there is a remedy in the hands of the executive and Legislature. The consequences of this decision are not for us. It is our duty to declare the law, to point out the invasion of the Constitution, and to forbid it. I agree with the result as announced in the opinion of *Mr. Justice Grant*.

McGrath, J., concurring:

I desire to express my hearty concurrence in the views expressed by my brethren. The purpose of the constitutional enactment is to secure as nearly as possible equality of representation. Any apportionment which defeats that purpose is vicious, contrary not only to the letter, but to the spirit, of our institutions and subversive of popular government. Power secured or perpetuated by unconstitutional methods is power usurped, and usurpation of power is a menace to free institutions. The greatest danger to the republic is not from ignorance, but from machinations to defeat the expression of the popular will. The population of the state, according to the last enumeration made by the authority of the United States, is 2,089,889. The ratio for each senator is 65,434. The following is a sketch of the division of the lower peninsula into senatorial districts by the Act of 1891: [See page 408.]

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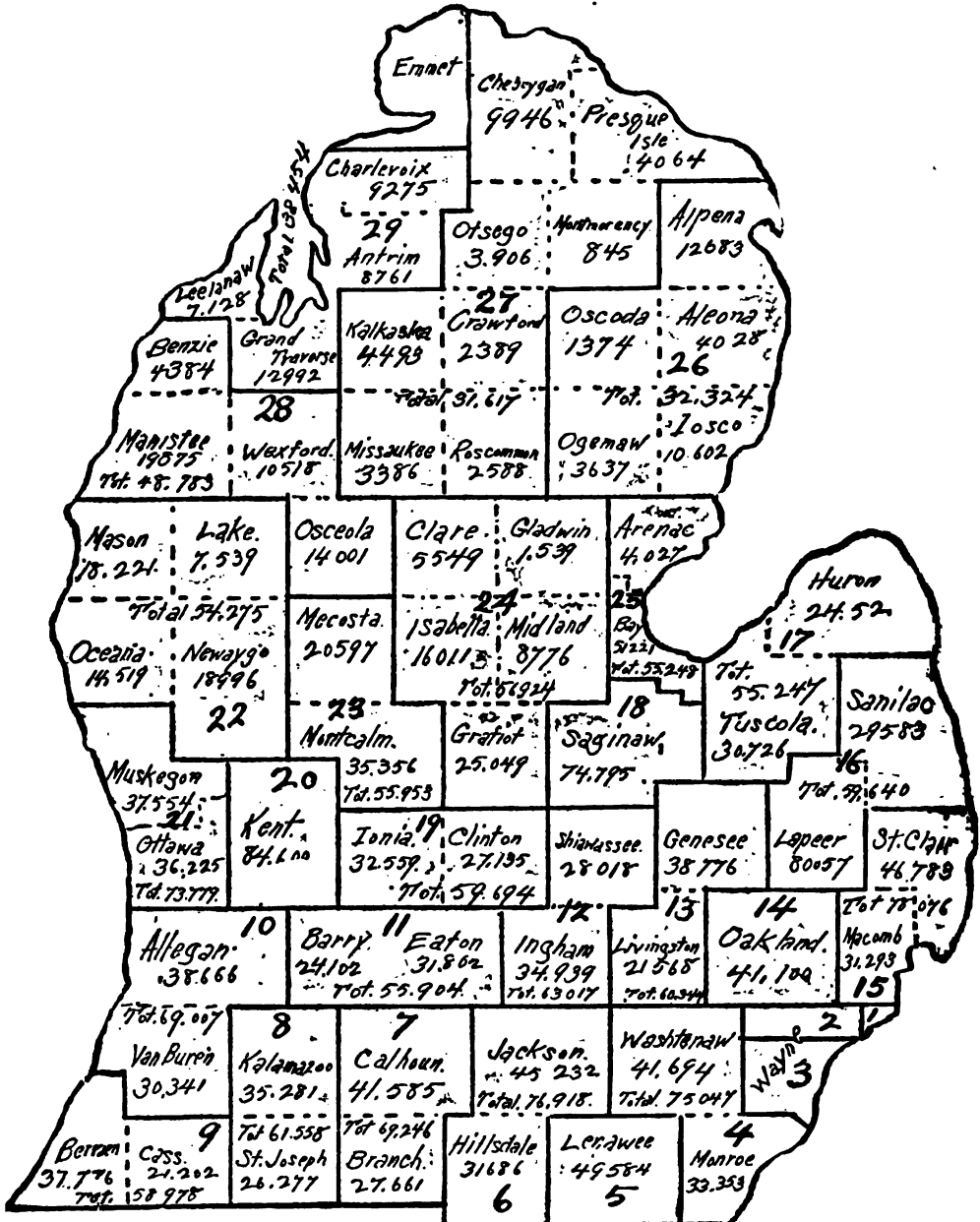
The population of each county is given with the total population of each district. The county of Wayne has a population of 257,114, and is divided into four districts. Emmet county is attached in the apportionment to the upper peninsula. It will be seen that eight of the districts so formed are populated as follows: 97,330, 91,420, 88,678, 86,129, 84,694, 82,697, 82,556, 82,213; making a total population of 695,717. Thus but 1,912, less than one third of the population of the state, have but one fourth of the total number of senators.

Eight other districts have a population of 849,056, and with but a little over 16½ per cent of the population they have 25 per cent of the representation in the Senate. Four of the first named have a total population of 863,557, while four of the last named have but 168,115. Any one of the first five named have more than double the population of any one of four of the last named. The first four have a population of 863,557, or 14,501 more than the last-named eight, yet the 849,056 persons have eight representatives in the Senate while 863,557 have but four. Why should the twenty-two contiguous counties forming the twenty-seventh, twenty-eighth, and twenty-ninth districts be so divided that five, having a population of but 43,701, are given one senator, and eight, having a population of but 40,083, are given another, while nine having a population of 97,320, or 13,586 more than both of the other districts, is given but one? Why should the twenty-eighth or twenty-ninth districts, having, respectively, a population of 40,083 and 43,701, be each allotted one senator, and St. Clair, with a population of 52,105, be united with Sanilac, so as to make a population of 84,694, or more than both of said districts; or Jackson, with 45,031, be united with Ingham, making a population of 82,697; or Kalamazoo and St. Joseph, with an aggregate population of 64,629, be united with Branch, so as to make a population of 91,420; or Ionia and Eaton, with 64,895, be added to Barry, making a total of 88,678; or Berrien, with 41,285, be united with Cass; or Bay, with 56,412, be united with Gladwin and Arenac; or Muskegon, with its 40,013, be united with Ottawa? Why should Saginaw be divided so as to give two senators to 82,273 persons, and nine counties be joined—as in the twenty-seventh district—to restrict 97,320 persons to one representative in the Senate; or three be joined, as in the seventh, to restrict 91,420 persons to one; or six be united, as in the thirty-first, to restrict 82,213 to a single senator; or three be joined, as in the eighteenth, to restrict 86,129 to one senator; or three, as in the fourteenth, to restrict 88,678; or four, as in the twenty-fifth, to confine 82,556 persons to a single senator; or why should Bay, with 56,412, or St. Clair, with 52,105, be joined with another county? Any two of the counties in the seventh or fourteenth or twenty fifth have a population in excess of either of the Saginaw districts, yet in each case those counties are joined.

But the law of 1885 is equally vicious. [See page 409.] The population of the state was 1,853,658, and the ratio 57,526. Under that apportionment 41 per cent of the population

population of 151,178, were given four senators, or one to each 37,794 inhabitants, each lacking over 20,000 of the ratio; and if Lake and Mason had been added they would have been entitled to but three; while St. Clair, Washtenaw, Jackson, and Bay, with 184,980

were each joined with another county and denied the right of sole representation. The eighteen counties in the twenty-sixth, twenty-seventh, and twenty-ninth districts had 102,395 inhabitants, or one ratio and 76 per cent of a second, and were accorded three



inhabitants, were practically given but two. Alpena, Oscoda, Alcona, Ogemaw, and Iosco, with less than 58 per cent of the ratio, were given one senator, while Bay, with nearly 89 per cent, Jackson with 77 per cent, St. Clair, with over 80 per cent, and Washtenaw, with nearly 72 per cent, of the ratio,

representatives in the senate; while St. Clair, Macomb, Jackson, Hillsdale, Monroe, and Washtenaw, with 280,041 inhabitants, were accorded but three. Such laws breed disrespect for all law, for law-makers become law-breakers.

MISSOURI SUPREME COURT (1st Div.).

Eugene C. TITTMAN, Public Administrator in Charge of the Estate of Michael Carroll, *Repts.*,

John THORNTON *et al.*, *Appts.*

(.....Mo.....)

1. Suit in a foreign state on a judgment recovered by an administrator in the state of his appointment may be maintained by him in his own name.
2. After the death of an administrator suing in his own name in a foreign state upon a judgment obtained in the state of his appointment, the suit may be revived in the name of his administrator appointed under the laws of the foreign state.
3. To entitle a bill of sale to admission in evidence its execution must be proved according to the laws of the state where it is offered, notwithstanding it purports to have been executed in a state whose laws make acknowledgments of instruments of its class which have been recorded valid and it is proved to have been recorded.
4. That a bill of sale was acknowledged before a notary public there or elsewhere does not prove its execution in Missouri.
5. A transcript of a record from another state properly authenticated by certificates of the judge and clerk of court as required by Act of Congress, which shows that the record is among those of the court of which they are officers, is prima facie admissible in evidence although the record itself purports to belong to another court; it will be presumed to be in the right office until the contrary is made to appear.
6. Insolvency is shown prima facie so as to justify a suit in equity in a foreign state to reach property of a judgment debtor, by testimony of one of his neighbors that he owned a homestead of five acres on which he resided, a cow or two, and was reported to have a legacy in the foreign state, and of his attorney that he knew of no property owned by the debtor where the suit was brought.
7. Surprise occasioned by the refusal to admit a bill of sale in evidence because not proved to have been properly executed is not a good cause for new trial where such proof could have been procured by the use of ordinary diligence.

(December 7, 1891.)

A PPEAL by defendants from a judgment of the Circuit Court for the city of St. Louis in favor of plaintiff in an action brought to compel payment of a judgment out of a fund held in trust for the judgment debtor. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. J. P. Garesche and Edmond A. B. Garesche, for appellants:
By the death of Michael Carroll the admin-

istrator, his letters are revoked and the suit must be revived in the name of the real party in interest, the representative of the estate of John Carroll.

Hill, *Trustees*, Am. Notes, p. 462, § 303, *note*; *Shook v. Shook*, 19 Barb. 656.

Executors or administrators have only a title to the possession which right expires on the revocation of their letters, by death or otherwise, and on this revocation the possessory title passes to the successor in the administration and, under exceptional cases, to the heirs.

Hill, *Trustees*, Am. Notes, p. 65; *Lessing v. Vertrees*, 82 Mo. 436; *Chandler v. Stevenson*, 68 Mo. 450; *Re Ames*, 52 Mo. 298; *Hanenkamp v. Borgmiser*, 82 Mo. 570; *State v. Thornton*, 56 Mo. 324; *McCarty v. Hall*, 18 Mo. 480.

The administrator of Michael Carroll has no standing in court.

2 Wms. Exrs. Perkins' Am. Notes; *Fletcher v. Sanders*, 7 Dana, 245; *Lea v. Hopkins*, 7 Pa. 385; *Russell v. Erwin*, 41 Ala. 262; *State v. Murray*, 8 Ark. 199.

Upon the death of a plaintiff suing as executor or administrator a revivor should be in the name of the administrator *d. b. n.* and not of the plaintiff's own personal representative. And in general an action brought to recover assets by a general executor or administrator, who afterwards dies, resigns, or is removed, may be revived in the name of his successor.

Schouler, Exrs. & Adms. § 409, bottom p. 480, citing *notes 6, 7*; *Brasfield v. Cardwell*, 76 Tenn. 253; *Russell v. Irwin* and *State v. Murray*, *supra*; *Harbin v. Levi*, 6 Ala. 408; *Sherts v. Peabody*, 6 Blackf. 122, 38 Am. Dec. 182; *Morse v. Clayton*, 18 Smedes & M. 380; *King v. Green*, 2 Stew. (Ala.) 135; *Cummings v. Edmundson*, 6 Port. (Ala.) 145; *Gambis v. Hamilton*, 7 Mo. 469; *State v. Hunter*, 15 Mo. 490; *Scott v. Crews*, 72 Mo. 268; *Morehouse v. Ware*, 78 Mo. 100.

The ancient authorities cited by plaintiff are inapplicable by reason of two statutory changes:

1st. That abolishing the restriction of administrator *d. b. n.* and leaving him absolute right to recover every asset of the estate even those in the hands of former administrator not accounted for.

2d. That requiring every suit to be in name of real party in interest. In this instance the party interested is the estate of John Carroll, deceased, and the claim to be reclaimed by an administrator—here properly appointed in lieu of Michael Carroll, deceased, the former administrator.

Burdyné v. Mackey, 7 Mo. 374.

The transcript of the record of the deed was valid according to our own statute, and the presumption was that the law of Iowa was alike.

Johnston v. Gawtry, 83 Mo. 339.

Mr. Edward Cunningham, Jr., for respondent:

When an executor or administrator has sued

NOTE.—The right of a foreign executor or administrator to sue on a judgment which he has recovered in another jurisdiction may be well regarded as established by the decisions although 16 L. R. A.

denied in Georgia. See *Buck v. Johnson*, 67 Ga. 82.

The decisions supporting the right are most of them cited in the report of the main case.

upon a debt or liability due his testator or intestate and has recovered judgment, he may, in his individual name and capacity, sue upon that judgment in a foreign state.

Woerner, Am. Law of Administration, § 162; Freem. Judgm. 8d ed. § 217; *Talmage v. Chapel*, 16 Mass. 71; *Barton v. Higgins*, 41 Md. 546; *Rucks v. Taylor*, 49 Miss. 560; *Lewis v. Adams*, 70 Cal. 407, 59 Am. Rep. 428; *Nichols v. Smith*, 7 Hun, 580; *Biddle v. Wilkins*, 26 U. S. 1 Pet. 686, 7 L. ed. 815; *Moorman v. Bender*, 80 Mo. 584; *Hall v. Harrison*, 21 Mo. 230, 64 Am. Dec. 225; *Thomas v. Relfe*, 9 Mo. 878; *Lacompte v. Seargeant*, 7 Mo. 351; *Wilkinson v. Culver*, 25 Fed. Rep. 689; *Newberry v. Robinson*, 86 Fed. Rep. 841; *Cherry v. Speight*, 28 Tex. 520; *Rittenhouse v. Ammerman*, 64 Mo. 199, 27 Am. Rep. 215.

There was no error of the trial court in reviving the suit in the name of Michael Carroll's administrator.

Abbott v. Miller, 10 Mo. 141; *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131; *Cook v. Holmes*, 29 Mo. 61, 77 Am. Dec. 548; *Block v. Dorman*, 51 Mo. 31; *Brooks v. Martin*, 69 Mo. 58; *Snider v. Adams Exp. Co.* 77 Mo. 528.

The trial court was right in overruling defendants' motion for a new trial notwithstanding counsel's affidavit of surprise and mistake. There was no surprise or mistake within the meaning of section 8704, Rev. Stat. 1879.

Pretwell v. Laffoon, 77 Mo. 26.

Black, J., delivered the opinion of the court:

This was a suit in equity, brought by Michael Carroll against John Thornton and others to subject certain funds in the hands of Archbishop Kenrick, belonging to Thornton, to the payment of a judgment which Carroll recovered against Thornton in the state of Iowa. The following are the principal facts: Michael Carroll recovered a judgment against John Thornton in the circuit court of Dubuque county, Iowa, on the 16th June, 1881, for the sum of \$4,499. The pleadings in that case show that the cause was carried on in the name of Michael Carroll, as if it had been a suit in his own right; but it appears from the body of the petition that the cause of action was based upon an indebtedness of Thornton as guardian of his ward, John Carroll. An amendment to the petition states that Michael Carroll was the administrator of the estate of John Carroll. In May, 1886, Michael Carroll commenced this suit in this state against John Thornton and Peter Richard Kenrick. The petition, among other things, sets up the Iowa judgment as one recovered by Michael Carroll in his own right. It is alleged that another John Thornton, at the city of St. Louis, the uncle of the defendant Thornton, bequeathed to the defendant Kenrick the sum of \$20,000, in trust to pay to defendant Thornton the interest thereon during his life, and prays that Kenrick, the trustee, be decreed to pay to the plaintiff the interest then accrued and thereafter to accrue on said fund until the judgment so recovered by the plaintiff in Iowa should be satisfied. Thornton, having been notified by publication, appeared, and by his answer disclaimed any interest in the fund, and on the suggestion of Kenrick one Duggan

was made a defendant. Duggan, by his answer, claims to be the owner of the income accrued and to accrue on said fund by virtue of an assignment of the same by Thornton to May Thornton, and a bequest of the same by her to him. The plaintiff died while this cause was pending in the circuit court, and by consent of the defendants it was revived in the name of Tittman, public administrator, having in charge the estate of Michael Carroll. The circuit court found the issue for the plaintiff, and entered a decree as prayed for, and the defendants appealed.

1. The first complaint is that the circuit court erred in admitting in evidence the transcript of the Iowa judgment. The objections made to the transcript are (1) that it shows a judgment in favor of Michael Carroll as administrator of John Carroll, while the petition declares upon a judgment in favor of Michael Carroll in his own right; (2) that this cause should have been revived in the name of the representative of John Carroll, and not in the name of the administrator of Michael Carroll. Looking to the judgment only as it appears in the transcript, it is one in favor of Michael Carroll in his own right. Still the transcript as a whole shows that he recovered the same in the capacity of administrator of John Carroll, and we shall treat it as a judgment in favor of Michael Carroll as administrator of John Carroll. It has been held by this court on several occasions that when one takes a note, payable to himself as executor or administrator, he may sue upon the note in his own name, and that a suit may be maintained thereon by his executor or administrator. *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Cook v. Holmes*, 29 Mo. 61, 77 Am. Dec. 548; *Block v. Dorman*, 51 Mo. 31. The theory of these cases is that when one takes a note or other obligation payable to himself as executor or administrator, he thereby makes himself a trustee of an express trust, and under the Code may sue thereon in his own name. Should such a person die, resign his letters of administration, or be removed, and the note or other obligation be turned over to the administrator *de bonis non*, the latter may, of course, sue thereon. But there are many cases where the suit may be maintained either by the trustee or by the beneficiary. *Moorman v. Bender*, 80 Mo. 579; *Chouteau v. Boughton*, 100 Mo. 406, and cases cited. But here the administrator appointed in Iowa recovered the judgment against the defendant Thornton, and then brought this suit, based on that judgment, in his own name, in this state, and this he had a right to do. *Hall v. Harrison*, 21 Mo. 227, 64 Am. Dec. 225. An administrator who has recovered a judgment in the state where he received his appointment may sue upon the judgment in his own name in a different state. Says Freeman: "There can scarcely be a doubt that a judgment rendered in favor of an administrator so merges the debt that it may be treated as his personal effect, so far as to authorize him to maintain suit thereon in a foreign country without there taking out letters of administration." Freem. Judgm. 8d ed. § 217. The following cases are to the same effect: *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 428; *Rucks v. Taylor*, 49 Miss. 552;

Barton v. Higgins, 41 Md. 539. Michael Carroll could not prosecute a suit in this state as administrator appointed under the laws of Iowa, but, having recovered a judgment as administrator in that state, he may sue upon the same in this state in his individual capacity. His right to recover here does not depend upon proof of his letters of administration. As he may sue here in his individual capacity, it must follow that the suit may be revived in the name of his administrator, appointed under the laws of this state. The court, therefore, did not err in admitting the transcript in evidence.

2. The next complaint is that the court erred in excluding the assignment from John Thornton to May Thornton, and the transcript of the will of May Thornton, both of which were offered in evidence by the defendants. It is upon this evidence the defendant Duggan depends for title to the income arising from the trust fund. This assignment, excluded by the court, is in the form of a deed executed by John Thornton, of Dubuque county, Iowa, on the 1st March, 1864, and was acknowledged on the same day before a notary public of that county and state. It professes to transfer to May Thornton, who was the wife of John Thornton, his interest in the income arising from the fund before mentioned, held by the defendant Kenrick in this state, and several horses, cows, and wagons. The court excluded the deed, on the objection that the signature of Thornton had not been proved. Thereupon the defendant read in evidence a single section of the statute law of Iowa, which provides, in substance, that acknowledgments of deeds, mortgages, and other instruments in writing, taken prior to the 18th of April, 1872, and which have been recorded, are declared "to be legal and valid," any law to the contrary notwithstanding. The defendants then again offered the instrument in evidence, but it was then discovered that the recorder had not signed the certificate indorsed thereon, stating that the instrument had been recorded. The defendants then read in evidence part of the deposition of Mr. Graham, which deposition had been taken and filed by the plaintiff, in which he, in substance, says: "Am an attorney at law at Dubuque, Iowa. Have never seen the assignment, but have seen what purports to be a copy of it on the records in the recorder's office. The instrument, if properly acknowledged according to the Laws of 1864, was entitled to be recorded, and is properly recorded." The defendant then for the third time offered the instrument in evidence, but it was excluded on the objection that there was no proof of its execution by Thornton. It is to be observed, in the first place, that defendants did not produce a copy of the Iowa record, certified either under the Act of Congress or under section 4844, Rev. Stat. 1889, of this state. Nor did they produce or offer in evidence a sworn copy of such record. The statutes just mentioned make records and exemplifications of office-books kept in any public office of a sister state, not appertaining to a court, evidence, when certified as therein specified. These statutes, however, have reference to the records of a sister state and exemplifications of such records. They do not,

as we understand them, make the original instrument evidence; for the original instrument is no more than a private document, so that a copy of it would not be evidence under either of the before-mentioned statutes. *Karr v. Jackson*, 28 Mo. 316. Concede, therefore, that the evidence of Graham is sufficient to show that this instrument was recorded in Iowa, still that does not help the defendants. The defendants offered in evidence, not a record of a sister state, but the original bill of sale, assigning the income of a trust fund which is located in this state. The original bill of sale must be proved according to the laws of this state. The fact that it had been recorded in Iowa does not dispense with proof of its execution. We have no statute which authorizes the acknowledgment of such a document, and the fact that it is acknowledged before a notary public here or elsewhere does not prove its execution. The appellants have not cited us to a statute or single authority which has the least tendency to show that this assignment should have been admitted in evidence without proof of its execution. The court, we conclude, did not err in excluding it.

3. The next complaint is that the court erred in excluding the transcript of the will, and the probate thereof, of May Thornton. It seems to have been excluded on the ground that the certificates were made by a clerk and a judge of a court other than that in which the will was probated. The transcript does show that the will was admitted to probate by the circuit court of Dubuque county, Iowa, on the 26th of October, 1880. To this transcript there are attached the following certificates: *First*. A certificate of the clerk of the district court of that county and state, in which he says "that the foregoing is a true copy of the last will and testament of May Thornton, deceased, and the certificate of probate thereof, as the same appear of record and on file in my office at Dubuque, Iowa." This certificate is dated 26th January, 1887. *Second*. A certificate of the judge of the district court to the effect that the certificate of the clerk is in due form. *Third*. Another certificate of the clerk, of the same date as the first, to the effect that the person who signed the second certificate is judge of the district court, and his signature genuine. *Fourth*. A further certificate of the clerk of the district court of date the 18th February, 1887, to the effect that the circuit court was abolished on the 1st January, 1887, and the jurisdiction and records thereof transferred to the district court. The only authentication required by the Act of Congress is the certificate of the clerk and that of the judge; and when the court in which the proceedings were had has been abolished, and the records transferred to the custody of another court, the certificates of the clerk and judge of the court to which the records have been transferred will be sufficient. *Manning v. Hogan*, 26 Mo. 570. Had the clerk, in his first certificate, followed by the certificate of the judge as it is, stated the fact that the circuit court had been abolished, and the records transferred to the district court, we think the certificates should be received as prima facie evidence of the fact thus stated. But the first certificate, as it is, shows that the will and the probate thereof

constituted part of the records of the district court, and from this it should be presumed that they were there of right, and belonged to that office, until the contrary is made to appear. The trial court therefore erred in excluding this transcript.

4. It is insisted that there is no sufficient proof of the insolvency of the defendant Thornton, and hence no foundation laid for this proceeding in equity. The plaintiff produced the only evidence offered on this issue. It shows that Thornton was a nonresident of this state, and that he resided in Dubuque county, Iowa. A Mr. Carson, of that place, testified that he had known Thornton for thirty years. That Thornton owned a homestead of five acres, on which he resided; a cow or two; and was reported to have a legacy in St. Louis. That he did not know of any other property, real or personal, owned by him. The attorney for the defendants in this case, being called by the plaintiff, testified that he did not know the defendant Thornton until called into the present case; that he knew of no property owned by Thornton in this state. We think this evidence is *prima facie* sufficient, to show the insolvency of Thornton, or at least to show that the legacy is the only property out of which the plaintiff's debt can be made.

5. Finally it is insisted in the brief of the appellants that a new trial should have been awarded on the ground of surprise in excluding the assignment, due to the mistakes of counsel in not discovering the fact that the

recorder had not signed the certificate indorsed thereon. We have before treated this assignment as if the certificate had been duly signed, and have held that the certificate, properly signed, would not have made the assignment evidence without proof of its execution by Thornton. There could, therefore, have been no surprise arising from the fact that the certificate was not signed by the recorder. The exclusion of the assignment is due to the failure to make any proof of its execution. This proof could have been procured by the use of ordinary diligence. This court in *Fretwell v. Laffoon*, 77 Mo. 26, approved the following statement made in 8 *Graham & Waterman on New Trials*: "If the surprise was owing to the least want of diligence, the applicant will be without sufficient excuse, and his motion will be denied. It is a condition precedent to his attaining relief that he shall be wholly free from blame." Page 949. Surprise produced by the laches of a party is never a good cause for new trial. These rules applied to the case in hand, it must follow that there was no surprise for which a new trial can be awarded.

6. Without this assignment, the will becomes immaterial, and we cannot see any ground upon which this court can, of right, award a new trial.

The judgment is therefore affirmed.

Sherwood, Ch. J., not sitting. The other Judges concur.

Rehearing denied.

SOUTH DAKOTA SUPREME COURT.

STATE of South Dakota, *ex rel.* A. E.
HITCHCOCK,

v.

Ed. F. HEWITT *et al.*

(.....S. Dak.....)

1. Where an officer is appointed for a definite term, subject to removal for specified causes, he can be so removed only after notice to him of the cause assigned, and an opportunity given him to defend.
2. A trustee of the state agricultural college appointed by the board of regents of education, as provided by section 4, art. 14, of the Constitution, is not a "state officer," within the meaning of section 3, art. 16, of the Constitution, providing that "state officers" are liable to impeachment.
3. The Constitution, sec. 4, art. 16, having specified the causes for which such trustee may be removed, section 5, chap. 6, Laws 1890, authorizing the board of regents to remove trustees for "sufficient cause," must be understood to mean by "sufficient cause" one or more of the causes so enumerated in the constitutional provision referred to.

(July 18, 1892.)

*Head notes by KELLAM, P. J.

NOTE.—For note on the validity of a summary removal of an officer, see *Trainor v. Wayne County Board of Auditors* (Mich.) 15 L. R. A. 95.
16 L. R. A.

APPPLICATION for a writ of mandamus to compel defendants as members of the Board of Regents of Education to restore relation to the office of trustee of the Agricultural College, from which they had made an alleged illegal attempt to remove him. *Granted*.
The facts are stated in the opinion.

Mr. A. E. Hitchcock, for relator:

Mandamus is the proper form of proceeding to correct a wrongful removal from office, and to restore to the enjoyment of his office a person who has been improperly deprived thereof.

High, Extr. Legal Rem. 2d ed. p. 68; S. Dak. C. L. § 5517; *Kennedy v. San Francisco Board of Education*, 82 Cal. 488; *Driscoll v. Jones* (S. Dak.) March 1, 1890; *State v. Shakespeare*, 43 La. Ann. 92; *State v. Atlantic City*, 8 L. R. A. 697, 59 N. J. L. 382.

The power of removal conferred upon an executive officer on board cannot be exercised summarily, *ex parte*, without notice, charges, and an opportunity for defense.

Ex parte Ramshay, 18 Q. B. 173; *Reg. v. Canterbury*, 1 El. & El. 545; *Cipel v. Child*, 2 Cramp. & J. 558; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128; *Ham v. Boston Board of Police*, 2 New Eng. Rep. 642, 142 Mass. 90; *State v. St. Louis*, 6 West. Rep. 464, 90 Mo. 19; *Com. v. Skifer*, 25 Pa. 28, 64 Am. Dec. 680; *Biggs v. McBride*, 5 L. R. A. 115, 17 Or. 640; *People v. Board of Fire Comrs.* 72 N. Y. 445.

The statute giving authority to the regents

board to remove trustees is in conflict with the state Constitution; the Constitution fixes definitely the term of a trustee for five years; removal can only be made under impeachment proceedings by the Legislature.

S. Dak. Const. art. 14, § 4; art. 16, §§ 1, 3, 4.

The construction of these sections in reference to the question under consideration raises two inquiries:

1st. Does the office of trustee come under the classification of "the governor and all other state officers" found in section 3, article 16?

2d. Is the provision found in the same section which says the various officers "shall be liable to impeachment" a prohibition upon the Legislature providing other means for removing state officers?

The words "all other state officers" includes the office of trustee, and a trustee is liable to impeachment.

2 Tomlin, Law Dict.; *United States v. Hartwell*, 78 U. S. 6 Wall. 885, 18 L. ed. 890; *United States v. Lockwood*, 1 Pinn. 868; 5 Wait, Act. & Def. p. 1; *Removal of Public Officers*, 25 Am. L. Rev. 201.

The office was created to manage certain affairs of a state educational institution. The institution is the property of the state, and is supported by state funds; the trustee is paid his compensation as are other certain state officers, by presenting his vouchers to the state auditor and receiving a warrant drawn upon the state treasury.

Laws 1890, chap. 6, § 7.

Under all recognized language and terms the board of trustees are state officials.

Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128.

Being classed as a state officer a trustee becomes liable to impeachment under the express terms of the Constitution.

The Constitution having created the office, fixed definitely its tenure and provided the manner by which the officers could be removed, by implication the Legislature is prohibited from enacting any other manner of removal than that prescribed by the Constitution.

Removal of Public Officers, 25 Am. L. Rev. 201; *State v. Com.* 3 Met. (Ky.) 287; *Page v. Hardin*, 8 B. Mon. 648; *Brown v. Grocer*, 6 Bush, 1; *Com. v. Gamble*, 63 Pa. 342, 1 Am. Rep. 422; *State v. Draper*, 50 Mo. 353; *State v. Thoman*, 10 Kan. 191; *State v. McNeely*, 24 La. Ann. 19; 5 Wait, Act. & Def. p. 12; *Com. v. Sutherland*, 3 Serg. & R. 145; Cooley, Const. Lim. 6th ed. p. 78. See also *People v. Draper*, 15 N. Y. 533; *State v. Williams*, 5 Wis. 308; *State v. Baker*, 88 Wis. 71.

Mr. Robert Dollard, Atty-Gen., for respondents:

While it is probably true, as contended by the relator, that the preponderance of authority is against the removal of an officer for cause, whose term of office is fixed by law, without formal charges and a hearing thereon on timely notice, it is held otherwise in Illinois.

People v. Mays, 5 West. Rep. 141, 117 Ill. 257. And our own Supreme Court in *Territory v. Coz*, 6 Dak. 501, held to the contrary. 16 L. R. A.

In the same case as well as in *People v. Stuart*, 74 Mich. 411; *State v. Olson*, 15 Neb. 247, and *Donahue v. Will County*, 100 Ill. 94, it was held that the exercise of such power was not judicial in its character.

The legislative department has decided the question of its power to make such a provision and until this court is satisfied beyond a reasonable doubt that in doing so it transgressed the constitutional limitation, its action cannot be set aside.

Cooley, Const. Lim. 221.

Kellam, P. J., delivered the opinion of the court:

This is an original application to this court for a writ of mandamus; the attorney-general, in behalf of the state, resisting the application on the merits, but filing a written expression of his opinion that the questions involved are of such public interest, and their early settlement so important, that they should be entertained and determined by this court in the first instance. The affidavit of the relator recites the following facts as the foundation of his application for the writ: That in the month of March, 1891, at a regular and lawful meeting of the board of regents of education of the state of South Dakota, he then being eligible, relator was duly and legally appointed and elected a member of the board of trustees for the South Dakota Agricultural College, located at Brookings, for the term of five years; that he immediately qualified, and entered upon the discharge of his duties as a member of said board, and has ever since so continued; that on or about the 7th day of January, 1892, at a regular meeting, the said board of regents passed and adopted a resolution and order summarily removing said relator from said office of trustee of said agricultural college; that relator was not notified in any manner that said board would take action upon any such resolution or order, nor that any charges or complaint had been made against his official conduct; that the first and only notice relator received that such action was contemplated, or would be or had been taken, was a written notice thereof, signed by the secretary of said board of regents, informing this relator that he had been "relieved from duty as a trustee of said agricultural college by dismissal by authority of law and for cause;" that said board of regents has ever since refused, and still refuses, to recognize this relator as a member of said board of trustees of the agricultural college, or to allow him to further perform the duties of said office; that there is no incumbent of the office from which this relator was thus removed, and this relator desires to continue and perform the duties of said office; and that there is no plain, speedy, and adequate remedy in the ordinary course of law. Upon this affidavit relator asks a writ of mandamus requiring the said board of regents of education to restore him to the use and enjoyment of the office of trustee of said agricultural college. The attorney-general, upon the part of the state, filed a demurrer to this affidavit, on the ground that it did not state facts consti-

tuting a cause of action, or which entitled relator to relief.

The plaintiff, or relator, contends that the resolution and action of the board of regents were unauthorized and illegal for at least two reasons: (1) Conceding the authority of the board of regents to determine whether cause for removal existed, and then to act upon such conclusion, it could not legally exercise the power of removal, *ex parte*, or without investigation, after notice to plaintiff, and (2) that the statute authorizing the board of regents to remove trustees is in conflict with the Constitution, and is therefore void.

Both the board of regents of education and the board of trustees for the several educational institutions are constitutional boards. Section 3, art. 14, of the Constitution, provides that "the state university, the agricultural college, the normal schools, and all other educational institutions that may be sustained in whole or in part by the state, shall be under the control of a board of nine members, appointed by the governor and confirmed by the Senate, to be designated the 'regents of education,'" etc. Section 4 provides that "the regents shall appoint a board of five members for each institution under their control, to be designated the 'board of trustees.'" They shall hold office for five years, one member retiring annually," etc. Chapter 6 of the Law of 1890 is supplementary to these constitutional provisions, and designed to carry them into execution. Section 5 of said chapter 6 provides: "Said board of regents shall have power to remove any or all of such trustees for sufficient cause." Section 8, in enumerating the powers and duties of said board of regents, gives them "full power at all times . . . to inquire and examine into . . . the official conduct of the trustees," etc. Section 11 authorizes such regents, or any one of them, "to administer oaths, and examine any person or persons in relation to any matters connected with the inquiries authorized by this Act."

The relator's alleged grievance is that the board of regents, assuming to act under these provisions of said chapter 6, determined upon, and, so far as they could do so, effected, his dismissal and removal from his said office of trustee, without any notice to him, or knowledge on his part that such action was contemplated, and without any opportunity given him to be heard in his defense. The attorney-general concedes that the preponderance of authority is against the power to remove for cause an officer whose term of office is fixed by law, without notice to him and an opportunity to be heard, but suggests that this question was very thoroughly discussed by Chief Justice Tripp in *Territory v. Cox*, published in appendix to 6 Dak. 501; and the conclusion reached by that learned judge was in favor of the power of removal without notice, unless the law authorizing removal required notice. Not being the judgment of the supreme bench, the opinion is not claimed to govern under the rule of *stare decisis*. We have examined

the opinion with great interest, both because of the acknowledged ability of its author, and because we found it a very thorough and elaborate discussion of questions closely connected with the one now presented to us. In the *Cox Case*, however, the question was whether or not, under the statute involved, the governor had the power of removal. It was a question of power rather than of the manner of its exercise. The statement of facts does not show whether the removed trustees had previous notice, and opportunity to appear before the governor, or not, but it does affirmatively appear that such executive action was only taken after investigation. Besides, in the decision of that case much importance was attached to the phraseology of the law under which the governor acted in making the removal. By it he was authorized, "at his discretion, to take such action for the public security as the exigency may demand." So that whatever authority was conferred was to be exercised at his discretion, and the case did not present the same question in this respect as would have been presented if such removal were only authorized to be made for cause shown. At all events, the controlling question in this case was not even an important question in that, if, indeed, a question at all.

We do not think it necessary, or even important, upon the first branch of this case, to discuss the abstract question whether, under statutes like this, the power of removal, or the proceedings by which its accomplishment is reached, are more distinctly judicial or executive. Such provisions have been a part of the statute law of England and of the American states for a century, and we shall at present confine our effort to ascertaining, if possible, how such provisions have usually been construed with respect to the exercise of the power of removal summarily, and without notice to the officer proceeded against, and, if we find that any particular construction or meaning has with great uniformity been given to such statutes, it will be entirely fair and reasonable to conclude that our own Legislature enacted this law intending and expecting that it would and ought to be so construed. The history of judicial proceedings in England affords numerous examples of the attempted exercise of this power of removal in an *ex parte* manner.

The *Ramsday Case*, 18 Q. B. 178, was one in which the Lord Chancellor undertook to summarily remove a judge of a county court under a statute authorizing him to make such removal for inability or misbehavior. The court, by Lord Campbell, *Ch. J.*, said: "The chancellor has authority to remove a judge of a county court only on the implied condition, prescribed by the principles of eternal justice, that he hears the party accused."

The case of *Reg. v. Canterbury*, 1 El. & El. 545, arose under an Act of parliament providing that a curate whose license had been revoked by the bishop might appeal to the archbishop, who should confirm or annul such revocation as to him should appear just and proper. An appeal was taken to the arch-

bishop, who, without giving the appellant an opportunity to be heard, confirmed the revocation. The court said: "No doubt the bishop acted most conscientiously, and with a sincere desire to promote the interests of the church, but we all think he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice that no man should be condemned without being heard."

In *Williams v. Bagot*, 8 Barn. & C. 785, Mr. Justice Bayley said: "It is contrary to common justice that a party should be concluded unheard." *Capel v. Ohild*, 2 Crompt. & J. 558, is in the same line. The court said: "A party has a right to be heard, for the purpose of explaining his conduct." The same views are expressed in *Baggs' Case*, 11 Coke, 98, and in *Gaskin's Case*, 8 T. R. 209. In this country, while the adjudications of the courts have not been absolutely uniform, they clearly preponderate in the same direction as the English authorities already noticed.

In his work on Municipal Corporations, (vol. 1, 4th ed. § 250,) Judge Dillon expresses the following opinion: "When an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But when the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal cannot . . . be exercised unless there be a formulated charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charge, and an opportunity given to the party of making defense."

In the early case of *Page v. Hardin*, 8 B. Mon. 648, where the governor of Kentucky undertook to decide that the secretary of state had abandoned his office, the tenure of which was good behavior during the term for which he was appointed, and commissioned another person in his place, no notice was given to Hardin, the incumbent, previous to the action of the governor. Chief Justice Marshall, in delivering the opinion of the court, said: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office, and we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good name and standing, implies a charge, and trial and judgment, with the opportunity of defense and proof."

In *Com. v. Skifer*, 35 Pa. 23, 64 Am. Dec. 680, an adjutant-general had been appointed for a specified term, subject, however, to a statute providing that "whenever in the opinion of the governor, the adjutant-general fails and neglects faithfully to perform the duties of his office, the governor shall remove him from office." During such term the governor appointed another to the office and this action was an application by the first ap

pointee for a mandamus to compel payment of his salary. No notice was given to him of any claimed neglect of duty prior to the appointment of his successor, and the court said: "We are unwilling to believe the governor intended without cause to remove an officer appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded, but the power is to be exercised upon cause shown. It exists only where the officer 'fails and neglects faithfully to perform the duties of his office.' It is true that the executive is made the judge, and that his opinion or judgment is conclusive as far as relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense. The reputation and the right of the incumbent to the office for the term specified in his commission are involved, and he has a right to know the accusation, and to be heard in his defense." The same court reiterated the same rule as to necessity for notice, where the removal could only be made for cause, in *Pfeild v. Com.* 32 Pa. 478.

In *State v. St. Louis*, 90 Mo. 19, 6 West. Rep. 464, the general rule as to removal of public officers is thus stated: "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal must be for cause, the power of removal can only be exercised when charges are made against the accused, and after notice, with a reasonable opportunity to be heard before the officer or body having the power to remove." And again, in the same opinion, the court says: "When the removal is not discretionary, but must be for a cause, as is the case here, and nothing is said as to the procedure, a specification of the charges, notice, and an opportunity to be heard are essential."

Dullam v. Willson, 58 Mich. 392, 51 Am. Rep. 128, was a case where the governor undertook to summarily remove without notice one of the trustees of the state institution for educating the deaf and dumb, on the ground of official misconduct and habitual neglect of duty, as stated in a paper filed with the secretary of state, and served on such officer after such removal. A statute authorized the governor to remove certain officers, including the one involved, for "official misconduct, or habitual or willful neglect of duty." The Constitution of the state also imposed upon the governor the duty of examining into the condition and administration of public officers, and authorized him to remove any such officer for gross neglect of duty, or for corrupt conduct in office, or other misfeasance or malfeasance therein. The question was whether the governor had legally exercised the power of removal. While the court held that the power of determining whether any of the specified causes of removal existed or not was judicial in its nature, still such power properly belonged to and might be exercised by the gov-

error because expressly conferred upon him by the Constitution; but it was further distinctly held that such power could not be properly exercised without notice to the officer to be proceeded against, and an opportunity given him to be heard in his defense. The court said: "Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte*, as well as summary, a removal without charges, notice, and an opportunity for defense could not be upheld. . . . The officer is entitled to know the particular acts and neglect of duty, or corrupt conduct, or other acts relied upon as constituting malfeasance or misfeasance in office. And he is entitled to a reasonable notice of the place and time when an opportunity will be given him for a hearing, and he has a right to produce proof on such hearing."

Ham v. Boston, 142 Mass. 90, 2 New Eng. Rep. 642, declares the same rule. Under a statute authorizing the board of police to remove any officer or member of the department for cause, the court held that such power could not be exercised by the board without assigning a cause for such removal, and giving to such officer or member an opportunity to be heard thereon. The court granted the mandamus restoring the petitioner to office, on the ground that "he was improperly removed, no hearing having been accorded him."

In the recent case of *Denver v. Darrow*, 18 Colo. 460, the court held that, where an alderman had been elected for two years, and had qualified, the board of aldermen, which by law was made the sole judge of the qualifications of its members, could not remove such incumbent from office, upon the ground of disqualification, without notice to him, and an opportunity afforded him to make defense against such charge. The same rule, requiring notice and investigation preliminary to the valid exercise of the power of removal for cause, was maintained or recognized in the following cases: *State v. Bryce*, 7 Ohio, pt. 2, 83; *Carter v. Durango City Council* (Colo.) 27 Pac. Rep. 1057; *Hallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408; *Murdock v. Phillips Academy*, 12 Pick. 244.

It will be observed, from examination of these cases, that the importance of notice and opportunity to defend does not at all depend upon whether the power of removal is regarded as judicial or executive. Notice is declared to be essential by courts holding either view. In *Biggs v. McBride*, 17 Or. 640, 5 L. R. A. 115, the court declined to decide whether such power was judicial or executive, but said: "It is believed under either view, and by whomsoever the power of removal for cause may be exercised, it must be done on notice to the delinquent of the particular charges against him, and an opportunity given him to be heard in his defense." While the courts of Illinois, and possibly other states, have not concurred in this rule, but held that, in the absence of any procedure prescribed by statute, the removal may be summary and *ex parte*, we are satisfied the weight of authority is in favor

of the right of the incumbent holding office for a definite term, but subject to removal for cause, to be notified of proceedings for his removal, of the cause assigned therefor, and to have an opportunity for defense. The Constitution fixes the term of office of the trustee in this case at five years, subject only to the condition that he is removable for certain specified causes enumerated in section 4, art. 16; and when section 5, chap. 6, of the Laws of 1890, authorizes the board of regents to remove trustees for "sufficient cause," it must be understood that "sufficient cause" means one or more of the causes so enumerated in the constitutional provision referred to. It being admitted in this case that no notice or information was given relator by which he could then, or can even now, know whether the reasons for his removal were such as might legally be considered "sufficient cause," and no opportunity given him to disprove or explain what might otherwise appear to be sufficient cause, but that the action of the board of regents was entirely *ex parte*, we hold such action invalid and void, and that the relator is entitled to a peremptory writ of mandamus as prayed for.

This conclusion, of course, disposes of this case; but we are asked by both sides to express an opinion upon petitioner's second proposition, that the Act of the Legislature authorizing the board of regents to remove trustees for cause is in conflict with the Constitution, and that the removals can only be made by impeachment and trial thereunder. With reference to impeachment, the Constitution (art. 16, § 8) provides that "the governor, and all other state and judicial officers, except county judges, justices of the peace, and police magistrates, shall be liable to impeachment," etc.; and section 4: "All officers not liable to impeachment shall be subject to removal for misconduct . . . or gross incompetency, in such manner as may be provided by law." Is a member of the board of trustees of one of the educational institutions of the state a "state officer," within the meaning of section 8, so that he is only removable by impeachment and trial by the Senate? We think not. We are of the opinion that the term "state officers," as used in said section, includes only such general officers as immediately belong to one of the three constituent branches of the state government. "Impeachment in the United States being a matter of constitutional provision, (repeated in the Constitutions of all the states,) is held to apply not only to the chief executive magistrate, but to other civil officers. In relation to the last named, however, it has never been extended to any not belonging to one of the three constitutional departments." Ord. Const. Leg. 448. The Constitutions of many of the states contain the same language as our own, defining what officers are subject to impeachment, but, so far as we have observed, such language has not been taken to include officers who hold by appointment either by the governor or some supervising board, authorized to make such selection and appointment. For instance, the Con-

stitution of Iowa makes "the governor, judges of the supreme and district courts, and other state officers" liable to removal by impeachment; and then provides, as does ours, that "all other civil officers" may be tried and removed in such manner as the General Assembly may provide. Their statute then provides that the state penitentiary shall be governed by a warden, elected by joint ballot of the General Assembly, and fixes his term of office at two years. Now, no reason is readily apparent that would make one of a board of trustees, selected and appointed by the board of regents, a state officer, that would not make the warden of the penitentiary selected and appointed by ballot in the state Legislature, a state officer; and yet the warden is not regarded by the law-making department of Iowa as a "state officer," within the meaning of the constitutional article on impeachment, for it is expressly provided by statute that the governor may remove him for official misfeasance or malfeasance. Similar conditions exist in other states, demonstrating the fact that trustees or superintending officers of state institutions, receiving their office not directly from the people, but by appointment from other officers or boards for subordinate administrative purposes, are not understood to be included in the term "state officers," as used in the constitutional article on impeachment. We think this view is both reasonable and fortunate. In nearly every state Constitution, as in the Federal Constitution, the causes for which a public officer may be impeached are criminal offenses only. This may be as far as it is prudent to go in the case of the heads of distinct departments of the government, but, in the case of subordinate administrative officers, the understanding has been very general, judging

from the legislation of the different states, which appears to have been unchallenged, where provisions respecting impeachment are like our own, that it is not only wise, but allowable under such constitutional provisions, to make such officers removable for incompetency, and perhaps other causes not constituting criminal offenses. Whether the power to remove is essentially judicial or executive in its nature was not discussed by counsel, nor do we express any opinion upon that question generally. It would seem, however, that such question could not be practically important in this case, for the reason that the Constitution itself, by which alone it must be determined when and by whom either the judicial or executive power may be exercised, has expressly committed to the Legislature the whole subject of the removal of all officers not liable to impeachment. Section 4, art. 16. Acting under this general authority, the Legislature has provided for the removal of such officers, and it could not well be objected that in so doing judicial functions had been committed to nonjudicial officers, for the Constitution has expressly authorized it, if the Legislature in its judgment shall so provide. The power of the Legislature to provide in what manner nonimpeachable officers may be removed is plenary, and is just as definitely and authoritatively announced as is the division of the aggregate powers of the state into judicial, executive, and legislative, and their distribution among different officers and agencies of the state for execution. All of these constitutional provisions must be construed together, and each is qualified by the other.

Let the peremptory writ of mandamus issue,
as asked for by relator.

All the Judges concur.

ARKANSAS SUPREME COURT.

BOARD OF IMPROVEMENT OF
STREET GRADING AND PAVING
DISTRICT NO. 46, of the City OF LIT-
TLE ROCK, *Appt.*,

v.

SCHOOL DISTRICT OF LITTLE ROCK.

(.....Ark.....)

1. A constitutional exemption of property used exclusively for public purposes such as churches, schools, buildings, etc., applies only to taxes for general purposes of revenue, and has no reference to special taxes as assessments for local improvements.

2. Public school-houses are not liable to assessment for local improvements under the general provision in a statute for the assessment of "all the real property situated in the district."

(Cookrill, Ch. J., dissents.)

NOTE.—The review of the authorities on the question of an implied exemption of public property from local assessments seems to be very fully made by the opinion and briefs of counsel above reported.

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(June 11, 1882.)

A PPEAL by plaintiff from a decree of the Chancery Court for Pulaski County in favor of defendant in an action brought to enforce payment of a street improvement assessment. *Affirmed.*

The facts are stated in the opinion.

Mr. William G. Whipple, for appellant:

The only exception to the generality of our statute, which, in terms, includes "all real property within the district," is that of public property used for governmental purposes.

Mansf. Dig. § 825.

Exemption from ordinary taxation does not carry with it exemption from local assessments. (Const. art. 19, § 27; *Cooley, Taxn.* 1st ed. p. 147; *Adams County v. Quincy*, 6 L. R. A. 156, 180 Ill. 566; *First Presby. Church v. Ft. Wayne*, 36 Ind. 328, 10 Am. Rep. 86, and cases cited.)

Statutes of exemption, even from ordinary taxation, are to be strictly construed.

2 Dillon, *Mun. Corp.* §§ 776, 777.

Churches, though by the statute exempt from general taxation, are liable to local assessment.

Cooley, Taxn. 1st ed. p. 458; *First Presby. Church v. Ft. Wayne, supra*; *Re City of New York*, 11 Johns. 77; Elliott, Roads & Streets, p. 408; 1 Desty, Taxn. p. 121; *Northern Liberties v. St. John's Church*, 18 Pa. 104; *Second Universalist Soc. v. Providence*, 6 R. I. 235; *Le Fevre v. Detroit*, 2 Mich. 587; *Methodist E. Church v. Ellis*, 88 Ind. 8; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; *Atlanta v. First Presby. Church* (Ga.) 12 L. R. A. 852.

Hospitals, asylums, and other charitable institutions come under the same head, and are held liable to local assessments, though they may be exempted from general taxation.

Cooley, Taxn. p. 458; *Cincinnati College v. State*, 19 Ohio, 110; *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1; *Sheehan v. Good Samaritan Hospital*, 60 Mo. 158, 11 Am. Rep. 412; *Chicago v. Baptist Theological Union*, 8 West. Rep. 96, 115 Ill. 245; *Re St. Joseph's Asylum*, 69 N.Y. 853; *Boston Seaman's Friend Soc. v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; Elliott, Roads & Streets, p. 408.

Even cemeteries are brought within the same rule, and held subject to local assessments, and they are "cities of the dead" as completely denuded of all possible secular uses and purposes as it is possible for anything earthly to be. But such is the rule.

Elliott, Roads & Streets, p. 40; Cooley, Taxn. p. 458; *Baltimore v. Green Mount Cemetery Co.*, 7 Md. 517; *Buffalo City Cemetery v. Buffalo*, 48 N. Y. 506.

The same doctrine applies to institutions of learning.

Elliott, Roads & Streets, p. 408; Cooley, Taxn. p. 458; *Re College Street*, 8 R. I. 474.

Exemption from all taxation in the charters of schools will not exempt them from assessment for local improvements.

Desty, Taxn. p. 121.

While a school district is a public corporation in some senses it is not a municipal corporation.

1 Dillon, Mun. Corp. § 22; Elliott, Roads & Streets, p. 408; *Fitzgerald v. Walker*, 55 Ark. 149.

The school-master is not a public officer invested in the government of the school with public authority.

Lander v. Seaver, 82 Vt. 114, 76 Am. Dec. 157.

What court or text-writer has ever spoken of schools as "local instrumentalities of government?"

Cooley, Taxn. p. 458.

A city may levy and collect a special tax upon the property of a school district situated within its limits for the purpose of building a sidewalk in front of such property.

1 Desty, Taxn. p. 121; *St. Louis Pub. Schools v. St. Louis*, 26 Mo. 468; *Sioux City v. Ind. School Dist. of Sioux City*, 55 Iowa, 150.

Taxation is the rule, and exemption the exception, and, therefore, strict construction of the statute under which the exemption is claimed is the rule.

Griswold College v. State, 46 Iowa, 275; Cooley, Taxn. 146.

Mr. Morris M. Cohn, for appellee:

Under our statutes the property held by school districts is not owned by them, but is held by the city. All property and revenues 16 L. R. A.

which may come into the possession of the school district are held in trust for specific purposes which are designated, and the same cannot be used for any other purpose, however unnecessary the purpose designated may be, and however meritorious the unauthorized object may be.

It was certainly not the purpose of the Act relating to the creation of local improvement districts to change these principles. Nor did said Act provide a separate and distinct fund from which the state, county, the city, or the school district could meet any payment for local improvement which might incidentally benefit property owned or held by any of these in any local improvement district.

The failing to make such provision for a fund rendered any attempt of the Legislature (if such had been made), to subject the property of the state and its subdivisions to assessment for such local improvements, unconstitutional and abortive.

The Constitution (art. 14, §§ 1, 8,) provides that "the General Assembly may authorize school districts to levy a tax not to exceed five mills on the dollar in any one year for school purposes. Provided, further, that no such tax shall be appropriated to any other purpose, nor to any other district, than that for which it is levied."

Manuf. Dig. § 6120.

In the absence of any statutory provisions, upon general propositions of law, it is anomalous to speak of taxing or assessing the property of a public political body.

An exemption from taxation in the case of eleemosynary or religious corporation, and the like, may not refer to local assessments; as little as a constitutional provision against special taxation may relate to the license exacted by a municipal corporation.

See *Washington v. State*, 18 Ark. 752; *McGehee v. Mathis*, 21 Ark. 40, 50 et seq., and authorities cited. See also *Worcester Agr. Soc. v. Worcester*, 116 Mass. 189.

But local political sub-divisions, like the state, are not subject to taxation, unless expressly made so.

Cooley, Taxn. 1876, p. 180; *Louisville v. Com.* 1 Duv. 295; *Boone County v. Keck*, 31 Ark. 387.

School districts are by statute quasi public corporations.

School District No. 11 v. Williams, 88 Ark. 454; *Granger v. Pulaski County*, 26 Ark. 37. See also 1 Dill. Mun. Corp. 4th ed. §§ 24, 25; *Harris v. Canaan School Dist. No. 10*, 28 N. H. 58; *Dartmouth Sav. Bank v. School Dist. Nos. 6 & 31*, 6 Dak. 332; Elliott, Roads & Streets, 408, 404.

While an assessment for improving a street is not in a strict sense a tax, yet it so far partakes of the nature of a tax as makes it operative only upon property subject to taxation.

Lowe v. Howard County Comrs. 94 Ind. 554; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80.

In the present case but one course of procedure is given, to enforce a statutory lien; that remedy is exclusive.

Cairo & F. R. Co. v. Turner, 31 Ark. 509; Cooley, Taxn. 1876, pp. 13, 300; *Lane County v. Oregon*, 74 U. S. 7 Wall. 80, 19 L. ed. 105,

and authorities there cited; *Burroughs*, Taxn. § 105; *Bridewell v. Morton*, 46 Ark. 73; *Worcester County v. Worcester*, 116 Mass. 193, referred to hereafter.

In *Worcester Agr. Soc. v. Worcester*, 116 Mass. 189, and *Worcester County v. Worcester*, Id. 193, we have by contrast, two cases, before the same court, relative to the same local improvement assessment, one referring to a corporation which owed its exemption from taxation to a law, and the other referring to a public political body which was not among taxable creations unless made expressly amenable to taxation by law. Here, if ever adjudged cases amounted to anything, is, then, a decision directly in point, of the persuasive character.

In *Atlanta v. First Presby. Church*, 12 L. R. A. 852, the Supreme Court of Georgia in February, 1891, had before it the question whether a law empowering municipal corporations to impose assessments for local improvements, that is, to grade, pave, macadamize and otherwise improve a street, applied to church property. It was held that such property, though exempt by law as to general taxation, was subject to this local assessment. The terms of the law were general, sufficient to embrace every character of individual or corporation. The court ruled: "That the public property of the United States, the state, the county or the city, was intended to be dealt with thus, is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be engrafted upon the Act by construction."

See also *United States v. Baltimore & O. R. Co.* 34 U. S. 17 Wall. 320, 21 L. ed. 600 *et seq.*; *Rochester v. Rush*, 80 N. Y. 302; *Schuytkill County Poor Directors v. North Manheim Twp.* *School Directors*, 42 Pa. 21; *People v. Salmon*, 51 Ill. 87; *West Hartford v. Hartford Water Comrs.* 44 Conn. 360.

School property is not liable to assessment for a street improvement; nor can a judgment be rendered against the board of education for the payment of the assessment out of its contingent fund.

Toledo v. Toledo Board of Education, 25 Ohio L. J. 81. See also *Edgerton v. Huntington School Trp.* 126 Ind. 261.

Hemingway, J., delivered the opinion of the court:

This case involves the question of the liability of a public schoolhouse to assessment under the provisions of the digest with reference to "assessing property for local improvements in cities of the first class." Mansf. Dig. § 825 *et seq.* The school board contends that the schoolhouse is not liable to such assessment, while the board of improvement contends that it is. It is conceded that the improvement district was regularly organized, and that the schoolhouse is embraced within it; the contention is that because it is a schoolhouse, belonging to a public school board, it is not liable to the assessment. The claim of exemption is placed—*First*, upon the 5th section of the 16th article of the Constitution of 1874, which provides that "public property, used exclusively for public purposes, churches used as such, cemeteries used exclusively as such, 16 L. R. A.

school buildings and apparatus, libraries, and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity, shall be exempt from taxation;" and, *second*, upon the terms of the Act that regulates the assessment of property for local improvements, and describes the property to be assessed simply as "all the real property situated in the district." We have found no difficulty in disposing of the first ground relied upon. The rule established by a consensus of authorities—text-writers and adjudged cases—is that the constitutional exemption refers alone to taxes for general purposes of revenue, and has no reference to special taxes or assessments for local improvements. If the case of *Peay v. Little Rock*, 32 Ark. 31, is an authority against it, that of *Davis v. Gaines*, 48 Ark. 370, is in support of it; and, if there be any conflict between these cases, we approve the latter, as right upon principle and in line with the authorities. Cooley, Taxn. 2d ed. p. 207, and cases cited.

As to the second ground relied upon to sustain the claim of exemption, we find the authorities divided. The argument in favor of the exemption is that as the statute in defining the property to be assessed does not expressly mention public property, nor include it by any necessary implication, the presumption is that it was not intended to be assessed. A leading case in support of the contention is *Inhabitants of Worcester County v. Worcester*, 116 Mass. 193. The question there arose upon the liability of a court-house to assessment by a sewer district. The court held that although it was not exempt by the statute, which had reference to general taxes only, it was free from taxation, because, being public property, acquired by public funds, managed by public authorities, constituting a instrumentality for the performance of public functions, it was not to be deemed a subject of taxation, either general or special, unless the intent of the Legislature to render it so clearly appeared. In the case of *Atlanta v. First Presbyterian Church*, (Ga.) 12 L. R. A. 852, the question of the liability of a church to assessment was presented to the Supreme Court of Georgia. The statute provided that all real estate abutting on the street improved should be assessed, and the contention was that churches were expressly exempted from taxation, and that, if the exemption applied to general taxes only, it implied an exemption from special taxes or assessments. The court held that the statutory exemption furnished no immunity from the special taxes, and that there was no implied exemption in favor of churches; but, in discussing the latter question, *Judge Bleckley* said: "We can be morally certain that they (the terms of the Act providing for the assessment) comprehend more than the Legislature intended they should; for they cover by their letter public as well as private property, and subject the whole alike to assessment, lien, levy, and sale. That the public property of the United States, the state, the county, or the city was intended to be dealt with thus is so improbable that we

can have no hesitation in holding that an implied exception should be engrafted upon the Act by construction."

In the case of *Baltimore County Comrs. v. Maryland Hospital*, 62 Md. 127, the question arose upon the assessment of property held by the board of managers of the state hospital for street construction. The court said "that to bind the land of the state in any way that may divest it from the state, or destroy or impair one of its established agencies or means of carrying on one of its functions, the Legislature must unequivocally give its sanction. . . . It is not material whether the state's property may be taken from it by a tax in the nature of assessment for benefits or in some other way. The danger exists in taking that which belongs to and is essential to the state; and it cannot be exposed to this danger without its direct sanction." A like conclusion has been reached by other courts. *Toledo v. Toledo Board of Education*, 25 Ohio L. J. 81; *Edgerton v. Huntington School Twp.* 126 Ind. 261; *Connecticut v. Hartford*, 49 Conn. 89.

Although a special tax or assessment is not usually embraced within the meaning of the general term "tax," the rule under which public property is presumed to be exempt from one justifies the presumption as to the other. In speaking of the latter, *Judge Cooley* says: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact." *Cooley, Taxn.* 2d ed. p. 172. It is uniformly conceded that this rule is correct when applied to general taxation. The reason sometimes given for it is the improbability that the Legislature would levy a tax upon that which results from a tax and must be replaced by a tax, and which is used for governmental purposes; another reason is found in the rule of statutory construction which presumes that the Legislature never intends to affect or transfer any governmental right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Whichever be the true reason of the rule, it is well settled, and we think it should apply alike to special and to general laws.

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If it be argued that the reasoning upon which the rule is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the tax while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the state-house and other state institutions relieves every taxable subject in the state from the burden of taxation, but it deprives the particular county or school district in which they are situate of the entire county or school tax; and so the exemption of county property from state taxes benefits the county only, and deprives the entire state of revenue; still, in all such cases, it is held that exemption is implied wherever liability is not expressed or necessarily inferred. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to special assessments. See *Endlich, Interpretation of Statutes*, §§ 161-163; *Sedgw. Stat. & Const. L.* pp. 28, 887, 521; *Suth. Stat. Constr.* p. 421; *Galveston Wharf Co. v. Galveston*, 68 Tex. 14; *Rochester v. Rush*, 80 N. Y. 302; *People v. Brooklyn Board of Assessors*, 111 N. Y. 505, 2 L. R. A. 148; *Jones v. Tatham*, 20 Pa. 398; *Schuylkill County Directors of Poor v. North Manheim Twp. School Directors*, 42 Pa. 21; 2 Dill. Mun. Corp. 4th ed. § 773; *People v. Doe*, 36 Cal. 220; *West Hartford v. Hartford Water Comrs.* 44 Conn. 360.

It is argued that, upon the authorities, exemption of public property for local assessments is denied, and cases to sustain the argument are to be found decided by high and learned courts. See *St. Louis Pub. Schools v. St. Louis*, 26 Mo. 468; *Sioux City v. Sioux City School Dist.* 55 Iowa, 150; *McLean v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 156. But in our opinion they are based upon error. The reason upon which they rest, as stated by the Supreme Court of Iowa, is that "taxation is the rule and exemption the exception," and that statutes under which exemptions are claimed must be strictly construed. To sustain this *Cooley* is cited. The same reason is given by the Supreme Court of Illinois, and *Dillon* is cited. Both courts seem to have overlooked the fact that the authors in the citations made were considering the subject with reference to private property, and had stated the rule with reference to public property to be that exemptions would be implied unless otherwise expressed. *Cooley, Taxn.* 2d ed. p. 172; 2 Dill. Mun. Corp. 4th ed. § 743.

It is argued that, even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The Constitution provides that the state shall ever maintain free public schools, and in performing this duty it exercises a function strictly public and governmental. It created school districts

and imposed upon them in part this duty, and in order to discharge it they own school-houses. They have no other duty than to perform for the state this public function, and only that they may do it is the house held. The state may abolish them, take the property, and undertake directly or through other agencies this public function. The means of controlling the property would thereby be changed, but its use would be unchanged, and there is nothing in the policy of the law to exempt the property while held and controlled by the state, which would deny the exemption while held by the state's agent, and used in the performance of its duties. *Green v. United States*, 76 U. S. 9 Wall. 655, 19 L. ed. 806, and authorities above cited. There is nothing in the Act to require the inference that it was intended to embrace public property held by the government, the state, or any of the state's subordinate agencies, and used for public purposes. It could not include the first, and this the Legislature no doubt knew; but there is as much reason to suppose that it intended to include the property of the government as that of the state. An exception must be implied as to the property of the government, and, as no appropriate remedy is provided for collecting sums due from the state or any of its agencies, there is no inference that the Legislature intended to include such property, and the presumption is that it was to be exempted.

Affirmed.

Cockrill, Ch. J., dissenting:

I do not concur in the court's judgment in this case, and do not think that the authorities relied upon sustain it. Nor does it seem to me that there is a division in the express adjudications on the question involved. The principle which underlies the difference between a tax for general benefits and a special assessment for the payment of local improvements, recognized in the opinion, should, in my judgment, resolve the present question against the school district. The former is recognized by the authorities as a continuing burden that must be submitted to for the public good, while the latter is in the nature of payment for a direct and immediate local benefit,—a *quid pro quo*,—as much as the consideration is which is agreed to be paid for the purchase of any other benefit or improvement. It is a principle of natural equity that all who enjoy the benefit shall pay for it. When the improvement is made in accordance with the statute, this obligation becomes a legal one, unless the exemption is found in the written law. No valid reason exists why the state, the county, the city, or the schools should not pay for the benefits derived by them, the same as any other property owners. *Hassan v. Rochester*, 67 N. Y. 528, 535. There ought to be no presumption that the Legislature intended to violate a principle of natural equity. It may do so when not inhibited by the Constitution, but justice to a co-ordinate department should impel us to establish the rule that inclusion and not exemption will be presumed when the Act is silent in such

cases, because the Legislature is presumed to intend to act fairly. The language of the Act is broad enough to include public property, and the only plausible reason, it seems to me, that is given for exempting it is that a governmental agency will be lost or impaired by subjecting the property of the state, county, etc., to sale to satisfy the claim. But a complete answer to that argument is that it is not necessary to resort to that remedy. The property need not be sold. No property used by a city, county, or school district in furthering the design of the origin of the corporation can be sold to satisfy a debt; but it has never been considered that that circumstance was a prohibition against liability. On the contrary, all such corporations are constantly compelled to pay their legal obligations without a sale of the public property owned by them. The cases cited by the court to sustain its judgment go no further than to hold that property, such as that in question, cannot be sold, and they do not therefore reach the question in the case. Thus, the case of *Connecticut v. Hartford*, 49 Conn. 89, and that of *Baltimore County Comrs. v. Maryland Hospital*, 62 Md. 127, were both attempts to sell the state's property, which was used for governmental purposes, to pay for a local improvement; and the efforts failed because the sale was not authorized. The case of *Worcester County v. Worcester*, 116 Mass. 193, was a like effort to deprive the county of its court-house and jail, and met with a like fate. The case of *Edgerton v. Huntington School Twp.*, 126 Ind. 261, does not seem to bear upon the question; and that of *Toledo v. Toledo Board of Education*, 25 Ohio L. J. 81, does not sustain the point to which it is cited. In the first of the two cases last cited, the court decided only that lands granted by Congress to the state for school purposes could not be subjected to direct or indirect taxation, and that the Legislature had no power to subject them to assessment for local improvement. The court relies upon a similar case in Illinois, which that court had no trouble in reconciling with the opposite of the rule it is now cited to sustain. The question of the power of the Legislature of this state to subject the land in suit to assessment for local improvement is conceded.

The case of *Toledo v. Toledo Board of Education*, is meagerly reported, and the opinion throws no light on the question at issue. It is there adjudicated, however, that the city in which the school property, which abutted the local improvement, was situated should pay the assessment thereby relieving the other abutting owners of the burden of paying the school property's *pro rata*. The city, I take it, was coextensive with the school district while the improvement district comprised but one of a large number of streets. The court therefore practically reached the conclusion contended for by the improvement board in this case. The case may then be said to sustain the board's position. Confining the language of the first three cases to the facts before the court the only rule that can legitimately be deduced

from them is that public property held for governmental purposes cannot be sold to pay for local improvements unless the sale is expressly authorized and that general language in a statute will not be deemed to be intended to change the law and authorize a sale of such property. In that rule I fully assent. It is in accord with the decisions cited from Illinois and it does not militate against the rule of a liability of the school district to be otherwise enforced as the Illinois opinions explain. All that relates to the subject in the Georgia case cited is confessedly *obiter*. The authority of Dillon and of Cooley is invoked in the opinion, but it is not and cannot be claimed that either has lent the weight of his name to maintain the judgment in this case. It is true the statute creates no remedy except by sale of the property improved. But when once it is established that there is no intention to exempt the school district from liability, the courts will devise a remedy if the Legislature has provided none, for a right never fails for lack of a remedy.

The Illinois law is the same as ours in that respect, and the question is satisfactorily met in *McLean v. Bloomington*, 106 Ill. 209, and cases cited. There is nothing in any of the cases cited by the court to militate against the doctrine that the courts will devise a remedy. The first two cases, as I have before said, were against the property of the state. As against the state the courts are powerless, for the suitor can have no remedy against the state unless it is expressly provided by the written law. The moral obligation of the state to contribute its *pro rata* of the payment due remains nevertheless, and the collection fails only because the courts are without power as against the state. *Hassan v. Rochester*, 87 N. Y. 528. The case in 116 Mass. was a proceeding by certiorari to quash the illegal levy by which it was sought to divest the county of the title to its court-house. In such cases there is no discretion in the court except to grant or deny the writ. Consequently, no other remedy could have been granted by the court in that case. The doctrine that the intention to exempt public property from taxation will be presumed,

because it is not probable that the public will tax itself to raise money to pay over to itself, is manifestly inapplicable to the case of an improvement board. The local improvement board is not the public. It is not a municipality, or a part of the governmental function; it is only an agency of the property holders for the purpose of making the required improvement and collecting the assessments to pay for it. *Fitzgerald v. Walker*, 55 Ark. 148; *Pine Bluff Water & L. Co. v. Sewer Dist. No. 1*, (Ark.) 19 S. W. Rep. 576. It is a small part only of the school district, and to collect a tax from the city at large to pay for improving the street in front of the school would not be a case of the public taxing itself to repay itself, any more than if the tax was collected from the public to pay the contractor who built the schoolhouse on the school grounds. It would be just as convincing to argue that no tax should be collected from the contractor's property, because it must be repaid to him.

But in addition to all this there is another view of the subject, which I think ought to control. The Constitution recognizes the difference between a tax and local assessment, and points out the exemptions intended to operate against the first, (art. 16, § 5,) but makes no exemption of liability to pay for the benefit derived from the local improvement, (art. 19, § 27.) Both sections are in the same instrument and were adopted at the same time. It is fair to presume that, as the framers made the exemptions in one case and made none in the other, they intended no exemptions which they did not express. *McLean v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 180 Ill. 566, 6 L. R. A. 156; *Sioux City v. Sioux City Ind. School Dist.* 55 Iowa, 150; *St. Louis Pub. Schools v. St. Louis*, 26 Mo. 468. Moreover, the command of that instrument is that assessments for local improvements shall be uniform. Where a part is exempt, uniformity is destroyed. *Davis v. Gaines*, 48 Ark. 870; *Monticello v. Banks*, Id. 251. When the Constitution has said that the assessment shall be uniform, by what rule of construction shall we say it shall not be? I think the judgment should be in favor of the improvement board.

MINNESOTA SUPREME COURT.

Thomas A. BUCKLEY, *Appl.*,

Emma A. HUMASON *et al.*, *Respts.*

(.....Minn.....)

*1. Transactions in violation of law cannot be made the foundation of a valid contract.

*Head notes by VANDERBURGH, J.

2. Where a statute or an ordinance, duly authorized and enacted, makes a particular business unlawful for unlicensed persons, any contract made in such business by one not authorized is void.

3. Where, by a valid city ordinance, it was made unlawful for any person to exercise within the city the business of a real-estate broker without a license,

NOTE.—Effect of failure to procure license for business on validity of contract therein.

Some of the statutes are so worded that there can be no doubt as to the effect upon the contract of a failure to procure a license. Some of them in 16 L. C. A.

terms make the contract void and prohibit any recovery upon it. Of course in such cases no recovery would be permitted. *Rowdre v. Carter*, 64 Miss. 221.

So if the statute prohibits a recovery of commis-

—Held, that a person so engaged in negotiating the sale or exchange of real property, in violation of such ordinance, could recover no commissions for his services.

(June 15, 1892.)

APPEAL by plaintiff from an order of the District Court for Ramsey County dis-

sions none can be had. *Smith v. Lindo*, 4 C. B. N. S. 405.

And the class of contracts which are within the prohibition seems to be large. Thus, a merchant who fails to procure his privilege license cannot recover upon a contract insuring his stock of goods against loss by fire. *Pollard v. Phoenix Ins. Co.* 63 Miss. 244.

Although, if the contract is entirely outside of the business of the one who should have procured the license it seems that it may be valid. *Harness v. Williams*, 64 Miss. 600.

Thus a bank which has not taken out a privilege license is not prohibited from recovering upon a bill of lading which has been assigned to it. *People's Bank of Meriden v. Alabama G. S. R. Co.* 65 Miss. 365.

Where contract prohibited.

No question can arise where the contract is directly prohibited. In such cases the statute will control and no recovery can be had. *Bull v. Haragan*, 17 B. Mon. 362.

The first doubt appears where a penalty is imposed simply, without any intimation of the effect which a violation of the terms of the statute will have upon the contract. In such cases it seems to be agreed upon that if the imposition of the penalty was to prohibit a particular act without license no recovery can be had for performing such act without license. *Taylor v. Crowland Gas & Coke Co.* 10 Exch. 233.

Effect of imposition of penalty.

For the purpose of determining whether or not the imposition of a penalty was intended to be prohibitory certain rules have grown up which seem to be quite uniformly recognized. And it is in the application of these rules that the apparent conflict in the cases arises.

Where the statute has in view the protection of the public health or morals, or the prevention of frauds by the person who is required to procure the license, then, though there be nothing but the penalty, a contract which infringes it cannot be supported. *De Allex v. Jones*, 37 Eng. L. & Eq. 475.

But if there was no clause making the contract of sale illegal, and the sale was at most a breach of a mere revenue regulation which was protected by a special penalty, the price may be recovered. *Johnson v. Hudson*, 11 East, 180.

Where the object of the Legislature was not to vitiate the contract, but only to impose a penalty on the person offending for the purpose of the revenue, he may recover the price of the goods sold, but he cannot if a prohibition was intended, although it was merely for the purpose of the revenue. *Smith v. Mawhood*, 14 Mees. & W. 453.

The general rule is that where the license required is for the protection of the public and to prevent improper persons from acting in a particular capacity, and is not for revenue purposes only, the imposition of the penalty amounts to a positive prohibition of a contract made in violation of the statute. *Taliaferro v. Moffett*, 54 Ga. 152.

In *Aiken v. Blaisdell*, 41 Vt. 637, a distinction is taken between a law which is intended to prohibit, prevent, restrict or regulate business, and one which operates merely on the person for the purpose of making him pay a tax, and it is held that in the latter case the contract is not void.

The courts will examine the statute as a whole to see whether or not the intention was to prohibit the act. *Solomon v. Dreschler*, 4 Minn. 273.

16 L. R. A.

And they do not always agree as to what the intention of the statute really is.

Sales of liquor.

Where the statute provided a penalty for selling liquor without a license, the court held the intention was to make a contract of sale under such circumstances illegal, and that no recovery could be had for the price, saying that there is a distinction between statutes which impose a penalty for the purpose of prohibiting a contract and those where the penalty is imposed for other purposes than that of making the contract illegal. *Lewis v. Welch*, 14 N. H. 234.

The price of liquors sold without license cannot be recovered. *Farrow v. Vedder*, 19 Ill. App. 305; *Dolson v. Hopp*, 7 Kan. 164; *Glass v. Alt*, 17 Kan. 444; *Bancroft v. Dumas*, 21 Vt. 465; *Hamilton v. Grainger*, 5 Hurlst. & N. 40; *Griffith v. Wells*, 3 Denio, 228; *Alexander v. O'Donnell*, 13 Kan. 603; *Moog v. Espalla* (Ala.) June 24, 1891.

In contrast with the above it was held in Pennsylvania that although a statute imposes a penalty on any one who shall carry on the business of a liquor dealer without having procured a license, a note given for liquor purchased from one who had no license was not void if there was no express prohibition from engaging in such business without a license. *Rahter v. First Nat. Bank of Lancaster*, 92 Pa. 363.

Contracts of agents, brokers, etc.

Whether or not the person acting as broker without license can recover his commissions depends on whether the Act requiring the license was to secure revenue or was to protect the public by preventing improper persons from acting as brokers. In the former case he can recover; in the latter he cannot. *Cope v. Rowlands*, 2 Mees. & W. 149.

Where the statute provided that the business of real-estate broker shall not be "pursued or done" without a license, a broker who without a license negotiates a sale cannot recover his commissions. *Stevenson v. Ewing*, 37 Tenn. 43.

In that case the court says that the rule that if the sole purpose of the Act is to raise revenue, the courts should so construe it as not to affect the validity of the contract made without a license, is called into requisition only when there is doubt, from the language of the statute itself, whether or not the Legislature intended to prohibit the exercise of the privilege without license.

So where the statute says it shall not be lawful for persons to exercise the business of brokers without a license, one who sold stocks without a license cannot maintain an action for his commissions. *Hustis v. Pickands*, 27 Ill. App. 270.

So an unlicensed real-estate agent subject to penalty for doing business without license cannot recover compensation under contract for such business. *Johnson v. Hulings*, 103 Pa. 493, 49 Am. Rep. 131.

Under a statute stating that no person shall without license engage in a business under a certain penalty, he cannot recover his commissions in case he does business without the license, although the act is not expressly forbidden. *Costello v. Goldbeck*, 9 Phila. 153.

But a conclusion quite the opposite seems to be reached in *Justice v. Rowand*, 10 Phila. 623.

On the other side, it has been held that an ordinance making it a misdemeanor for anyone to transact business as a house and real-estate agent

missing, after the introduction of plaintiff's evidence, an action brought to recover commissions alleged to have been earned in procuring the transfer of certain real estate. *Affirmed.*

without a license therefor will not prevent the enforcement of a contract between an unlicensed agent and a vendor which had been executed by the former. *Prince v. Eighth Street Baptist Church*, 3 West. Rep. 621, 20 Mo. App. 832.

So a traveling merchant who has subjected himself to a penalty for selling goods without a license may still recover their price if the sale is not expressly prohibited by the statute. *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433.

Contracts of physicians, surgeons, etc.

Lord Ellenborough thought that a statute requiring surgeons to be licensed was not prohibitory. *Gremare v. Le Clare Bois Valon*, 3 Campb. 144.

But in *Ope v. Rowlands*, 2 Mees & W. 149, that was held not to be a binding authority.

And it is now held that a statute imposing a penalty on a person occupying himself as a surgeon without a license will be regarded as a prohibition and he cannot recover for services rendered. *De Allex v. Jones*, 37 Eng. L. & Eq. 475.

Where the statute makes it a misdemeanor for a person to practice medicine without a license, he cannot recover compensation for services so rendered. *Gardner v. Tatum*, 81 Cal. 370.

A contract to pay a fee for services rendered by a physician who is not licensed to practice medicine is void in its inception where a statute prohibits him from practicing as a physician for fee or reward without license. *Puckett v. Alexander*, 3 L. R. A. 43, 102 N. C. 95.

Unlicensed physicians or apothecaries cannot recover. *Leman v. Housley*, L. R. 10 Q. B. 66.

United States Revenue Laws.

The courts are not agreed upon the question whether or not the United States Revenue Laws were intended to be prohibitory. On the one side it has been decided that the United States laws requiring a license for the sale of intoxicating liquors were not intended to render a sale without a license void, but were simply for raising revenue. *Corning v. Abbott*, 54 N. H. 439.

Failure by a real-estate agent to take out the license required by the Internal Revenue Law of the United States will not affect his right to recover compensation. *Buckman v. Bergholz*, 57 N. J. L. 437.

On the other side it has been held that the United States Revenue Laws requiring peddlers to be licensed are prohibitory. *Best v. Bander*, 29 How. Pr. 439.

One who has failed to take out a license under the United States Revenue Laws cannot recover for services performed in the business on which the tax is imposed, although the contract is not expressly declared void by the Act. *Holt v. Green*, 73 Pa. 200, 18 Am. Rep. 737.

Contracts in other kinds of business.

A statute requiring a license from a public cartman is prohibitory. *Ferdon v. Cunningham*, 20 How. Pr. 154.

Without a license an innkeeper cannot establish a lien on the goods of his guests. *Stanwood v. Woodward*, 35 Me. 93.

A person acting as an attorney at law without license cannot recover for his services. *Tedrick v. Hiner*, 61 Ill. 189.

16 L. R. A.

The facts are stated in the opinion.
Messrs. Stephens, O'Brien & Glenn
and *Armand Albrecht* for appellant.
Messrs. Otis & Godfrey for respondents.

The statute does not prohibit dealing in bills of exchange without a license although it imposes a penalty for so doing. *Lindsey v. Rutherford*, 17 B. Mon. 240.

Application and limitation of the rule.

The statutes will be strictly construed and a statute imposing a penalty for "carrying to sell or exposing for sale" without a license does not render void a sale so as to prevent a recovery of the price. *Jones v. Berry*, 33 N. H. 210.

An agreement to permit an unlicensed person to carry on business under the license of another cannot be enforced. *Ritchie v. Smith*, 6 C. B. 463.

A license taken by one member of a law firm will not validate contracts made on behalf of the firm by his partner. *McIver v. Clark* (Miss.) Feb. 1, 1892.

That the broker had no license will not avoid the contract between the principals. *Smith v. Lindo*, 4 C. B. N. S. 406; *Pidgeon v. Burslem*, 3 Exch. 466; *Jessopp v. Lutwyche*, 10 Exch. 614.

A new promise is not sufficient to permit a recovery for the price of liquors sold without license. *Melchoir v. McCarty*, 31 Wis. 255, 11 Am. Rep. 605.

The repeal of the statute does not validate the contract. *Anding v. Levy*, 57 Miss. 52, 34 Am. Rep. 435; *Decell v. Lewenthal*, 57 Miss. 331.

A contract by one who is not a real-estate broker to procure a purchaser for a piece of real estate is not void although such person is not licensed as a broker. *Chadwick v. Collins*, 26 Pa. 133. See also *Shepler v. Scott*, 35 Pa. 331.

Absence of license will not avoid a sale made by one who has been a traveling peddler if the sale is not made in that capacity. *Brett v. Marston*, 45 Me. 401.

Mr. Benjamin has admirably summed up the law upon this subject in his work on *Sales* (Corbin's ed.) § 825; (Bennett's 1892 ed.) § 533. His rules will in most cases furnish a ready test as to the validity of a contract, and they are therefore inserted here. They are as follows:

First.—That where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. It is enough that parliament has prohibited it, and it is therefore void.

Secondly.—That when a question is whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the Legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is, that the statute was not intended to prohibit contracts; in the latter that it was.

Thirdly.—That in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to prevent the dealing to prohibit the contract and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced. H. F. F

Vanderburgh, J., delivered the opinion of the court:

This action is brought by plaintiff to recover commissions for services as a real-estate agent or broker in procuring a purchaser for certain real estate in Chicago. The cause of action is stated as follows in the complaint: "During the year 1890 the plaintiff, at the special instance and request of the defendants, performed services for said defendants in the city of Chicago, in the state of Illinois, in and about procuring a purchaser for certain property in the state of Illinois, which said services were then and there of the reasonable value of \$4,375, and which said sum the defendants agreed and promised to pay plaintiff therefor." The plaintiff testified that at the time of the alleged services he resided in the city of Chicago. The transactions referred to occurred there, and the negotiations were there concluded, and the contract and purchase were consummated in that city, and the plaintiff claims to be entitled to the usual commissions charged and received in Chicago for such services. He also testified that he had been previously engaged in the real-estate business in Chicago, as an agent, and sold and exchanged property for others on commission; and the transaction in question appears clearly enough to have been in the line of his regular business as a real-estate agent or broker. In this connection we must observe that it is admitted in the pleadings that during the year 1890, and prior thereto, an ordinance of the city of Chicago, enacted in pursuance of a statute of that state, was in force, which provided that it should not be lawful for any person to exercise within that city the business of real-estate broker, without a license therefor, and defined a "real-estate broker" as a person who, for commissions or other compensation, is engaged in the selling of or in negotiating sales of real estate belonging to others. A license fee of \$25 per annum is required to be paid by such broker, and any

person violating the provisions of the ordinance is subject to a penalty of not less than \$25, and to the same penalty for every subsequent violation thereof. The testimony shows that the plaintiff was using and exercising the business of a real-estate broker in the city of Chicago during the time in question, and in performing the services for which a recovery is sought in this action. It was made unlawful for him to do so by the terms of the ordinance referred to. It was not at all material that the parties for whom he negotiated a sale agreed to take property in St. Paul in payment or exchange for the Chicago property of which plaintiff negotiated a sale, and for which he found a purchaser. The ordinance, which is set out in full in the answer, was valid, and the case as presented by the evidence clearly falls within it. *Braun v. Chicago*, 110 Ill. 187. It has the force of law within the city of Chicago. *Bott v. Pratt*, 83 Minn. 323, 53 Am. Rep. 47. The particular transaction in question was therefore in violation of law, unless he was duly licensed, which was not shown. On the contrary, the answer alleges, and it stands admitted, for want of a reply, that the plaintiff was not duly licensed as a broker. The plaintiff cannot, therefore, recover his commissions. *Hustis v. Pickands*, 27 Ill. App. 270; *Johnson v. Hulings*, 108 Pa. 501, 49 Am. Rep. 181; *Holt v. Green*, 78 Pa. 198, 13 Am. Rep. 787. Business transactions, in violation of law, cannot be made the foundation of a valid contract; and the general rule is that where a statute makes a particular business unlawful generally, or for unlicensed persons, any contract made in such business by one not authorized is void, (Bishop, Cont. §§ 471, 547; 1 Pom. Eq. Jur. § 403;) and the contract being void where it was made and to be performed, will be so held here. (Bishop, Cont. § 1883.) The case was properly dismissed upon the evidence.

Order affirmed.

COLORADO SUPREME COURT.

J. Warren BROWN, *Plff. in Err.*,

v.

REPUBLICAN MOUNTAIN SILVER MINES, Limited.

(.....Colo.....)

- *1. Directors of a corporation are not entitled to compensation for their services as directors, unless such compensation is provided for or expressly sanctioned by the charter.
2. If a director renders services to the corporation clearly outside of his duties as a director, in pursuance of an antecedent appointment or employment by competent corporate authority,—that is, in pursuance of an express contract entered into in good faith,—and the services be such as the company may

*Head notes by ELLIOTT, J.

NOTE.—For note on the subject of the right of a director of a corporation to compensation for his services, see *Ten Eyck v. Pontiac, O. & P. A. R. Co.* (Mich.) 3 L. R. A. 378, 16 L. R. A.

legally contract for, he may recover compensation therefor.

3. **Quere, whether a director may recover at all upon an implied contract;** but,—*Held*, that he certainly cannot recover compensation for services rendered by himself to his corporation upon an implied contract, unless it be established by a clear preponderance of the evidence—*First*, that the services were clearly outside of his ordinary duties as a director; and, *second*, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation.

(May 2, 1902.)

ERROR to the District Court for Clear Creek County to review a judgment of non-suit in an action brought to recover compensation for services alleged to have been rendered by plaintiff as managing director of defendants corporation. *Affirmed.*

Statement by Elliott, J.:

Action against a mining corporation by one of its directors to recover compensation as managing director. Judgment of nonsuit. From the record it appears that the defendant below, the Republican Mountain Silver Mines, Limited, was a mining corporation organized under the laws of Great Britain, and that it was engaged in the business of mining in Clear Creek county, Colo., between the years 1880 and 1890; and, further, that J. Warren Brown, plaintiff below, was one of the directors, and also the managing director, of said company during most of said period. The plaintiff, Brown, was a resident of Freehold, N. J., and had his place of business in New York city. He first became managing director of the defendant company in 1882. In this action he sues to recover the sum of \$15,000 as the value of his services as managing director for the period of five years from May, 1884. He makes no claim for compensation as managing director for the period prior to May, 1884, but admits that he received his share of the £600 per annum provided for the directors. He claims that he did not do as much for the company as managing director prior to 1884 as he did afterwards. He bases his claim to compensation for the five years following May, 1884, upon the ground that his duties as managing director were equivalent to those of general superintendent; that he exercised the combined powers of the board of directors, though subject to the board; that is, that he filled the place of mining superintendent, and, in addition, had the general direction of the affairs of the company. The evidence, however, shows that the defendant company had a mining superintendent residing in Clear Creek county, Colo., who gave special attention to the company's business, subject, of course, to the control and direction of the plaintiff as managing director; that plaintiff generally came twice a year to Colorado to look after the business of the company, particularly to give attention to certain litigation; that he did this prior to May, 1884, as well as afterwards; and that he also made several trips between London and New York on the company's business. The defendant company reimbursed plaintiff for traveling expenses, and all expenditures of money made by him in behalf of the company, so that this suit is based entirely upon his claim for compensation for services rendered as managing director during the five years aforesaid. Plaintiff was one of the largest stockholders of the defendant company, owning about one half the entire stock, and a larger amount of the deferred stock than any other stockholder. The following extracts from the charter of the defendant company were in force during the period covered by this litigation: "Sec. 88. The office of a director shall be vacated if he accepts or holds any other office or place of profit under the company, except that of managing director, manager or agent of the company, or of a member of a local board or local committee of management. . . . Sec. 90. . . . The remuneration of the directors shall be a sum of £600 per annum, to be paid out of the profits of the company, and to be divided amongst them as they shall determine. The said remuneration

of £600 to be increased at the rate of £50 for every two per cent of yearly dividends or bonus paid to the shareholders after the first 10 per cent per annum; provided, always, that the said remuneration shall not begin to accrue until the company's mines are being worked at a profit. Sec. 91. If any director shall be called upon to go or reside abroad on the company's business, or otherwise perform extra services, the board may arrange with such director for such special remuneration for such services, either by way of salary, commission, or the payment of a stated sum of money, as they shall think fit."

Messrs. Morrison & Fillius, for plaintiff in error:

The services performed by plaintiff were not those usually performed by directors. They were the active superintending of the opening up of a large and valuable mining property, and took up, practically, the entire time of the plaintiff. In the exact language of the Supreme Court of the United States, in *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 187 U. S. 111, 34 L. ed. 618: "The character of all these services placed them outside of official duties proper."

In *Pew v. First Nat. Bank in Gloucester*, 180 Mass. 395, the language used is: "That the defendant is liable under an implied promise, if the services were valuable" and "rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Mr. Charles E. Gast, for defendant in error:

A director or officer of a corporation, in the absence of a by-law fixing his compensation, or of an express agreement to pay for his services, cannot recover the value of them on a *quantum meruit*. The rule is applicable not only to directors, but to all officers, however they may be styled, who are managers for the stockholders, thus holding a trust relation as distinguished from a mere agency. The rule originated from the common-law doctrine of trusts and has been adhered to by the courts, first, because it is sound in principle, and second, because public policy demands its enforcement for the protection of stockholders.

See *Kilpatrick v. Penrose Ferry Bridge Co.* 49 Pa. 118; *Accommodation Loan Assn. v. Stonemetz*, 29 Pa. 534; *Merrick v. Peru Coal Co.* 61 Ill. 472; *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Cheaney v. Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *Holder v. Lafayette B. & M. R. Co.* 71 Ill. 106, 23 Am. Rep. 69; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Citizens Nat. Bank v. Elliott*, 55 Iowa, 104; *Wood v. Lost Lake & C. Mfg. Co. (Or.)* March 4, 1890; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Fort Scott First Nat. Bank v. Drake*, 29 Kan. 311; *Martindale v. Wilson-Cass Co.* 134 Pa. 848; *McAvity v. Lincoln Pulp & P. Co.* 82 Me. 504; *Toponce v. Corrine Mill, O. & S. Co. (Utah)* July 12, 1890; *Mather v. Eureka Mower Co.* 118 N. Y. 629; *Ellis v. Ward* (Ill.) April 8,

1889; *Eakins v. American White Bronze Co.* 75 Mich. 568.

Elliott, J., delivered the opinion of the court:

At the close of plaintiff's evidence the district court, upon defendant's motion, rendered a judgment of nonsuit, upon the ground that plaintiff had failed to prove a sufficient case for the jury. Code, § 166. This action of the court is assigned for error, and it is the only matter urged in argument for reversal. The ground of defendant's motion for nonsuit was that there could be no recovery in the case, since there was no evidence of an express agreement or arrangement between the plaintiff, Brown, and the defendant company by which he was to have compensation for the services sued for. The doctrine is generally accepted that directors of a corporation are not entitled to compensation for their services as directors unless such compensation is provided for or expressly sanctioned by the charter. Without such authority, the directors cannot lawfully vote compensation to themselves for the performance of their ordinary duties, nor can they accomplish such end indirectly; as by designating one of their number "managing director," and giving him a salary for the performance of such ordinary duties as are devolved by the charter upon the board of directors.

If, however, a director renders services to the corporation clearly outside of his duties as a director, in pursuance of an antecedent appointment or employment by a majority of the board, and the services be such as the company may legally contract for, he may recover compensation therefor. The more stringent rule is that, to justify a recovery of compensation under such circumstances, the employment must be by express contract, as by a resolution of the board duly adopted and recorded before the services are rendered, or by other equally competent and definite evidence. Some modern decisions announce a more liberal rule, to the effect that for services rendered by a director, not embraced in his ordinary duties as such, his employment by the corporation, and its promise to pay therefor, may be implied or inferred from the facts and circumstances of the case, thus allowing a recovery as upon a *quantum meruit*. There are many reasons for adhering to the more stringent rule. Ordinarily the directors of a corporation are intrusted with extensive powers in the management of its affairs. They occupy positions of trust and confidence with reference to the corporate body and its stockholders. The relation is of a fiduciary character. Hence in the performance of their duties as representatives of the corporation, especially in matters where their individual interests are also concerned, the law exacts of them the utmost good faith and fair dealing. But, even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to his corporation upon an implied contract, unless it be established by a clear preponderance of

the evidence—*First*, that the services were clearly outside his ordinary duties as a director; and, *second*, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation. 1 *Morawetz, Priv. Corp.* §§ 508, 516; 2 *Waterman, Corp.* § 265; *Taylor, Corp.* §§ 612, 646, 647; *Loan Association v. Stonemetz*, 39 Pa. 535; *Kilpatrick v. Penrose F. Bridge Co.* 49 Pa. 118; *Martindale v. Wilson-Cass Co.* 134 Pa. 348; *Cheeny v. Lafayette, B. & M. R. Co.* 68 Ill. 570, 28 Am. Rep. 584; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Mather v. Eureka Mower Co.* 118 N. Y. 629; *McAvity v. Lincoln Pulp & P. Co.* 82 Me. 504; *Eakins v. American White Bronze Co.* 75 Mich. 568; *Citizens Nat. Bank v. Elliott*, 55 Iowa, 104; *Pew v. First Nat. Bank in Gloucester*, 130 Mass. 395; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608; *Ten Eyck v. Pontiac, O. & P. A. R. Co.* 74 Mich. 226, 3 L. R. A. 378.

It is unnecessary in this case to decide which of the rules above stated is to be preferred. The ruling of the trial court, to the effect that the plaintiff's evidence did not prove a sufficient case for the jury, was, in our opinion, correct, according to either rule. The charter, as offered in evidence, does not provide in terms that the services of a managing director shall be remunerated. The plaintiff does not base his claim upon the contingencies specified in section 90 of the charter; and there is no evidence that the board made any arrangement with plaintiff for his special remuneration, as indicated by section 91. It is not contended that the evidence shows an express contract by the defendant company to pay plaintiff for his services as director or as managing director. It is conceded that plaintiff was not entitled to compensation as managing director prior to May, 1884, though he held that position during 1883, and continuously thereafter, until the bringing of this action. It is admitted that plaintiff was reimbursed for his traveling expenses, and for all expenditures of money out of pocket made in the service of the company. He was a member of the board of directors, and attended their meetings, during the five years for which he now claims compensation, and yet no agreement or arrangement was entered into in respect to such compensation. The evidence may, perhaps, show that he gave more attention to the business of the corporation after May, 1884, than before that time; but it does not show that the character of his duties as managing director were essentially different from and after that date, nor that he at any time rendered services for the defendant company clearly outside of the proper duties of a director or of the board of directors. From all the facts and circumstances shown in evidence, it is clear that the jury would not have been justified in sustaining his claim to recover in the action upon the basis of an implied contract, even if such basis were to be held sufficient in law.

The judgment of nonsuit was therefore proper, and must be affirmed.

ILLINOIS SUPREME COURT.

ILLINOIS WATCH CASE CO., *Petitioner,*
v.Isaac N. PEARSON, Secretary of State,
et al.

(.....Ill.....)

1. A license to form a corporation under a certain name issued by the secretary of state gives such corporation the right to that name as against an already existing corporation having a different name which has passed a resolution and given notices for a meeting to vote on a change of its name to that selected by the new corporation, at least where its promoters did not know at the time of their license of the proposed change.
2. The secretary of state cannot revoke a license to form a corporation under a certain name merely because another corporation before the license was issued had called a meeting to vote on the question of adopting such name instead of that which it then had.
3. A writ of mandamus will not be issued to compel the secretary of state to receive and file a certificate of the vote of a corporation to change its name as provided by statute where this would result in the use of the same name by two corporations with a possible conflict of interests and litigation under statutes which show an intention to prevent the use of the same name by two or more corporations.

(March 26, 1892.)

PETITION for a writ of mandamus to compel the secretary of state to receive and file in his office a notice of change of name of the corporation petitioner, and also to compel him to revoke a license which he had issued to certain other persons authorizing them to organize a corporation under the name which petitioner desired to adopt. *Writ denied.*

The facts are stated in the opinion.

Messrs. Griffin & Wile for petitioner.

Messrs. W. H. & J. H. Moore & Purcell for respondents.

Magruder, Ch. J., delivered the opinion of the court:

This is a petition for mandamus, filed in this court on January 13, 1891, by the Illinois Watch Case Company, against the secretary of state, alleging, in substance, that, while it was engaged in taking such steps for the

change of its name to the "Elgin Watch Case Company," as required by the statutes of this state, certain persons, to wit, John M. Cutter, J. H. Moore, and J. A. McCormick, made and filed with the secretary of state a statement, under the Corporation Law of this state, for the purpose of forming a corporation by the name of the "Elgin Watch Case Company," and obtained a license to them as commissioners to open books for subscription to the capital stock of the "Elgin Watch Case Company," and that the petitioner, having done all that was required by law to change its name and adopt the name of the "Elgin Watch Case Company," is injured and wronged by the efforts made by such persons, and others subscribing for said stock, to organize a corporation under the same name. The prayer of the petition is that the secretary of state be commanded to file in his office the certificate theretofore presented to him, of the vote of the stockholders of the petitioner in favor of such change of name, and also that the secretary of state be required to revoke the license so issued, to open books of subscription to the capital stock of a corporation to be called the "Elgin Watch Case Company." The secretary of state filed his answer to the petition, and afterwards, upon motion and by stipulation, the said Cutter, Moore, and McCormick, and Walter T. Thompson, Albert J. Perry, and Will J. Vincent, were made defendants to the proceeding, all of whom, except the said Moore, were subscribers to the stock of the proposed new corporation. The new defendants thus brought in have filed a general demurrer to the petition.

The question presented is whether the petitioner has the better right to the use of the name "Elgin Watch Case Company," by reason of the steps taken by it to change its name, or whether the defendants, who are the proposers of the new corporation and subscribers to its capital stock, have the better right to the use of said name, by reason of the license issued, and of the proceedings had under the license. Such of the facts set up in the pleadings as are material in the consideration of the question thus presented will be recited. The steps taken by the petitioner to effect the change of its name were in accordance with the requirements of the Act of March 26, 1872, providing for changing the names of incorporated companies, and of the Act of June 14, 1887, amending section 1 thereof, and of the

NOTE.—Unlimited multiplication of corporations in recent years has already given rise to frequent conflicts in respect to names. So far as the change of a name of a corporation does not interfere with the enjoyment by another corporation of its name, it is manifestly a matter of statutory regulation, but when the assumption of a name either on organization or by subsequent change of name is likely to injure another corporation having a similar name, the courts apply substantially the same rules that govern in respect to the conflict of trade-names of individuals or partnerships.

For the name of a business establishment as part of the good-will of the business, see *note* to *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462.

16 L. R. A.

For the acquisition and use of a name by an individual, see *note* to *Lafin & R. P. Co. v. Steytler* (Pa.) 14 L. R. A. 690.

See also, as to the doctrine of *idem sonans*, *note* to *Veasey v. Brigman* (Ala.) 13 L. R. A. 541.

As to the conclusiveness of the decision of an officer who issues a certificate to a corporation allowing it to use a certain name, see *American Order of S. C. v. Merrill*, 8 L. R. A. 620, 151 Mass. 558.

For a restriction by statute on the use by foreign corporations of names similar to those of domestic corporations, see *International Trust Co. v. International L. & T. Co.* 10 L. R. A. 753, 153 Mass. 271.

Act of June 6, 1889, amending sections 1, 3, 4, and 7 thereof. 1 Starr & C. Stat. p. 624; Laws 1887, p. 132; Laws 1889, p. 95. On January 18, 1890, the directors of the Illinois Watch Case Company passed a resolution expressing a desire to change the name to the "Elgin Watch Case Company," calling a special meeting of the stockholders for February 24, 1890, and providing for the giving of notices of such meeting to the stockholders in person or by mail, and by publication. On January 20, 1890, notices were mailed to all the stockholders of the meeting to be held on February 24, 1890, to vote upon the question of the change of the name. General notice of such meeting and its object was published for three successive weeks in a Chicago newspaper, to wit, on January 21 and 28 and February 4, 1890; on February 24, 1890, a meeting of all the stockholders was held at the company's place of business in Chicago pursuant to the notice, and a resolution that the name be changed as above was adopted, all the stockholders voting for it in the mode required by the statute. The statutory certificate of the vote, verified by the affidavit of the president and under the seal of the corporation, was filed in the recorder's office of Cook county. On May 24, 1890, a like certificate was presented to the secretary of state at his office in Springfield, with a tender of the legal fee for filing the same, and a demand was then and there made upon him that he file the same, but he refused to receive and file said certificate. It is alleged in the petition that petitioner has been prevented from making the further publication required by section 5 of said Act of 1872, by reason of such refusal of the secretary of state. On January 30, 1890, said Cutter, Moore, and McCormick filed with the secretary of state the statement above mentioned, in accordance with section 2 of the Act of April 18, 1872, concerning corporations, for the purpose of forming a corporation for pecuniary profit under the name of the "Elgin Watch Case Company," with a capital stock of \$10,000, and having its principal office in Chicago; and thereupon, on the same day, the secretary of state issued the license above mentioned, to open books of subscription to the capital stock of said company. The secretary alleges in his answer that, when he issued the license, no notice had been filed in his office of the proposed change of name of the petitioner, and that he had no notice of such proposed change until he received a letter dated May 7, 1890, from one of petitioner's attorneys, inclosing a certificate of the vote of the stockholders of the petitioner "in favor of such change," and that he "then refused to permit the petitioner to file said certificate . . . solely because the name had been appropriated by other persons for another company." The petition alleges that no organization of any corporation under said license had been completed when the stockholders of the petitioner adopted a resolution for the change of name, on February 24, 1890, and that, when petitioner demanded of the secretary that he file the certificate of the vote upon said resolution, it also demanded of him that he revoke the license so issued by him, to open books of subscription, both of which demands were

refused. Accordingly, on June 7, 1890, the petitioner served upon the secretary a written notice that it had taken all the preliminary steps required by law to change its name, and that it claimed the exclusive right to the name of the "Elgin Watch Case Company;" and in which notice the secretary was notified not to issue to any other persons or "concern" any final certificate of the organization of any other incorporation by that name. On September 10, 1890, Cutter and McCormick offered to file in the secretary's office their report, as commissioners acting under said license, showing that the stock had been fully subscribed for, and that after the giving of the ten days' notice required by law a meeting of the subscribers had been held on September 5, 1890, and certain persons had been elected as directors. The petition alleges that the secretary refused to file said report or to issue a final certificate of organization. In his answer, however, he alleges that the commissioners filed their report, but that, being in doubt as to the rights of the parties, he has delayed the issuance of the final certificate, and he "submits that he had no authority to revoke the license, . . . and had no authority to file the certificate of change of name of petitioner, as demanded, or to issue any certificate of such change." The petition alleges that the petitioner, the Illinois Watch Case Company, was organized under the laws of Illinois on November 27, 1888; that its principal office was located in Chicago; that its manufacture of watches was carried on in Chicago until May 20, 1890, when its factory was removed to Elgin, in Kane county, in pursuance of plans which were matured in January, 1890. The petition also alleges that all the defendants who demur to the petition "had actual knowledge that your petitioner had taken each of the steps and had done each of the acts hereinbefore set out for changing the corporate name," "long before, at the time of, and since their alleged subscription," and at the time of the offer to file said report of the commissioners. It would appear that the subscription to the stock had not been completed until about ten days before September 5, 1890. The petition does not state at what time before such subscription the said defendants had or acquired their knowledge of petitioner's acts for the change of its name. The petition contains no averment, and therefore the demurrer thereto does not admit, that the defendants had any notice or knowledge on January 30, 1890, when they applied for and obtained the license aforesaid, of any of the steps theretofore taken by petitioner for the change of its name.

Section 1 of the Act of March 26, 1872, after providing that, whenever the board of directors of any corporation existing under the laws of this state may desire to change the name, they may call a special meeting of the stockholders to vote upon the question of such change of name, contains the following proviso: "Provided that, in changing the name of any corporation under the provisions hereof, no name shall be assumed or adopted by any corporation similar to, or liable to be mistaken for, the name of any other corporation organized under the laws of this state, without the consent of such other corporation." Sec-

tion 2 of the Act of April 18, 1872, after providing that persons proposing to form a corporation shall make, acknowledge, and file with the secretary of state a statement "setting forth the name of the proposed corporation," and the other matters therein specified, closes as follows: "The secretary of state shall thereupon issue to such persons a license as commissioners to open books for subscription to the capital stock of such corporation at such times and places as they may determine, but no license shall be issued to two companies of the same name." 1 Starr & C. Stat. p. 610; Rev. Stat. 1891, chap. 82, § 2. Although the first of the above named Acts went into force on the day of its passage, and the second not until July 1, 1872, yet they were both passed at the same session of the Legislature; and, so far as any of their provisions relate to the same subject-matter, they may be construed together. Thus construed, they plainly indicate that the intention of the Legislature was to prevent, if possible, any two or more corporations, doing business under the laws of this state, from making use of the same name. The steps required to be taken to secure a change of name must be taken by the corporation itself. Proceedings for the change are to be begun when the directors desire it. The directors call the special meeting of the stockholders to vote upon the change and give the notices of such meeting. The stockholders, by their vote, adopt or reject the proposed change. The certificate of the vote must be verified by the affidavit of the president, and must be under the seal of the corporation, and must be filed by the corporation in the offices of the secretary of state and of the recorder of the county where the principal business office is located. "Upon the filing of such certificate the change proposed and voted for at such meeting as to name . . . shall be and is hereby declared accomplished." The corporation upon filing such certificate shall cause a notice of such change to be published for three successive weeks. There is nothing necessary to be done to change the name of the corporation, which cannot be done without the aid or co-operation of the state, or of any of its officials, unless the secretary of state has the right to refuse to receive the certificate of the vote of the stockholders, or to refuse to permit it to be filed in his office, when he knows that the new name is the name of a corporation already existing or in process of organization. On the other hand, the proceedings necessary for the formation of the corporation cannot be carried on or completed without the aid of the state, acting through its secretary. The secretary of state must issue the license and the final certificate of complete organization. When there is a change of name the stockholders must see to it that the new name adopted by them is not similar to, or liable to be mistaken for, the name of any other corporation organized under the laws of the state. When a new corporation is formed the secretary of state must see to it that a license is not issued to two corporations having the same name. The duty of avoiding the use of the same name by two corporations is imposed by both of the foregoing Acts. The principal act in

effecting a change of name is the vote of the stockholders in adopting the new name. If they are forbidden to adopt a name similar to that of any other corporation organized under the laws of the state, it must follow that they should take steps to ascertain whether any other corporation in the state bears the name which they propose to take, or a name similar thereto. The prohibition against the adoption of a name already in use involves and implies the duty of ascertaining whether such name is already in use. Such fact can be learned by inquiry at the office of the secretary of state. The records of the recorder's office of a particular county may show the names of corporations whose principal office is in that county, but the records of the office of the secretary of state will show the names of the corporations organized under the general state law, whether their principal office be in one county or another. If when the stockholders of petitioner met, on February 24, 1890, to vote to change the name, they had applied to the secretary of state for information, they would have learned that theretofore, to wit, on January 30, 1890, application had been made to form a new corporation, having the name of "Elgin Watch Case Company." Not only is it true that the petition in this case does not charge the proposers of the new corporation with having notice on January 30 of the resolution adopted by petitioner's directors on January 18, or with having knowledge of the notices given by the directors for the meeting of February 24, but it is also true that the notices which section 2 of the Act of March 26, 1872, requires to be delivered or mailed, and the general notice which that section requires to be published, were intended as notice to the stockholders of the meeting, and that such published notice was not intended to be a notice to the general public of a desire to change the name. The notice of the change which is required to be given to the public is the notice provided for in section 5, to be published after the filing of the certificate of the vote. Up to January 30, petitioner had done nothing to effect the change in its name, except that the directors passed a resolution on the 18th to call a meeting of the stockholders for February 24, and mailed notices of such meeting to the stockholders on January 20, and published notice thereof on January 21 and January 28. We do not think that the adoption of such resolution and the giving of such notices gave the petitioner an exclusive right to the use of the proposed name.

As the law forbids the adoption of a name similar to that of "any other corporation organized under the laws of this state without the consent of such other corporation," it is said that the new corporation of the defendants cannot be embraced within the meaning of the law, because it had not been fully organized when petitioner completed the steps necessary to change its name, but merely had a license at that time to open books of subscription; and that, therefore, its consent to the use of the name could not be obtained. The name of another corporation cannot be adopted without the consent of the latter, and it can make no difference whether the failure to obtain that consent arises from refusal to give it or from

the inability to give it. It is true that a strict construction of the statute would limit its language to "organized" corporations. But we think the phraseology should be construed to include corporations so far advanced in the process of organization as to have secured the issuance of a license. When the proposers of the corporation have obtained a license, they have called into exercise the power of the state, which alone can give being to a corporation. Under the license, subscriptions to the stock may be taken, directors may be elected, and two years are allowed for organizing and proceeding to business. The law nowhere confers upon the secretary of state the power to revoke the license except for failure to organize and proceed to business within two years from the date of such license. During the two years the license is authority for taking the steps authorized by the law, and cannot be revoked. The sole ground upon which it is claimed that the secretary should be required to revoke the license in the present case is that before its issuance the directors of petitioner desired to change petitioner's name, and had notified its stockholders to meet and vote upon the question of such change. The ground alleged is wholly insufficient. We are therefore of the opinion that a mandamus directing a revocation of the license should not be granted.

It has been held that a writ of mandamus may be issued for a part of the relief asked. *People v. Secretary of State*, 58 Ill. 90; *People v. Lippincott*, 72 Ill. 578. The petition here is not only for a revocation of the license; but to compel the secretary of state to receive and file in his office the certificate of the vote by petitioner's stockholders to change its name, as provided for in section 4 of the Act of March 26, 1872. Upon this branch of the case we have had more difficulty in reaching a conclusion. If said section be considered by itself, it would seem that the filing of the certificate of change of name was a mere ministerial act, and that the secretary of state had no discretion in the matter of allowing it to be filed. But we are inclined to the view that section 4 should be construed in connection with section 2 of the Corporation Act. By the latter the secretary of state is clothed with the discretionary power of refusing a license to two corporations of the same name. If, after he had granted a license for the formation of a cor-

poration by a certain name, he should suffer an existing corporation to file a certificate showing its adoption of that same name, he would thereby be consenting to the existence of two corporations in the state of the same name. This would be a violation of the spirit if not the letter of the statutes. As in the present case the license to form the Elgin Watch Case Company was irrevocable, the only way to give effect to the intention of the Legislature that two corporations by the name of the "Elgin Watch Case Company" should not be allowed to do business in the state, would be to refuse to allow petitioner's certificate of change of name to be filed. But, whether the secretary had or had not the discretion to refuse to permit the certificate of change to be filed, the fact remains that he did so refuse; and the question before us is whether we shall grant a writ of mandamus to compel him to permit it to be filed. The exercise of the power to grant the writ "rests to a considerable extent in the sound discretion of the court, subject always to the well-settled principles which have been established by the courts or fixed by legislative enactment." *High, Extr. Legal Rem.* § 9. "Its issue is discretionary with the court, acting upon existing facts, and viewing the whole case with due regard to the consequences of its action." *People v. Ketchum*, 72 Ill. 212. The writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied. *Cristman v. Peck*, 90 Ill. 150; *People v. Lieb*, 85 Ill. 484.

The consequence of granting the writ here will be that two corporations of the same name will be doing business in the state, and a conflict of interests and litigation in a different form from that now pending may result hereafter. The writ is never granted in doubtful cases, or unless the party asking it has a clear right. *High, Extr. Legal Rem.* § 9. Such doubt exists in the case at bar, and the petitioner has not a clear right to the relief asked, by reason of its failure to apply to the secretary of state for information, or to notify him in any way before January 30, 1890, of its intention to change its name.

For the reasons here stated, *the writ will be denied.*

Rehearing denied.

MICHIGAN SUPREME COURT.

HOUGHTON COUNTY SUPERVISORS,
Relators,
v.

Robert R. BLACKER, Secretary of State.

(.....Mich.....)

1. The Legislature has no power to divide a county in the apportionment of districts for the election of represen-

NOTE.—For other recent decisions as to apportionments, see *State v. Cunningham* (Wis.) 15 L. R. A. 561; *Giddings v. Blaker* (Mich.) *ante*, 402; *McPherson v. Blaker* (Mich.) *post*, —, 16 L. R. A.

tatives under the Michigan Constitution, which provides for the election of representatives by single districts equal as nearly as may be in population and for which no township or city shall be divided, and also that if any county is entitled to more than one representative, the board of supervisors shall divide it into the requisite number of districts.

2. An Apportionment Act must be held entirely invalid where it divides a county in violation of the Constitution, and the effect of correcting the Act in this particular and giving the county the representation to which it is entitled would make one more representative than the Constitution permits.

3. "Convenient and contiguous territory" within the meaning of a constitutional provision as to the apportionment of election districts does not mean contiguous in contact by land when applied to counties which are composed of islands, and consequently Keweenaw and Isle Royal counties in Michigan may be declared as convenient and contiguous to other counties bordering on deep waters of the lake, as to Houghton county.

4. There can be no legislative discretion to give a county of less population than another greater representation under a Constitution requiring representative districts to contain "as nearly as may be" an equal number of inhabitants.

5. On holding an Apportionment Act unconstitutional election notices will be ordered to be given under the preceding Act if that was valid, unless a new Act shall be passed before it is necessary to give the notices.

(July 29, 1892.)

PETITION for a writ of mandamus to compel the Secretary of State to give notice of the election of two representatives in the state Legislature for Houghton County in disregard of the apportionment of representatives made by Pub. Acts 1891, No. 109. *Notices ordered to be given under the apportionment made by Pub. Acts 1881, No. 255.*

The facts are stated in the opinions.

Messrs. T. L. Chadbourne and Hubbell & Gray, with Mr. Allen F. Rees, for relators.

Mr. A. A. Ellis, Atty-Gen., for respondent.

Long, J., delivered the following opinion:

The Legislature, by Act No. 109, Pub. Acts 1891, apportioned anew the representatives in the Legislature among the several counties and districts of this state. The number of representatives was fixed by the first section of the Act at 100, in accordance with section 8, art. 4, of the Constitution, agreeably to a ratio of 1 representative to every 20,988 persons, including civilized persons of Indian descent, not members of any tribe, in each organized county, and one representative to each county having a fraction more than a moiety of said ratio, and not included therein, until 100 representatives are assigned. Under the United States census of 1890 it appears that Houghton county had a population of 35,399, or a ratio and a fraction more than a moiety. Under the above Apportionment Act, however, that county was divided, and the townships of Adams, Chassell, Duncan, Franklin, Hancock, Laird, Portage, Quincy, Schoolcraft, and Torch Lake made to constitute one representative district, while the townships of Calumet and Osceola, of Houghton county, and the whole of the counties of Keweenaw and Isle Royal, were constituted one representative district; that is, two townships of Houghton county were cut off and put into a district with Keweenaw and Isle Royal counties. This is a petition for a mandamus to compel the respondent, as secretary of state, to give notice of the election of two representatives from the county of Houghton, and disregard the division of the county as made by the Legislature under the Act.

16 L. R. A.

It is claimed that the Constitution is violated by this Act in two particulars: (1) In dividing the county by putting two of the townships into a representative district outside of it; (2) in refusing to give to the county two representatives, it having a ratio and a fraction over a moiety. Section 8, art. 4, of the Constitution, provides: "The House of Representatives shall consist of not less than sixty-four nor more than 100 members. Representatives shall be chosen for two years and by single districts. Each representative district shall contain as nearly as may be an equal number of inhabitants, exclusive of persons of Indian descent, who are not civilized or members of any tribe, and shall consist of convenient and contiguous territory; but no township or city shall be divided in the formation of a representative district. When any township or city shall contain a population which entitles it to more than one representative, then such township or city shall elect, by general ticket, the number of representatives to which it is entitled. Each county hereafter organized, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation. In every county entitled to more than one representative the board of supervisors shall assemble at such time and place as the Legislature shall prescribe, and divide the same into representative districts equal to the number of representatives to which such county is entitled by law, and shall cause to be filed in the office of the secretary of state and clerk of such county a description of such representative districts, specifying the number of each district, and the population thereof, according to the last preceding enumeration." After the Act of 1891 took effect, the board of supervisors of Houghton county assembled, and acting under what is claimed to be the power of said board conferred by this provision of the Constitution, proceeded to divide the county into two representative districts, it having a ratio, as fixed by the Act, and a moiety over, under the last preceding enumeration. A description of such representative district was offered for filing in the office of the secretary of state. By resolution of the board of supervisors the county was divided into two districts; the townships of Calumet, Schoolcraft, and Torch Lake, containing a population of 18,758, constituting district No. 1, and the townships of Adams, Chassell, Duncan, Franklin, Hancock, Laird, Osceola, Portage, and Quincy, containing a population of 16,681, constituting district No. 2. It is expressly provided by the section of the Constitution above set forth that where a county is entitled to more than one representative the board of supervisors shall assemble and divide the county into representative districts. This power is therefore vested in the board of supervisors, and not in the Legislature; so that, if the county of Houghton is entitled to more than one representative, the Act of the Legislature, so far as it attempts to divide the county into districts, is void and of no effect.

At the time of the framing of the Constitution the convention adopted a schedule, which was made a part of it, and ratified by a vote

of the people. The purpose of this schedule, as stated in the preamble, is as follows: "That no inconvenience may arise from the changes in the Constitution of this state, and in order to carry the same into complete operation, it is hereby declared," etc. Section 22 of this schedule provides: "Every county, except Mackinaw and Chippewa, entitled to a representative in the Legislature at the time of the adoption of this Constitution, shall continue to be so entitled under this Constitution; and the county of Saginaw, with the territory that may be attached, shall be entitled to one representative; the county of Tuscola and the territory that may be attached, one representative; the county of Sanilac and the territory that may be attached, one representative; the counties of Midland and Arenac, with the territory that may be attached, one representative; the county of Montcalm, with the territory that may be attached, one representative; and the counties of Newago and Oceana, with the territory that may be attached, one representative. Each county having a ratio and a fraction over equal to a moiety of said ratio, shall be entitled to two representatives, and so on above that number, giving one additional member for each additional ratio." At the time of the adoption of the Constitution of 1850 there were seven organized counties in the upper peninsula of the state, including Houghton county, and thirty-three organized counties in the lower peninsula. The county of Houghton, by the terms of section 22 of the schedule, was then entitled to one representative at least; and each organized county, except Mackinaw and Chippewa, was regarded as a unit for representative purposes, and to be dealt with by the Legislature only as a whole. By the plain provisions of section 8, art. 4, of the Constitution, and of section 22 of the schedule, it is manifest that the Legislature, in apportioning the representatives, should take into consideration the fact that certain counties had been organized prior to the adoption of the Constitution, and such counties, except Mackinaw and Chippewa, would be entitled to one representative at least; and that, where a county was thereafter organized, with such territory as might be attached thereto, it should be entitled to a separate representative when it had attained a population equal to a moiety of the ratio of representation, and that each county was to be regarded as a unit. Also, that when any county then organized, or thereafter organized, should be entitled to more than one representative, such county should be divided into districts by the board of supervisors; but that such county was also to be regarded as a unit. Again, if not alone entitled to one representative, it must, as a whole, be joined with other entire counties and other territory to send one representative. These limitations by the Constitution are placed upon the power of the Legislature in apportioning representatives to the various counties of the state. No other Legislature since the adoption of the present Constitution, in 1850, has ever given any other interpretation to the Constitution. It has never been thought that the Legislature has the power, under the Constitution, to divide a county in making representative districts, until the pres-

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ent Act was passed by the Legislature of 1891. By no one of the eight apportionment bills passed since 1850 has this been attempted; but, on the contrary, in every bill so passed, the county has been regarded as a unit. This has not arisen from matter of accident in the apportionment, but by the various Acts there is a distinct recognition of the fact that the Legislature has no power, under the Constitution, to divide a county. The first Apportionment Act after the adoption of the Constitution recognized the limitation of power. Act No. 104, Laws 1855. That Act provided that "the House of Representatives shall hereafter be composed of members elected agreeably to a ratio of one representative for every 7,000 white persons . . . in each organized county." And the Acts of 1861, 1865, 1871, 1875, use the same language. The Act of 1881 further says: "And one representative to each county having the largest fraction more than a moiety of said ratio."

It is apparent, therefore, that the Legislature had no power to divide the county of Houghton, and set off a portion of its territory into another district. Under our Constitution and form of government the county has come to be regarded as of much importance in the administration of the affairs of the state and in the matter of local self-government. The boards of supervisors may have conferred upon them, under section 88, art. 4, of the Constitution, powers of a local legislative and administrative character. Such powers have been conferred from time to time, so that the county, with its county seat established, and its own officers to manage its affairs, represents the interests of the state in that part of the territory designated as a county. Many of these counties existed at the time of the adoption of the present Constitution, and the formation of others was provided for as local interests might demand. The interests of the people of a county center around its seat of government, and the people of a county in the past have always been represented in the lower house of the Legislature by one of its own constituency. As was said by *Mr. Justice Orton* in *State v. Cunningham* (Wis.) 15 L. R. A. 561: "The people have a commendable pride in their own counties, and have more or less a common feeling and interest, and participate together in all their county affairs. They have a right to be represented by their own members of the Legislature, and the members themselves can better represent them, and promote and protect their interest." It is contended, however, by the attorney-general, who appears for the respondent in this case, that, though the Legislature may have made a mistake in dividing Houghton county, yet, if the Act is otherwise valid, it should not be declared unconstitutional. It will be seen that, if the provisions of section 22 of the schedule to the Constitution had been followed in making the apportionment, Houghton county, having a ratio of representation and a fraction over equal to a moiety, would be entitled to two representatives, so that, while the Act is invalid, inasmuch as it attempts to divide the county and set off a portion into another district, it also deprives the county of Houghton of that representation to which, under this

section, it would be entitled. This court has no power, however, to make an apportionment, and could in no case hold that two representatives should be elected from that county. Under section 8, art. 4, of the Constitution, the whole number of representatives cannot exceed 100. The Legislature by the Act fixed the utmost limit of representation, and if it should now be held by this court that Houghton county should have two representatives, it would make the total number 101, or one more representative than the Constitution recognizes. This would be the effect of such a holding, or it would deprive Keweenaw and Isle Royal counties of all representation. We have no power to do this, or to declare what county or counties shall lose a representative in order to make the number good to Houghton county.

Some argument is made that the Legislature was bound under the provisions of section 8, art. 4, declaring that "each representative district shall consist . . . of convenient and contiguous territory," to unite Keweenaw and Isle Royal counties to the county of Houghton, for the reason that, within the meaning of the Constitution, they were not convenient and contiguous territory to any other county. This clause in the Constitution does not bear the restricted meaning contended for. It does not mean in contact by land. Certainly, so far as the islands are concerned, they may be considered contiguous, although separated by wide reaches of navigable deep waters. Isle Royal and other islands would go unrepresented if this were not so; and they may be as well declared 'convenient and contiguous territory to Baraga, Ontonagon, Marquette, or other counties bordering on the deep waters of the lake, as to Houghton county. We think this is the meaning of these words as used in the Constitution. Keweenaw county was set off from Houghton county in 1861. The Apportionment Act of 1865 gave her one representative, she then having a moiety of a ratio. That of 1871 made Ontonagon and Keweenaw together a district, the latter county having then less than a moiety of a ratio. The Act of 1875 joined her with Isle Royal, Baraga, and Ontonagon, that of 1881 with the same counties; that of 1885 the same; during all of which time Houghton county was entitled to one representative only. It was not thought in those times that Keweenaw was not convenient and contiguous to those counties. It would seem, therefore, that there was no difficulty in placing Keweenaw and Isle Royal counties in a district with convenient and contiguous territory without dividing a county to make a district. The Legislature had no constitutional power to divide the county of Houghton, and, we believe, no necessity existed, in apportioning the members of the Legislature to each county, to do so.

Many other glaring unconstitutional provisions of the Act could be pointed out,—provisions applying to other counties, where many are deprived of the number of members to which under the ratio they are entitled, and other counties given more members than such counties would be entitled to under the ratio. It is of course well known that an equal and exact division of the members among the different counties cannot be made, and all that the

Constitution contemplates is that the division shall be as equal as may be; but where one county is given more representatives than it is entitled to, to the detriment of other counties, without any necessity or just cause, the county deprived of a member may well complain, and for such reason the Act may be held void. But we need not, in the present controversy, enter upon a discussion of that subject, as it is apparent that Houghton county could not constitutionally be divided and one portion of the territory put into another district. The prayer of the petition, however, cannot be granted as fully as the claim is made. As we have said, we have no power to make an apportionment, and the board of supervisors of that county would have no right to apportion two representatives to that county, as, in that case, the number would exceed the constitutional limit; but, for the reasons above given, we must hold the whole Act unconstitutional and void. In view of the facts set up in the petition and admitted by the answer, *the writ must be granted, directing the secretary of state to give notice of election of the members of the Legislature throughout the state in accordance with the preceding apportionment*, under Act No. 255 of the Public Acts of 1881, for the reasons set out in the opinion of my brother Morse, unless in the meantime the Legislature shall be assembled and apportion the members anew.

The other Justices concurred.

Morse, Ch. J., delivered the following opinion:

The main question involved in this controversy is the right of the Legislature to dismember a county in the formation of representative districts. It is argued that there is no express prohibition in the Constitution against the division of a county, as was done in the apportionment of 1891, and attaching a portion of it to other counties to form a representative district. But such prohibition is plainly implied when the provisions in relation to representatives in the Legislature are taken as a whole and considered together, as they must be, in construing their meaning. It is very evident that it was not intended by the Constitution that counties should be divided unless entitled to two or more members, and then it is expressly provided that the division shall be made by the board of supervisors, at such time and place as the Legislature shall direct. The Constitution provides not only that each county thereafter organized shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation, but the schedule, which, from its reading, must be held in operation for all time unless it shall be stricken out or amended, also provides that "each county having a ratio of representation and a fraction over equal to a moiety of said ratio shall be entitled to two representatives, and so on above that number, giving one additional member for each additional ratio." These provisions negative the idea of dividing counties and joining parts of two or more counties, or a part of one county to another entire county, in order to get an equality of population in the districts. Here, as in the senatorial apportionment, the county is the chief factor.

The provision that each district shall contain, as near as may be, an equal number of inhabitants, exclusive of persons of Indian descent who are not civilized, or are members of any tribe, and shall consist of convenient and contiguous territory, does not conflict with this main idea of representation by counties. The words "as near as may be" are capable of sufficient expansion to meet all difficulties that lie in the way. The number of inhabitants in each district is to be as equal as may be under a compliance with the other provisions of the Constitution, which compel a representation by counties. The Constitution does not look to a division of counties to obtain equality of population in the districts. For instance, if two counties adjoining contain, one of them a ratio and a fraction over, equal to a moiety of such ratio, and the other a population equal to a moiety of the ratio, the Constitution does not contemplate that the county having the excess over the ratio shall be divided and enough of its territory added to the lesser county to make it equal a ratio so that two districts shall be composed of the two counties in this way; but expressly provides that the larger county in population shall have two members and the smaller county one, making three districts out of two ratios. If it had been intended that a county should be divided and a part of its territory added to some other county, or a portion of some other county, in order to equalize more perfectly the population of the districts, these two provisions,—one giving an additional representative for a moiety and the other one for a moiety when the population of the county did not reach the ratio,—would not have been inserted in the Constitution. In fact, a county cannot be dismembered and carry out these two clauses of the Constitution.

In this case, Houghton county, under one of these provisions, was entitled to two representatives, and when a portion of it was detached and added to Keweenaw and Isle Royal counties, and the balance of the county given but one representative, the clear provisions of the Constitution were violated and ignored. It is plain to me that the framers of the Constitution intended that the county, as well as the township, should be treated as a unit in the formation of representative districts, except when a county was entitled to more than one representative. In such case the Legislature cannot divide. It must be done by the local Legislature, the board of supervisors. It is contended by the attorney-general that the provision of the Constitution that no city shall be divided in the formation of such districts, suggests that it was contemplated that a county might be divided, because a city may be, as some villages now are in the state, situated in two counties; and that, if it be held that a county cannot be dismembered under the Constitution, then the clause of that instrument which prohibits a division of a city might be nullified. But a city,—especially one not in existence at the time of the adoption of the Constitution—is the creature of the law, and has no constitutional right of being. There was no city, at the time the present Constitution was adopted, situated in this way, and there has been none since. Nor can a city be

created, embracing territory in more than one county, unless such city shall be made a county by itself, in view of the provisions relative to the apportionment of representatives, without violating the plain intent of the Constitution. If, at the adoption of the Constitution, there had been a city thus situated, the contention of the attorney-general would have much force; but, as it is, it has none.

It is also claimed that the Constitution, in relation to the apportionment of representatives, cannot always be carried out in detail without violating some of its provisions. This is no doubt true, but it affords no argument in favor of the division of counties, except in the cases provided by the Constitution. If one county can be dismembered all of them can; and we might have, under the exercise of the legislative discretion, a representation ignoring counties altogether, and based solely upon the idea of equality of population. The schedule to the Constitution expressly provides that "every county, except Mackinac and Chippewa, entitled to a representative in the Legislature" at the time of its adoption, shall continue to be so entitled. When it is attempted to carry out this provision, and to give each county organized since the Constitution was adopted one representative for a moiety of the ratio, and also every county a member for each ratio, and an additional member for a moiety of a ratio, and then limit the number of representatives to 100, or any number, which shall be the quotient of the division of the whole population of the state by the ratio, it will be found that it cannot always be done without denying to some county its constitutional right of representation. For instance, the ratio of representation at 100 members, under the census of 1890, is 20,938. Under this census and ratio, if the Constitution be followed in all of its provisions, the counties entitled to one or more representatives under the moiety system use up 97 out of the 100 members, and there are still left 29 counties in the northern part of the state, with a population in round numbers of 187,000, out of which to carve three districts, each with a population of over 45,000,—more than double the ratio; so that two men would not have the representation in these districts that one would have in the others.

As far as I have examined, there has never been an apportionment but this difficulty has been encountered; and it has been a subject of much perplexity and vexation in the Legislature. It has resulted always in the necessary denial to some county or counties of their full representation under the moiety system. This court could not be called upon to enforce a constitutional provision incapable of enforcement. In case of making as equitable a division as possible under the Constitution,—and that is all that can be required,—it must be in the discretion of the Legislature to deprive some of the counties of their representation or additional representation upon the moiety plan; for two ratios cannot always be given three representatives, and at the same time limit the number of the whole to one for each ratio. But in such discretion the counties having the least number of inhabitants above the ratio or the moiety of the ratio should be the ones to suffer this deprivation. For instance in the

present apportionment Houghton county, with a population of 35,889, was entitled, under the moiety plan, to two representatives, as were also Sanilac, Tuscola, Menominee, Macomb, and Montcalm. These counties, in population, under the census of 1890, were as follows: Menominee, 33,639; Montcalm, 32,637; Sanilac, 32,569; Tuscola, 32,508; Macomb, 31,813. Of these six counties, if three were to be left out, Houghton, Menominee, and Montcalm were entitled to two members each, and Sanilac, Tuscola, and Macomb to one each. But the Legislature gives two each to the last three, and only one to each of the first three above named, thus reversing the constitutional order of preference. Under the Constitution all of them are entitled to two, if the various provisions of the Constitution can be so worked out as to give each of them two. If they cannot, then the one or more left out should be those having the least population. There can be no legislative discretion, under the Constitution, to give a county of less population than another a greater representation. Such action would be arbitrary and capricious, and against the vital principle of equality in our government, and it is not intended or permitted by the Constitution; nor could such action lead to any good result. There can be found no excuse for it.

The relator prays that the secretary of state deliver a notice to the sheriff of Houghton county that two representatives are to be chosen in said county at the next election, and for such other and further relief as to the court may seem proper in the premises. The special prayer cannot be granted. The board of supervisors have no power to divide Houghton county into two districts, unless so authorized by the Legislature. Their action in this respect is null and void. But the people of the county are entitled to vote together for a representative. No portion of them can be detached and joined to another county. The Apportionment Act of 1891 is void, because it undertook to dismember Houghton county, and because the Constitution was also violated in giving counties two representatives having a less population than counties which were accorded but one. The Law of 1885 is also unconstitutional for the reason that the counties, or some of them, were given representation in defiance of the Constitution, and without the discretion of which I have spoken. Bay county, with a population of 51,221, was given but two representatives, while Lenawee county, with a less population, to wit, 49,584, was given three. This was not the exercise of constitutional discretion, but an arbitrary determination for some reason other than a desire to conform to the Constitution. Under the moiety clauses, Bay, Lenawee and St. Clair were entitled, in 1885, in the order named, to three representatives. If only one could be given this number, the Constitution required it should be Bay; if two, Bay and Lenawee. An examination of the Apportionment Act of 1891 shows it to have been within the constitutional discretion of the Legislature, and therefore the secretary of state must give his notices under that law, unless a new and valid apportionment shall be made by the Legislature.

The other Justices concurred.

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Orissa M. JONES

v.

The PRESIDENT, etc., of the Village OF PORTLAND, App't.

(.....Mich.....)

1. That a physician is employed to examine a person who has been negligently injured, for the express purpose of giving his testimony in a suit to be brought for the injury, does not render such testimony incompetent, but that fact may be considered by the jury as affecting its weight.
2. Testimony as to exclamations of pain, made by the injured person during the examination, cannot be given by a physician who has been employed to examine a person who contemplates suing for injuries received through another's negligence, for the express purpose of making him a witness in such suit.
3. Testimony as to statements made by the injured person to his attending physician of how the accident happened is not admissible in a suit to recover for alleged negligent injuries.
4. It is improper for counsel in an action to recover for injuries received by a fall on a sidewalk to offer, in the presence of the jury, to prove that other walks in the vicinity of where the accident occurred were defective, accompanying it by a positive statement that they are all unsafe; and it will be reversible error for the court to simply reject the offer without telling the jurors of its improper character and cautioning them not to be influenced by it.
5. A medical expert cannot in an action to recover for injuries alleged to have been caused by a fall upon a defective sidewalk, be permitted to give his opinion as to the cause of the condition of a person in a hypothetical case stated to him, which embraces the evidence which has been introduced concerning the injured person since it is a usurpation of the province of the jury.

(December 31, 1891.)

ERROR to the Circuit Court for Ionia County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by a fall on a sidewalk which defendant had negligently permitted to become and remain out of repair. *Reversed.*

The facts are stated in the opinion.

Messrs. A. A. Ellis and W. H. Howard for appellant.

Messrs. Davis & Nichols for appellees.

Champlin, Ch. J., delivered the opinion of the court:

This action was brought to recover compensation in damages for a fall caused by a defective cross-walk in the village of Port-

NOTE.—The rule admitting evidence of exclamations of pain made by an injured person is too well settled to need the marshaling of authorities in support of it. The exception thereto made by the above decision, although somewhat novel, seems so reasonable and just that it may be well regarded as unquestionably correct.

land, which the village authorities neglected to keep in repair. The plaintiff recovered judgment, and the defendant brings the case here by writ of error.

The injury was received on July 20, 1888, about 9 o'clock in the evening. This was on Friday; and on the evening of Tuesday, which was the 24th, Dr. Grant and Dr. Logan, of Ionia, came to see her. She had not at that time employed them, but they were employed by her husband, who was a lawyer. He engaged these physicians for the purpose of prescribing for his wife, and for the purpose of preparing them as witnesses to testify in a suit which was to be brought to recover damages against the village. The latter purpose would seem to be the principal one. Both of them understood that to be the object when they took the case and first went to see Mrs. Jones. During the summer previous Mrs. Jones had been ill, and she then had employed Dr. Alton and Dr. Hugg to attend her. Although she did not send for nor employ the Ionia physicians in the first place, she ratified what her husband had done, and submitted to an examination by and treatment from them. This suit was brought September 15, 1888, and some of these examinations were made before and some after suit brought. The physicians were allowed to testify to her complaints and to her statements of pain made during the examination made by them; also as to tenderness and pain in the region of her back, hip, and genital organs. They discovered a slight discoloration on the left hip, and a fullness at her knee, which were the only indications which they found of any ailments, and which, independently of her assertions that she had been injured, they would have attributed to rheumatism.

The questions presented by the assignments of errors upon this branch of the testimony are: *First*. Is it competent for a physician to testify to exclamations of pain made by a party who is being examined by such physician, when such party contemplates the bringing of a suit to recover for the injury which she claims to suffer, when such physician is employed with a view and for the purpose of giving testimony in such suit so to be brought? *Second*. Is it competent for such physician to testify to such exclamations and statements of the party upon examination made after suit is brought, and for the purpose of giving the same in evidence? The plaintiff claims that such testimony is admissible, under the following authorities: *Hyatt v. Adams*, 16 Mich. 180; *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Mich. 49; *Mayo v. Wright*, 63 Mich. 32.

Hyatt v. Adams was an action on the case against a physician for malpractice in treating the plaintiff's wife, causing her death within four days. All there is in the opinion upon this subject is found in a single paragraph upon page 200, and reads as follows: "The court did not err in admitting the exclamations of pain and suffering uttered by the deceased, and her complaints as to the nature of her suffering during

and after the operation, though some of them were in the absence of the defendant. This is the natural and ordinary mode in which physical pain and suffering are made known to others, and the only mode by which their nature and extent can be ascertained. Such exclamations and statements are therefore original evidence. But it was, of course, open to the defendant to show, or to raise an inference if he could, that they were feigned, or intended to deceive. They were clearly admissible as tending to show the malpractice of the defendant, though not for the purpose of aggravating the damages." It will be noticed that the admission of the evidence was confined to a single fact to be proved, and that was the malpractice of the defendant; and it was expressly stated that it was not admissible for the purpose of aggravating the damages. That case is not analogous to this. The exclamations of Mrs. Jones to her physicians, made four days after the accident happened, could in no manner tend to prove that she met with a fall upon a sidewalk through the negligence of defendant. It would not be competent testimony to prove the main fact in this way from statements of the party. The only bearing it could have legitimately would be to aggravate the damages, and the case cited is authority that it is not admissible for that purpose. *Johnson v. McKee*, 27 Mich. 471, was not a case of negligence, but of assault and battery. Testimony was received showing the statements by plaintiff at various times concerning her pains and bodily suffering. These were objected to as hearsay statements, and as declarations in her own favor. It was held by the court that, "so far as they were not narrations of past as well as present suffering, it has been well settled that such statements of present feelings are facts which furnish the best, and often the only, evidence of such physical conditions as are not open to discovery by the sight or other senses of witnesses." The question was no further considered. *Elliott v. Van Buren*, *supra*, was an action for an assault and battery, and the court said: "The declarations of a sick person, made from time to time, concerning present sufferings and sensations, (not being relations of past occurrences,) are the usual means of evidence where third persons testify on the subject." *Mayo v. Wright* was an action brought against a physician for malpractice in setting a broken leg, in which the same principle was asserted and applied. None of these cases were actions for negligence, but the causes of action were the direct act and misfeasance of the defendant, and the testimony was admissible as bearing upon the wrongful act alleged. In each of them, also, the exclamations were at a time when motives to make testimony favorable to the party in a suit such party had brought or contemplated to bring were absent. In this case it must be borne in mind that the witnesses were employed with a view of a suit to be brought, so far as was connected with two at least of the examinations made by them, and after the suit was brought, as to the other testimony relating

to her exclamations or statements of her pain and suffering made to them.

In *Grand Rapids & I. R. Co. v. Huntley*, 88 Mich. 544, 81 Am. Rep. 321, this court had occasion to pass upon the competency of testimony of physicians employed as "a mere auxiliary to a law-suit." Chief Justice Campbell, in giving the opinion of the court, said: "It has been held several times by this court that statements of pain and of its locality were exceptions to the rule excluding hearsay evidence. These statements are admitted only upon the ground that they are the natural and ordinary accompaniments and expressions of suffering. It would be impossible in most cases to know of the existence or extent or character of pain without them. They are received, therefore, as acts, rather than declarations, and admitted from necessity. The rule which admits declarations of present suffering has never been extended so as to include declarations either of past suffering or of the causes in the past of such suffering, so as to make such statements proof of the facts. Declarations concerning the past are narratives, and not facts. Exclamations of suffering may be, and, if honest, are, parts of the occurrence itself. It is difficult to lay down any very clear line of admission or exclusion where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion. But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before, as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency, if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor. The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. *Stockton v. Williams*, Walk. Ch. 120, 1 Doug. (Mich.) 546, (citing the *Berkeley Peerage Case*, 4 Campb. 401; *Richards v. Bassett*, 10 Barn. & C. 857; *Doe v. Turner*, Ryan & M. 141; *Monkton v. Attorney-General*, 2 Russ. & M. 160; *Whitelock v. Baker*, 18 Ves. Jr. 514. "The language of Lord Eldon in *Whitelock v. Baker* has met with general acquiescence. He says: 'All are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.' Page 514. It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain, made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule."

141; *Monkton v. Attorney-General*, 2 Russ. & M. 160; *Whitelock v. Baker*, 18 Ves. Jr. 514.

"The language of Lord Eldon in *Whitelock v. Baker* has met with general acquiescence. He says: 'All are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.' Page 514. It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain, made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule."

While we adhere to the rule permitting such testimony in proper cases, we do not feel inclined to extend it beyond the necessities of the case, nor to cases clearly within the exception noted in the *Huntley Case*.

The fact that the physician is employed for the express purpose of giving his testimony in a case does not, for that reason alone, make him an incompetent witness. Nor is his testimony incompetent for that reason. It certainly may be considered by the jury as affecting the credibility of the witness and the weight the jury should give to his testimony; but the reason why such testimony is incompetent when given by third persons, either as original or corroborative testimony, is that it is giving in evidence the *ex parte* statements of a party to a suit upon points material to the issue, and made for the purpose of being testified to and given in evidence in a suit already pending or to be brought. Such testimony is incapable of contradiction. It has all the evils of manufactured testimony, without any possible means of detecting the falsity of it. In this state a party can testify to his sensations of pain and of suffering, mental or physical; but a party cannot be allowed to corroborate such testimony by witnesses employed to listen to such statements with a view to a suit to be brought or pending. In this case the plaintiff had been sworn, and detailed her condition and sufferings, and then introduced the two physicians employed with a view to bringing suit, to whom she stated her condition and pains and suffering, who corroborated her by swearing to such statements. Not only this, but they were permitted to testify to what plaintiff said as to her feelings and sensations of pain after suit brought, and even during the trial of the cause. This was plainly error, as held in the *Case of Huntley*.

Dr. Grant, upon being examined in chief, testified to her condition on the occasion of his first visit, as learned from Mrs. Jones, the plaintiff. The record shows the following to

have occurred: "Question. What did she represent to you as to her condition? (Objected to as incompetent, on the part of the defendant. Mr. Davis: I think we have a right to know upon what he bases his opinion or conclusion, if he had come to any. The court: I suppose what answer she made to the physician would be evidence as to her condition. Mr. Ellis: Take an exception.) Answer. She stated how she had received the injury. It is not necessary to go over that any more. Q. I want to know just what she told you about it. A. She stated that she had received the injury from a fall, catching her heel in a walk going down town a few days previous, and had fallen in such a way as to severely strain the right knee-joint, so that it was doubled under her in such a way as to— Q. How did she describe this doubling under, doctor? Can you tell how that was? (Objected to as incompetent. The court: If she did not describe it, of course that would end it. I don't think that would be proper; what she said how she fell at that time would be proper.)" This testimony should have been excluded. It was another method of corroborating the party in a material part of the case by her own statements. *Dundas v. Lansing*, 75 Mich. 499; *Merkle v. Bennington Twp.* 58 Mich. 156, 55 Am. Rep. 666; *Rossa v. Boston Loan Co.* 132 Mass. 439.

The injury in this case was alleged to have been caused by a defective sidewalk. Counsel for plaintiff asked a witness the following question: "Question. How is the walk right straight along for eighty rods this side of Dorman's residence to day? Answer. It is bad. Q. Is it not true that in three or four places there are six inches of plank gone, and holes in the walk? (Mr. Ellis: I object to the question, and ask to have the last answer stricken out. The court: I am inclined to think the other party tried to get in something like that.)" Then followed an offer made by Mr. Davis, and the record proceeds as follows: "Mr. Davis: They did. Their offer was simply for the purpose of showing that Dr. Dillingham did not know where this was; that it was somewhere in the city. His attention was not called to it. My object is to show that at this very time and at the present time these walks are in such condition that it is unsafe for aged people or infirm people to pass over them to-day,—right along this street, for upwards of eighty rods. I am perfectly willing they should go into that if they go on the ground they intended to go in to show that they are giving it that careful examination they are attempting to show. They have offered to show the safe and nice condition of things. I say they are not safe for a man that was in any way infirm, or for a lady, to go along there at night without being injured or tripped up a half dozen times there in that walk. Mr. Ellis: I object to the statements out of order, not directed to any particular walk. The court: I don't think it is best to go into an investigation of all the sidewalks in Portland. I am a little fearful that it would be too long. Better confine ourselves to this

particular cross-walk. Mr. Davis: Make it with a view of showing the general unsafe condition at that time and since. The committee on streets had had them in charge with one in question. Mr. Ellis: I object to it; object to his making it to the jury. He can't prove anything of the kind in the case. I take an exception to the offer. The court: We will not go into it."

The offer made by the plaintiff's counsel in the presence of the jury was improper, and directly in conflict with at least two decisions of this court,—*Dundas v. Lansing*, cited above, and *Tice v. Bay City*, 78 Mich. 209. When an offer is so made in the manner this was, with the assertion on the part of the attorney that the cross-walks "right along this street for eighty rods are not safe for a man that is in any wise infirm, or for a lady, to go along there at night without being injured or tripped up half a dozen times there in that walk," and such statement and offer are objected to, and nothing is said by the court to correct such error in its practice, it is reversible error. The impression which the jury must have received from the offer and statement, as well as from the testimony of the witness which the court did not on motion strike out, must have been detrimental to the defendant. The court, instead of saying to the attorney that his offer was improper, and contrary to the law as laid down by this court, and should not have been made in the manner and with the assertion of fact by the attorney, and instead of cautioning the jury not to be influenced by it, merely said: "I don't think it is best to go into an investigation of all the sidewalks in Portland. I am a little fearful it would be too long. Better confine ourselves to this particular cross-walk." And again, "We will not go into it." It left the jury to infer that, if it had been gone into, the assertion made by the attorney would have been substantiated by other testimony, and the attorney got before the jury the same effect of this immaterial testimony as if it had actually been introduced.

Objection is made to a question asked Dr. Grant as an expert witness. The record shows the following to have occurred: "Question. Doctor, I want to ask you this question: Now, suppose a woman forty-eight years old, free at the time from rheumatism, and in good health, one year previous having had a severe illness known as 'malarial fever,' and which confined her to the house for some thirteen weeks; and some six or seven years prior to that time having had some sickness of the lungs,—lung difficulty; and in 1864, while in a hospital in the south, had the small-pox; not having menstruated for about one year; never had any difficulty with her back except what she terms 'back-ache,' brought on at monthly periods,—(The court: Leave out "brought on,"—that she had back-ache at the time of monthly periods;)—her uterine organs never having troubled her; never having had any trouble with her hip or the small of her back, except the back-aches spoken of, at the time spoken of; but three years previous had injured her left knee, by strik-

ing it against a stick of stove-wood, while putting it into the stove, to that extent that the injury terminated in what is known as 'dropsy of the knee, and for which she wore a rubber knee-cap until about three months previous,—till July 20, 1888, from which time until the 20th of July the said left knee was apparently as well as ever; and that about one year previous to July 20, 1888, she knelt upon the damp ground for about one-half hour, and upon her right knee; and that as a consequence she found swollen condition; but that upon application of iodine she found the next morning—(The court: Change that "as a consequence."—that it was followed by that. After kneeling down there it was followed by swollen condition.) That after kneeling down it was followed by swollen condition. That upon the application of iodine the next morning she found that the knee was apparently as well as ever. That about three or five months previous to July 20, 1888, she again knelt down upon the ground and upon her right knee, and it again appeared to be swollen and slightly painful, and continued for a period of about six weeks. That she then applied, during this time, iodine, and after three months, but for three months prior to 20th of July, 1888, she had no trouble with said knee,—that is, the right knee. The same appeared to be well, to have entirely recovered from the difficulty, having no tenderness of the muscles through the small of the back or lumbar regions, or pain or tenderness of the genital organs, no ecchymosed condition of the tuberosity of the ischium, no pain or inflammation in the sacro iliac joint or the muscles covering the same,—should catch her left heel in the cross-walk, and for the purpose of protecting herself, should throw her right foot back, and double her right foot under her right leg, and fall in that position upon the left hip and side, become unconscious, or nearly so, by reason of the suddenness of the fall, her left foot becoming loose in the mean time, and upon getting up she walked a distance of about 1,150 feet in going home, with great difficulty, being obliged to go from side to side, suffering great pain in the groin, extending to the front of the body, with pain in the back, and upon reaching home obliged to go to bed, and the next day after such accident suffering great pain in her left groin, back and front of her body, suffering intensely while lying on her left side, being unable to lie on the right side on account of pain in her right knee, being obliged to lie on her back, and in a position to have a pillow under her right knee, suffering great pain in her left heel; also with a pain in the back of her neck, or drawing in back of her neck, so that she had to have a pillow under it to keep her head from going forward; that five days afterwards you find upon examination the right knee in a semi-flexed condition, and upon comparison with the left knee you find that the right knee is about an inch larger than the left at certain points and where resistance is least you find a puffness at the side of the patella, also fullness or promi-

nence above the knee, and the joint very tender, especially when you attempt to extend it; finding no contusions or bruises on the surface whatever, and skin apparently normal; left knee being in apparently a normal condition; finding upon the left hip, a little outside the tuberosity of the ischium, ecchymosed condition; finding no dislocation of knee joint or no fracture; more bruising of the tissue there upon upper part of hip-joint, near sacro iliac joint, or the muscles covering the same you find tenderness; with muscles covering the same you find tenderness with no bruises. Passing to the lumbar region you run your finger over the occipital bone from the upper part of the spinal column all the way down, and find tenderness on the left side of the spine in the lumbar region, and the patient complaining of extreme pain when attempt is made to put the muscles in action; upon pressure, finding over the pubic and left groin very much tenderness, and pain also in neighborhood of pubic bone; upon digital examination of vagina, you find placing your finger upon neck of uterus, extreme pains complained of by patient; attempting to impinge ovary you find that this manipulation causes so much pain that the patient was unable to bear it, according to her statements; and, coming to the conclusion that the trouble was with the left ovary and congested state of the womb, the temperature being 99, heart irritable, pulsation 96, bladder irritable, left ovary very tender upon pressure. Upon your second examination, which was on the 11th day of August, 1888, you find that the swelling in the knee has been reduced to one-half inch less, pain and tenderness in the muscles of the neck, in genital organs, and patient unable to bear her weight on her right foot. Upon third examination, which occurred about the 18th of September, you find same symptoms, with slight modifications in the reduction of swelling and the lessening of pain and tenderness in the right knee and muscles. Upon fourth examination, which occurs upon 17th day of October, you find her still unable to extend her right knee, with slight modifications of pain and tenderness in the right knee, hip, and genital organs. Upon fifth examination, made night before last, you find contraction of the external and internal tendons, 16 months' time having elapsed from date of first examination to that of last,—what would you say as to probability of absolute recovery of patient from all these conditions which you found her in at the time of your first examination? (Objected to. The trouble with the question is that, without describing it same condition, you find tenderness; you find tenderness there,—different parts. The court: Where it states that you find tenderness upon the examination that may be changed,—that the patient complains of tenderness and pain, complains of tenderness at those points. Mr. Ellis: Also that he assumes—the question does—that the left knee was in normal condition. The court: At what time? Mr. Ellis: At the time of the examination by the doctors. The court:

The first one? Mr. Ellis: Yes, sir. The court: There is some evidence by the doctor, certainly, that he found it in normal condition at that time. Then there is some evidence to base it upon. Mr. Nichols: This doctor himself says it was. Mr. Ellis: The other doctor said it was not. Also, at the time of the third examination, the patient was unable to bear her weight upon her right limb. There is not any evidence of that kind. Mr. Nichols: I said the second examination. I don't say the third. The court: Well, change that—that the patient saying that she was unable at that time, at the time of that examination, to bear her weight upon the limb. Anything further? Mr. Ellis: I object further to the question that it is so long, and contains so many disputed propositions. Also contains a decision or determination that the doctor made at the time of the examination. The court: What decision do you refer to? Mr. Ellis: Concerning the cause of the trouble of the internal organs at that time; so much so that he decided so and so at the time. There is not any evidence that this doctor decided that. The court: There is evidence that this doctor decided something about the knee. Mr. Ellis: Oh, yes, but nothing about the genital troubles. The court: What do you say in your question about decision as to genital organs? Mr. Nichols: Extreme pain in attempting to impinge ovary between your fingers. This manipulation she was unable to bear; coming to the conclusion that the trouble was with the left ovary. Dr. Logan swears to that. The court: There is something to base that upon,—that is, in the opinion of one physician who examined it. Now, anything further? The court: I guess I will let him answer. Exception for the defense. The court: If you want anything added to, add to it. Mr. Ellis: I haven't any requests to make. It is in the same condition that it was before. The court: Our supreme court has decided as to those questions. When the court asks counsel to point out defects it is their duty to do so. Mr. Ellis: There was the condition about the excessive flowing afterwards. Mr. Nichols: I will add that some seven days afterwards—Mr. Ellis: Also doesn't contain medicine that the woman had been taking during that time. Mr. Nichols: Five days after the injury complained of by the patient—after the 20th—menstruation commences again, and continues for some time excessively, then ceases for a short time, and then again commences, and continues for the period of eight weeks without cessation, in excessive degree. The court: Did you state about her having lung trouble? Mr. Nichols: Yes, sir. The court: She had lung trouble some six or seven years ago, and coughed considerably. Mr. Ellis: It doesn't state what was taken, or what has been done with,

16 L. R. A.

the patient, or the care she had had, or the place of these examinations, or where she had traveled to make these examinations from time to time, nor the medicine or care that she had had during that time. It seems to me that would be necessary, so that you could tell whether they were permanent or not. Whether she had run along without any care, what it was, the medicine that was given her, would be material. The court: Well, based simply upon what is included in the question, you may answer it, doctor. Exception for the defense.) Answer. You want to know as to my opinion of the permanency of all these disabilities mentioned? Answer. Yes, sir. A. Well, I have to exclude everything except the disability of the knee-joints. Q. Very well then, what can you say about that? A. As I believe, the others are not permanent. I think I answered the same question this forenoon,—that I believe the injury or the disability to the knee-joint was permanent."

In *Mayo v. Wright*, cited above, we held that it was no objection to a question asked an expert witness that it was too lengthy; but we also held that it should be reduced to writing, and embrace the whole question in a connected manner. We think this question is open to the criticism made upon the question in so far as relates to the disconnected method of propounding it. It undoubtedly contains, however, the elements of what the plaintiff bases her right to recover on for the injury caused by the negligence of the defendant, which, upon examination of the question, turns out to be more in the aggravation of existing ills than any definite new injury caused to plaintiff. Following the expert question above referred to, the following was asked of this witness: "Question. Taking into consideration simply these things that were asked you on this question, to what would you attribute the condition that you found the patient in at the time of your examination?" This was objected to as incompetent. "The court: I am inclined to think that is proper. Leaving out now everything except what was stated to you in this hypothetical question, then what, in your judgment, caused the condition in which you found her? Answer. As to the cause? Answer. Yes. A. Why, it seems to me there could be but one conclusion, knowing the history of the case and all,—that it resulted from the fall. It doesn't take a medical expert to answer that question, does it?" This was improper. It was usurping the province of the jury. The witness was permitted to testify to a conclusion, contrary to our own decisions. *Dundas v. Lansing*, 75 Mich. 499; *Tice v. Bay City*, 78 Mich. 209.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

INDIANA SUPREME COURT.

PEOPLE'S GAS CO. *et al.*, Appts.,
v.

Elbert TYNER.

(.....Ind.....)

1. The explosion of nitroglycerin in a gas well on one's own land to increase the natural flow is not an unlawful interference with the rights of other persons from whose land the gas is thereby drawn.
2. An injunction may be granted to prevent the explosion of nitroglycerin in a gas well within a city so near the residence of complainant as to endanger life and property therein.
3. The fact that an act which is dangerous to life and property constitutes a crime will not prevent an injunction against it on the application of a private citizen whose residence and family are endangered.
4. On an application for a mere temporary injunction, the sufficiency of the complaint will not be tested as by a demurrer if it presents a proper subject for investigation.

(April 27, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Hancock County in favor of plaintiff in a suit brought to enjoin defendants from exploding dynamite in a gas well for the alleged reason that it would injure property of the plaintiff. *Affirmed.*

The facts are stated in the opinion.

NOTE.—Natural gas.

The supplying of natural gas is a public use, and a corporation organized for that purpose may be granted the power of eminent domain. *Johnston v. People's Nat. Gas Co. (Pa.) 5 Cent. Rep. 564; Carother's App. 11 Cent. Rep. 48, 118 Pa. 468; Bloomfield & R. N. G. L. Co. v. Richardson, 63 Barb. 437.*

Securing natural gas and laying pipes for the transportation thereof for the use of a municipal corporation and its citizens, is a public purpose for which the corporation may validly exercise its taxing powers. *Fellows v. Walker, 30 Fed. Rep. 651.*

Whether natural gas is a "volatile substance" is a question of fact in determining which the aid of the testimony of scientific men must be had. *Ford v. Buchanan, 1 Cent. Rep. 896, 111 Pa. 31.*

A lease of land to be worked for oil and providing that it shall be void if oil is not found within four years is not satisfied by the finding of gas. "Gas" and "oil" are not synonymous. *Truby v. Palmer (Pa.) 4 Cent. Rep. 925.*

A municipal corporation cannot grant an exclusive right to supply it and its citizens with natural gas. *Citizens Gas & Min. Co. v. Elwood, 14 West. Rep. 32, 114 Ind. 383.* The court here said: "It would hardly be contended that even the Legislature could confer upon any corporation a special privilege to supply a town or city with coal or wood, and it is not easy to perceive why the same principle does not apply to natural gas. Less common than coal or wood, it is, nevertheless, a fuel."

A statute providing for the formation of corporations for "the manufacture and supply of gas, or the supply of light or heat to the public by any other means" does not authorize the grant of a franchise to furnish natural gas. *Emerson v. Com. 16 L. R. A.*

Messrs. James A. New, Charles Downing and Asa M. New for appellants.
Mr. David S. Gooding for appellee.

Coffey, J., delivered the opinion of the court:

This was an action by the appellee against the appellants in the Hancock circuit court for the purpose of obtaining an injunction. The complaint alleges, substantially, that the appellee and his wife are the owners by entireties of the real estate therein described; which consists of four city lots in the city of Greenfield; that the lots are enclosed together by a fence, and that his dwelling-house and residence, in which he and his family reside, is situated on the lots; that the lots are near the centre of the city; and, with his residence thereon, are of the value of \$4,000; that with full knowledge of all the facts the appellants regardless of the rights of the appellee, and of the safety, peace, comfort, and lives of himself and family, have, without his consent and over his objections, within the last forty days, dug and constructed a natural gas well, to the depth of about 1,000 feet, and about 200 feet distant from the appellee's residence, with only a street forty feet in width between the appellee's lots and the lot on which the well is sunk; that the appellants are about to "shoot" said well, and will do so unless restrained; that for the purpose of "shooting" the well the appellants, about midnight of the ——— day of August, 1889, unlawfully procured to be brought and unlawfully permitted a large quantity of nitroglycerin or other nitro explosive com-

108 Pa. 111. *Green, J.*, says, p. 129: "The furnishing of natural gas is not the furnishing of heat. Natural gas is not heat. It is a fuel; a substance which may be converted into heat by combustion with atmospheric air. When the gas is delivered to the consumer it is still gas only. It is not heat. If the consumer does not produce combustion, no heat is obtained and if he does produce it, the act of doing so is his act and not that of the company which furnishes the gas."

A corporation authorized to maintain any work, public or private, which "may tend or be designed to improve, increase, facilitate, or develop trade" may engage in the business of producing, transporting, and supplying natural gas to factories and dwellings. *Carother's App. 11 Cent. Rep. 48, 118 Pa. 468.*

A contract to bore an oil or gas well of a specified diameter is not substantially performed by boring one of less diameter, without other excuse than to save time and expense, although for the purpose of testing the territory, which was the only result accomplished, the smaller well might be as effective as the larger. *Gillespie Tool Co. v. Wilson, 123 Pa. 19.*

A stipulation in a lease that the lessee, who agrees to drill a well for gas, shall furnish the lessor gas to heat and light his buildings and furnish pipes and fixtures therefor, is not an absolute agreement to furnish the gas and fixtures in any event, but only in case gas is obtained from the well. *Evans v. Consumers Gas Trust Co. (Ind.) Dec. 18, 1891.*

A manufacturing company having a contract for the use of natural gas for a fuel only, which uses it for illumination also, is liable for the reasonable value of the gas used for illumination without re-

pound to be and remain upon Sycamore street, a public street in the city, and within less than 200 feet of appellee's residence, for about three hours, in the midst of and surrounded by a large number of people; that appellants by their employes, threatened and attempted to "shoot" said gas well, and that they still threaten so to do, with their said nitroglycerin or other nitro explosive compound, and will do so unless restrained; that nitroglycerin is highly explosive, and very dangerous to property and life, and is liable to explode under any and all circumstances, and at any time or place, and that an explosion of 60 or 100 quarts of said explosive at any given place on the surface of the earth could and probably would destroy life and property for a distance of 500 yards in all directions from such explosion; that the handling or storing thereof in or about appellant's gas well will endanger the lives of his family as well as the safety of his property, and that the shooting of said well with nitroglycerin will greatly injure and damage the appellee's said property, both above and under the surface of the earth, and endanger his life and the lives of his family. This complaint was verified, and upon it and the affidavits filed in support of its allegations the court granted a temporary injunction, from which this appeal is prosecuted. The affidavits filed by the appellee tended to prove that the appellants' gas well is within the corporate limits of the city of Greenfield; that a short time prior to the filing of the complaint in this cause the appellants deposited in or near the derrick at the well described in the complaint about 117 quarts of nitroglycerin, weighing about 840 pounds, with the intention of exploding the same in the well. The affidavits further tend to show that nitroglycerin is very explosive,

and that it is liable to explode at any time; that the explosion of that quantity of nitroglycerin upon the surface of the earth would be likely to destroy life or property at any point within 500 yards of such explosion.

It is contended by the appellants—*First*, that they had the right to use their own property as to them seemed best, and for that reason they could not be enjoined from exploding nitroglycerin in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee; *second*, that, as bringing nitroglycerin into the corporate limit of a town or city in a greater quantity than 100 pounds is made a crime by statute, it cannot be enjoined. On the other hand, it is contended by the appellee—*First*, that natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use; *second*, that as he is liable to suffer an injury peculiar to himself, to which the public in general is not subject, by the unlawful act of the appellants in bringing nitroglycerin within the corporate limits of Greenfield, he is entitled for that reason to an injunction.

It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State v. Indiana & O. O. G. & Min. Co.*, 120 Ind. 575, 6 L. R. A. 579. Water, petroleum oil, and gas are generally classed by themselves as minerals possessing in some degree a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterranean stream of water, there is much diversity of opinion and conflict

gard to the price paid for that used for fuel. *Philadelphia Co. v. Park*, 138 Pa. 346.

A contract by a natural gas company to supply a village with gas for street lamps contemplates such lamps as are commonly used in the natural gas region, and where only open lamps were there used the village cannot be compelled to use closed lamps in order to lessen the consumption of gas. *Salisbury Gas Co. v. Salisbury*, 10 L. R. A. 193, 138 Pa. 250.

"From the nature of gas and gas operations, . . . the grant of well-rights is necessarily exclusive." *Westmoreland & C. Nat. Gas Co. v. DeWitt*, 5 L. R. A. 731, 130 Pa. 235.

Under a lease of the right to bore for and gather "all oil or gases" on certain premises in consideration of a part of the oil found, the lessee is entitled to all the gas found. *Baton v. Wilcox*, 43 Hun, 61.

From the next paragraph it seems that the result would have been the same had the right to gather the gas not been expressly given.

Under a lease of land "for the purpose of mining and excavating for rock or carbon oil" and "for said purpose only," in consideration of a part of the oil obtained, the lessee is entitled to all the natural gas which escapes by its own force from a well from which oil is taken. *Wood County Pet. Co. v. West Virginia Transp. Co.* 23 W. Va. 210, 57 Am. Rep. 659.

A test well producing gas sufficient to furnish five stoves, one grate, three jets, and two street lights produces gas in paying quantities, within a gas and oil lease for a term of years and so long as gas or oil are so produced, where, after the quantity

produced was known, all parties thereto joined in or assented to the laying of pipe for its use and the expenditure of money therefor. *Herrington v. Wood*, 6 Ohio C. Ct. Rep. 326.

A reasonable regulation of the pressure at which natural gas may be transported in pipes is within the police power of a state Legislature, but a prohibition of the use of artificial means to maintain the legal pressure in order to prevent transportation of gas into other states is invalid. *Jamieson v. Indiana Nat. Gas & Oil Co.* 12 L. R. A. 653, 128 Ind. 555; *Benedict v. Columbus Const. Co.* (N. J. Eq.) Jan. 25, 1892. In the latter case *McGill, Ch. J.*, said in the syllabus: "Until the national Congress regulates the transportation of natural gas from state to state—it being admittedly a dangerous commodity—the several states may make reasonable regulation for the protection of the life and health of its citizens against it, and such regulations when not directed against interstate commerce, but only incidentally and necessarily affecting it, will be upheld as valid. But where the state steps beyond the legitimate domain of police regulation, and under its guise or otherwise seeks by its legislation to restrict interstate commerce, such legislation becomes invalid."

Both of these cases arose out of the Indiana statute. A prior statute of that state directly prohibiting the transportation of natural gas in pipes into another state was held invalid as being interstate commerce legislation. *State v. Indiana & O. O. G. & Min. Co.* 6 L. R. A. 579, 120 Ind. 575. See note to this case, 6 L. R. A. 579, 580, for "power of Congress to regulate commerce." J. G. G.

in the adjudicated cases; but the authorities agree that the owner of a particular tract of land may sink a well, and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land. Ang. Watercourses, § 112; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Wheatley v. Baugh*, 25 Pa. 523, 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 302; *Acton v. Blundell*, 12 Mees & W. 824; *Delhi v. Youmans*, 50 Barb. 816; *Mosier v. Caldwell*, 7 Nev. 363; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112; *Greencastle v. Hazlett*, 28 Ind. 186. It is a familiar maxim that in contemplation of law, land always extends downward as well as upwards, so that whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr. Angell says that it would seem to follow from this maxim that whether what is subterranean be solid rock, mines, or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein, and apply all that is there found to his own purposes *ad libitum*. Ang. Watercourses, § 109. Upon this principle, it was held by this court in the case of *New Albany & S. R. Co. v. Peterson*, *supra*, that if an adjoining land-owner, in lawfully digging upon his own land, draws the water from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which cannot become the ground of an action. In the case of *Halde-man v. Bruckhart*, 45 Pa. 514, it was said: "The purchaser of land in which there are unknown subsurface currents must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of land in which a spring arises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land." Mr. Gould, in his work on Waters, (2d ed. § 291.) says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. Like water, it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil, or of anything for which ejectment will lie." In recognition of the principles here announced in the case of *Brown v. Vandergrift*, 80 Pa. 142, it was said by the court that "the discovery of petroleum led to new forms of leasing lands. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment." What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas. In the case of *Westmoreland & O. Nat. Gas Co. v. De Witt*, 180 Pa. 235, 5 L. R. A. 781, it was said: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as mineral *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is

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uncertain. . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land, and draw therefrom all the gas that may naturally flow to it, but he contends that they have no right to explode nitroglycerin in the well to increase the natural flow. When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitroglycerin therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all. So far as this suit seeks to enjoin the appellants from exploding nitroglycerin in their gas well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it cannot, in our opinion, be sustained. The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owner of a lot may not erect and maintain a nuisance thereon, whereby his neighbors are injured. If he does so, and the injury sustained by such neighbor cannot be adequately compensated in damages, he may be enjoined. *Owen v. Phillips*, 78 Ind. 284.

If the appellants in this case have been guilty of the folly of sinking a gas well in the center of a thickly-populated city, where they cannot collect the necessary quantity of nitroglycerin to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly cannot be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerin within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself, and not sustained by the public in general. 3 Bl. Com. p. 219; *Powell v. Bunker*, 91 Ind. 64; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *McCowan v. Whitesides*, 81 Ind. 235; *Fosson v. Landry*, 128 Ind. 186; *First Nat. Bank of Mt. Vernon v. Sarlle* (Ind. Sup.) 28 N. E. Rep. 434; and *Adams v. Ohio Falls Car Co.* (Ind.) 81 N. E. Rep. 57, (at this term.)

The sufficiency of the complaint, as it would be when tested by demurrer, is not involved

here. It is a mere temporary injunction. To authorize the court to grant such relief it was not necessary that a case should be made that would entitle the appellee to relief, at all events at the hearing. In such cases, it is sufficient if the court finds upon the pleadings and evi-

dence a case which makes the transaction a proper subject for investigation in a court of equity. *Spicer v. Hoop*, 51 Ind. 365. In our opinion the court did not err in granting the temporary injunction in this case.
Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

John C. STEVER

v.

PEOPLE'S MUTUAL ACCIDENT INSURANCE ASSOCIATION of Pittsburgh.

(.....Pa.....)

There is not a loss of a foot within the meaning of an accident insurance policy where the foot is not even injured and can be used when the person wears a "plaster jacket" to prevent an injury in another part of his body from affecting the use of the foot.

(July 13, 1892.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Huntingdon County in favor of plaintiff in an action brought to recover the amount alleged to be due under an accident insurance contract. *Reversed.*

The facts are stated in the opinion.

Mr. George B. Orlady for appellant.

Messrs. John M. Bailey and W. H. & J. S. Woods for appellee.

Green, J., delivered the opinion of the court:

This action was brought upon an accident policy, and the claim of the plaintiff was to recover the maximum amount of \$2,500 for a partial disablement. If, under the evidence, a recovery can be had at all for that species of disablement, the judgment of the learned court below should stand. The language of the policy, which authorizes a payment of \$2,500 for such an injury, is in these words: "The relief for partial permanent disablement, viz., the loss of one hand or foot or both eyes, by means as aforesaid, within sixty days from date of injury, shall not exceed \$2,500." The policy defines the meaning of the expression, "partial permanent disablement." It is, "the loss of one hand or foot or both eyes." The plaintiff was not affected as to his hands or eyes, and he did not lose a foot, in the sense of a physical severance of a foot from the leg. Yet it was contended in the court below, and the court held, that a physical severance of the foot was not necessary to entitle the plaintiff to recover. On this subject the court charged as follows: "The evidence shows there has been no amputation of the foot; yet if the jury

believe from the testimony that the foot, by reason of the injury and the paralysis, is entirely useless to the plaintiff; that he has no use thereof; that without artificial means he would be almost or entirely unable to move around; that it is only by artificial means—the plaster jacket—that he is able at all to use his foot; and that if the jacket were dispensed with he would be a helpless cripple,—we say to you that that would be, to our mind, satisfactory evidence of the loss of the foot, even though it be not amputated." This and other similar language in the charge was assigned for error, and presents the main subject for decision.

Upon recurring to the evidence, we find that in point of fact the plaintiff sustained no direct injury to his foot or his leg. They were both as whole and entire after the accident as before. The injury, as claimed by him, was sustained while riding in his wagon over a rough road, by his being jolted from one side of the seat to the other, and the muscles or ligaments of the back near the lower end of the spinal column being strained or wrenched severely, so as to cause him great pain and suffering, by reason of which he was subsequently deprived of the use of his left leg and foot, except by the application of an artificial device called a "plaster jacket." This jacket, as described in the testimony, was applied around his body in such a manner as to cause the weight of the body to rest upon the hips, and thereby relieve the affected parts of the pressure upon the spinal column, and consequent soreness and pain. Soon after commencing the use of this contrivance, the condition of the plaintiff improved so that he was finally enabled to resume the practice of his profession, and to go about visiting his patients riding in his wagon, or on the cars, or walking to some extent. It is surprising that very little testimony was given as to the extent of his power of locomotion on his feet. The plaintiff did not say, and was not asked, whether he could walk without a cane or a crutch, or whether he was able to go about freely on foot; whether he was obliged to limp, or whether he suffered any pain in ordinary walking, when he had on his plaster jacket. He did testify that without the jacket he was entirely disabled, and could not use his left leg or foot, and he was supported in this by the testimony of the physicians who were examined on his behalf. He also testi-

NOTE.—The question how far insurance against "loss of" a limb will include "loss of the use" of it because of injuries to other portions of the body is an interesting one and in view of modern policies will doubtless be an important one. So far as we

can ascertain this case is the first contribution towards an adjudication of that question, and considering the fact that the use of the foot was not in fact lost in this case, the decision leaves that question about as much open as it was before.

fied that he could not sleep at night without pain if he laid off the jacket. One jacket would last about two months, and then had to be renewed. It must be conceded that, under the testimony, he could not use his left leg or foot without the assistance of the plaster jacket, and that without it his foot was comparatively useless to him. Just what he could do and did do by using the jacket is not so clearly described in the testimony as it might be, but some idea may be gained of this by an examination of portions of the evidence. The plaintiff testified that he had continued in the practice of his profession from the 1st of January, 1891, to the time of the trial, February 16, 1892; that after the month of June, 1891, his professional income was at the rate of \$1,500 a year, and that it was improving. He was asked: "Question. When were you first able to go about the house and prescribe for your patients?" Answer. Well, about the beginning of December, 1890. Q. And you have attended to your professional duties in that way from that time since? A. Yes, sir. Q. How frequently have you been to Huntingdon within that time? A. Well, whenever I had any business; I couldn't approximate. Q. Half a dozen times? A. It might have been. Q. About the same number of times as during the eighteen months preceding the accident? A. No; oftener. Q. Oftener since? A. Yes, sir. Q. Have you been riding in a buggy? A. Why, occasionally. Q. On horseback? A. No, sir. Q. Did you ever ride horseback? A. Yes, sir. Q. Prior to the accident? A. Yes, sir. Q. Have you been riding in the cars? A. I have rode in the cars. Q. Have you been walking around town? A. I don't walk much; walking is the worst thing I have to do. I can do anything else better than walk. Q. You can't walk straight? A. I can't stand erect; yes, sir." He was also asked, in re-examination: "He has asked you about your practice since January 1, 1891. What enables you to practice at all?" Answer. Well, by the artificial means of support I am able to go about and do some work. Question. Without that artificial means of support, could you practice? A. I could not. Q. Without that artificial means of support, what effect would it have on both limbs? A. They would be useless." He also testified that his appetite and digestion were good, that he weighed nearly 200 pounds, and that he had not the appearance of an invalid.

Dr. Dercum, a witness for the plaintiff, testified: "Question. As to the extent of the permanent condition, in your opinion is it total or partial?" Answer. It is not total, in the sense that it prevents him from walking. It is partial, as regards enabling his getting about. I should qualify that by this statement: that the back being maintained in its condition of relief—rest—by the jacket that he wears and which he wore at the time I examined him,—he had removed it for a little while and put it on again,—while the spine is kept more or less at rest the pain is less both in the back and in the leg, and during that time he could get around tolerably well; at least, he seemed to move around in my office. . . . Q. It is a weak back? A. Yes, sir. Q. He uses both legs with average movement? A. Yes, sir. Q. 16 L. R. A.

He steps forward with each leg alike? A. Yes, sir. Q. Turns and moves the body? A. Yes, sir; he did this, though, when I spoke to him, and he then stood alone upon one leg and the other. He stood very steady on the right leg, and badly on the left." Dr. Barnhart, another witness for the plaintiff, who attended him, was asked: "Question. After the application of the jacket and its use, the doctor commenced to improve? A. Yes, sir. Q. He was able to get up and move himself around? A. Yes, sir; that is, after a few weeks. Q. Or after the first of December, I think? A. Yes, sir." He further testified that he made his last examination about a year later, and found that the plaintiff's condition had improved, and his general health was better. Dr. James, another of plaintiff's witnesses who attended him, after describing his condition and the treatment used, said: "I couldn't tell whether it was the nerve or a ligament or a tendon torn off. I didn't get down to see. You can't tell that. It was evident there was something there; that one of these was injured to a certain extent. Question. From that time on, under your treatment, he continued to improve until he was able to walk around? Answer. Under the plaster of Paris treatment he continued to improve steadily. Q. And partially recovered his health, so that he is able now to move around, and go from his house to town, and to the railroad station, and on the cars to come to town? Is that correct? A. Well, I see him moving around, certainly, but he still has his jacket on."

There was much medical testimony as to what was the precise character of the plaintiff's injury. It was thought there was some atrophy of the muscles, and Dr. Dercum thought there was pain in the sciatic nerve extending down the leg, and all agreed that without the artificial support of the plaster jacket he would become helpless; and also that with it he could move around on his feet with more or less freedom, and could carry on the practice of his profession, including the visiting of his patients. It is beyond all question that the plaintiff was severely and painfully injured, and that without artificial support he would probably become helpless and unable to use his limbs. Under this state of the testimony, the question recurs, and it is the one leading question of the cause, Can there be a recovery, under the particular contract between these parties, for a lost foot? It is only for the loss of a foot that there can be any recovery of any kind in this action. The policy insures only against "bodily injury effected through involuntary, violent, and accidental means." In the fifth of the numbered conditions, it prohibits any recovery of benefits for certain injuries, and for the results of disease, in the following words: "Fifth. The benefits and insurance under this certificate shall not extend to any bodily injury of which there shall be no external visible signs, nor to hernia, nor to any bodily injury happening directly or indirectly in consequence of any disease, nor to any death or disability which may be wholly or in part attributable to disease or bodily infirmities existing prior to, or happening subsequent to, the date of this certificate, or poison in any form or manner, or the coming in con-

tact with any poisonous substances, or any other cause, except where the injury is the proximate and sole cause of disability or death." It will be perceived, therefore, that the policy in suit insures only against involuntary, external, violent, and accidental injuries, and not against disease of any kind, nor against disabilities which are the result, wholly or in part, of disease or bodily infirmities; and, for the purposes of the present case, the only injury for which there can be any recovery, within the terms of the policy, is the loss of one foot. Now, in point of fact, as has been already stated, the plaintiff has not lost a foot. So far as the evidence goes, both his feet are in perfect natural condition. His left foot is the only one in question, and in reality it has received no injury of any kind, external or internal. So far as all its physical functions are concerned as a member of his body, it is entirely capable of use, if the other parts of his body which can or may affect its use are in proper condition. It is not proved, or even alleged, that any of the muscles, tendons, or nerves of the foot are injured in any manner. The source of the difficulty does not lie in the foot nor in the leg. It is in another part of the body, to wit, the back. Just what the actual physical injury or difficulty was is not precisely stated in the medical testimony. It is uncertain. It is supposed to be some injury to a muscle, or ligament, or nerve, or nerve center, or to the vertebrae of the spinal column. The physicians have different theories regarding this subject, and none of them claims to know with certainty. The disability of the plaintiff did not result immediately from the injury. He went to Philadelphia the day after, and remained several days; was examined and treated by physicians; returned home, and, on Monday following the previous Tuesday on which the accident occurred, he became disabled while returning from his stable. Whether the disability thus arising was due solely to the injury received at the time of the accident, or partly to a diseased condition of the muscles, tendons, nerves, or spinal vertebrae, might be an interesting, and possibly a controlling, question; but, in the view we take of the case, it is not necessary to determine that question. In point of fact, the plaintiff was so much benefited by the treatment he received

that he was able in December following, and from thence until the trial, to use both his feet, to walk about and attend to his business, to ride in wagons and on cars, and generally to go around his house and the town as he was accustomed to do before he was injured. It is only when he removes the mechanical appliance called a "plaster jacket" that he becomes disabled. In such circumstances we do not see how he can be considered to have suffered the loss of a foot. He has neither lost a foot nor the use of it. He has it, and he constantly uses it, and therefore it cannot be said that because he is deprived of its use he is entitled to be considered as having lost the foot itself. If he had suffered an attack of permanent paralysis in the leg, and been thus deprived of the use of his foot, he could not have recovered, as the cause of his disability would have been disease. If, when he removes the jacket, a paralytic condition ensues, is it not due to a diseased condition of the nerves of the back, and does that help his legal standing under the fifth clause of the conditions of the policy? We think not; but, aside from that, he has received surgical treatment for his injury which has been successful, and has enabled him to preserve the use of his foot, and the position is not tenable that he has lost his foot, within the meaning of the policy, because he has lost its use. Of course, if the foot had been cut off by the accident or by amputation, and he had been provided with an artificial substitute which he could use, he could recover; but that would be because he had literally brought himself within the terms of the policy by actually losing his foot. But where, as here, he has not lost his foot, and it has not even been injured, and he is enabled to use it constantly by means of an appliance which prevents an injury in another part of his body from affecting the use of the foot, we are quite clear that there can be no recovery under the contract of the parties as for the loss of a foot. We sustain the second, fourth, fifth, and sixth assignments of error. As there is a remaining question whether the plaintiff is entitled to another sum under the policy, a new venire must be granted.

Judgment reversed, and a venire de novo is awarded.

MARYLAND COURT OF APPEALS.

NORTHERN CENTRAL R. CO., *Appt.*,

v.

John O'CONNER.

(.....Md.....)

1. **The illegibility of the date on a ticket which the passenger receives in that condition does not impose on him the duty of getting the indorsement of a ticket receiver as to its validity because it is questioned by the gateman, and a rule of the railroad company making such a requirement is unreasonable, because it would subject a passenger to great inconvenience and might cause him to lose his train.**

2. **Damages for the refusal to permit a passenger to take a train which his ticket entitled him to take include the amount paid by him for another ticket, compensation for loss of time, necessary hotel expenses and also compensation for any inconvenience suffered.**

(June 8, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Harford County in favor of plaintiff in an action brought to recover damages because of defendant's alleged wrongful refusal to honor a ticket which plaintiff presented for passage over a portion of defendant's road. *Reversed.*

The facts sufficiently appear in the opinion.

Argued before Miller, Robinson, Irving, Bryan, McSherry and Fowler, JJ.

Messrs. Bernard Carter, C. H. Carter, H. Robinson and William Grason for appellant.

Messrs. John I. Yellott and M. W. Offutt for appellee.

Robinson, J., delivered the opinion of the court:

This is an action to recover damages for the

refusal by the defendant's agent to allow the plaintiff to pass through the gate to the train, then about to leave the Calvert station. The plaintiff, a lime burner by trade, bought of the defendant's agent a round-trip ticket from Texas station to Baltimore, good for two days, and paid therefor 68 cents. The conductor on the train to Baltimore tore off the Baltimore coupon, and handed the return coupon back to the plaintiff. On the evening of the same day, the plaintiff exhibited the return coupon to the gateman, who, after examining it, finding the date thereon illegible, even by the aid of a strong electric light, told the plaintiff that the ticket was in bad condition, and that he could not make out the date, and refused to allow him to pass through to the train. The plaintiff insisted that it was in the same condition as when he got it from the ticket agent at Texas station. This explanation, however, was not satisfactory, and, after some words between the plaintiff and the gateman, the ticket was handed to a police officer then on duty at the station, who, after examining it, said: "The date was rubbed out, and it looked as if it had been rubbed out on purpose." The gateman then said, "This is what I told him." The plaintiff still insisting upon his right to pass through, the gateman told him to take the ticket to the receiver's office up-stairs, and his indorsement would make it all right. The plaintiff started up-stairs, but how far he got there is some conflict in the testimony. Be that as it may, in a very short time he returned, and said he could not find the receiver's office, and demanded that he should be allowed to pass to the train, threatening at the same time to sue the company if the gateman refused. Thereupon the latter called the conductor of the train, and, showing him the ticket, asked if he would honor it, to which he replied, "No." In a few minutes the train

NOTE.—Regulations as to admission of passenger to train house.

A railroad company has exclusive dominion over its station and grounds and may make such reasonable regulations for use of them as may best further its own convenience. See *note* to *Montana Union R. Co. v. Langlois* (Mont.) 8 L. R. A. 753.

And this may extend to the prohibition of the transaction of private business by individuals in and about the station which has no connection with the company's contract for the carriage of passengers. See *note* to *Cole v. Rowen* (Mich.) 13 L. R. A. 843.

And the company may also establish reasonable rules for the convenient performance of its duty to its passengers. See *note* to *Walker v. Vicksburg S. & P. R. Co.* (La. Ann.) 7 L. R. A. 111.

Although in the establishment of these rules there can be no discrimination between persons. See *note* to *McGowen v. Morgan's L. & T. R. & S. Co.* (La. Ann.) 5 L. R. A. 817.

Hack drivers may be excluded from the station. *Barker v. Midland R. Co.* 13 C. B. 45.

The company may exclude even from its stations persons having no business there. *Harris v. Stevens*, 51 Vt. 79, 73 Am. Dec. 387.

The above rights of the company would seem to give it the right to make some reasonable regulation by which it may determine who are passengers

and entitled to access to its stations and trains and who are not.

And in *Chicago, B. & Q. R. Co. v. Borer*, 1 Ill. App. 473, the court states that it is not to be disputed that the railroad company has a right to establish a rule requiring passengers to produce their tickets before entering its cars. See also *Pittsburgh, C. & St. L. R. Co. v. Van Dyne*, 57 Ind. 573, 23 Am. Rep. 68.

While in *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 423, it is said that no claim could well be made against the reasonableness of a rule requiring persons passing through the gates of the depot for the purpose of taking trains to exhibit their tickets to the gate keeper and have them punched by him, such or similar rules would seem absolutely necessary to preserve to the defendant control of its ground and to enable it to receive and discharge passengers with order and to the safety, comfort, and convenience of the passengers.

And in that case it was decided that where a person crowded past the gate keeper without showing his ticket that officer might rightfully lay his hand upon and stop him without liability to an action for trespass.

The right of the passenger to be carried is superior to any rule or regulation which the carrier may make, and no rule can be upheld which will have a tendency to interfere with such rights. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62. *El. P. F.*

left, and the plaintiff was obliged to remain in Baltimore till the next morning. The defendant offered in evidence the following rule, adopted by the defendant company in regard to defaced tickets: "When outlawed or mutilated tickets, or tickets upon which the limit has expired, are presented at the gate, holders should be refused admittance to the trains, and referred to the ticket receiver for investigation of the case, who will decide the matter."

The defendant, it is claimed, has the right to pass rules and regulations in regard to the admission of passengers to its trains, and that, if the return coupon was defaced, and the date thereon illegible when it was exhibited to the gateman, and the latter referred the plaintiff to the receiver for his indorsement of the ticket, and the plaintiff refused to take it to the receiver, then he is not entitled to recover in this action, even though the jury should find that the ticket was not in fact defaced or blurred by the act of the plaintiff, and was in the same condition as when he got it from the defendant's agent at Texas station. To this we cannot agree. The defendant has the right, no doubt, to pass rules and regulations in regard to the admission of passengers to its trains, provided such rules are reasonable rules, and do not subject the passenger to unnecessary inconvenience and annoyance. It may, for its protection, require passengers to exhibit their tickets to the gateman in passing to the train, and the latter may, in the exercise of his judgment, refuse to allow one to pass through the gate on a defaced ticket. But in this, as in other like matters, the defendant is responsible for the wrongful and injurious exercise of judgment on the part of its agents. The gate, as the record shows, is opened a few minutes only before the train is to leave the station. And how long it would take the receiver to examine and pass upon the validity of a ticket referred to him depends, as he testifies, upon the circumstances. He would be obliged to see whether he had the corresponding coupon, and this might involve the examination, he says, in some cases, of a thousand tickets. And to hold that a passenger who has bought a ticket, and in good faith presents it to the gateman in the same condition as when he got it from the ticket agent, is obliged to go to the receiver's office, and get his indorsement, because its genuineness has been questioned by the gateman, would not only subject him to great inconvenience, but in many cases it would be impossible to get such indorsement in time to take the train. And, besides, suppose the receiver refuses to indorse the ticket, it can hardly be contended that his judgment is binding and conclusive as against the passenger. At the same time we agree that, if the return coupon was so defaced by the act or negligence of the plaintiff as to make the date illegible, the gateman had the right to refuse to honor it, and to refuse to allow him to pass to the train, and for such refusal no action would lie. On the other hand, if the ticket was so blurred or defaced at the time it was delivered to him by the ticket agent at Texas station, and it was presented at the gate in the same condition as when he got it, and the gateman refused to allow him to pass, the plaintiff, be-

ing himself without fault, was under no obligation to get the indorsement of the ticket receiver, and for such wrongful refusal by the gateman the defendant is liable. So the defendant has no reason to complain of the plaintiff's first prayer, nor of the rejection of its first prayer.

And this brings us to the question in regard to the measure of damages, and the law in this respect is well settled. In the absence of malice or wantonness or circumstances of aggravation, the plaintiff was entitled to recover such damages only as were the immediate and necessary consequences resulting from the wrongful act of the defendant; that is to say, the expenses incurred by him by reason of the defendant's refusal to allow him to enter its car, the amount paid for another ticket, compensation for loss of time, hotel expenses, if any, incurred, and, in addition to these, inconvenience suffered by him, may be ground of damages if it is such as is capable of being ascertained and assessed at a money value. *Carr's Case*, 71 Md. 185. There was no error, therefore, in granting the defendant's third prayer. The rule laid down in defendant's second prayer,—that in estimating the damages the jury should allow merely the sum of 40 cents, being the cost of a ticket from Baltimore to Texas station, and the further sum of \$1.50, being the actual loss sustained by the plaintiff by absence from his business,—is rather too narrow, and the prayer was properly refused. We cannot agree, however, with the court below, that the facts set forth in plaintiff's second prayer would justify the jury in finding that the refusal by the gateman to accept the return coupon, and to allow the plaintiff to pass to the train, was made not merely in disregard of his rights, but with a wanton or reckless indifference to such rights. Now, what are these facts? First, that in refusing to accept the return coupon the gateman assigned as a reason for so doing that the date looked as if it had been rubbed out on purpose, and then that he referred the plaintiff to the ticket receiver, and that he returned, saying he could not find the receiver's office; and, further, that the gateman himself had time before the departure of the train and without neglecting his other duties to have reported the case to the receiver, and failed or refused so to do. We cannot agree that these facts in themselves would warrant the jury in finding that the gateman acted with a wanton or reckless indifference to the plaintiff's rights. He had no right, we agree, to use offensive or insulting language towards the plaintiff, and, if he did, such conduct on his part would be evidence from which the jury would be justified in awarding exemplary or punitive damages. And we agree, too, that in saying the date looked as if it had been rubbed out on purpose, such language may be construed as an insinuation, at least, that the date had been rubbed out by the plaintiff. But the plaintiff, it is clear, did not so understand it; nor did he consider it offensive, for it seems to have made no impression upon him. On the contrary, it had entirely escaped his recollection, and the evidence in regard to it was brought out by the gateman himself, who says that, after examining the ticket, the police officer told the

plaintiff it looked as if the date had been rubbed out on purpose, which the witness added is "the same thing I told him." So it does not seem that the language was used, nor was it understood by the plaintiff as being used, in an offensive or insulting manner. Then, as to the refusal or neglect of the gateman to report the case to the receiver, the proof shows that it was his duty to stand at the gate until the departure of the train, and it would have been a breach of duty to have left the gate for this or any other like purpose. And there was error, therefore, in granting the plaintiff's second and fourth prayers.

Nor can we agree that these facts would warrant the jury in allowing not only such damages as they may find to have been the direct and immediate consequences of the defendant's refusal to admit the plaintiff to its train, but, in addition thereto, such other damages as they may believe he has suffered in his person and feeling. *Rice's Case*, 64 Md. 64, relied on in support of this instruction, differs widely from the case now before us. In *Rice's Case* the plaintiff had purchased a round-trip ticket from Wilmington to Philadelphia, and on the trip to Philadelphia the conductor by mistake canceled the return coupon. Afterwards, finding out his mistake, he attempted to correct it, by writing on the return coupon, "Canceled by mistake," and, handing it back to the plaintiff, said: "I have fixed it all right now. You can ride on it." The mistake, however, it seems, was not corrected in accordance with the rules of the company, and when the plaintiff presented the coupon to the conductor on the train from

Philadelphia to Wilmington he refused to accept it, and demanded of the plaintiff that he should pay full fare on the return trip. This the plaintiff refused to do, and he was forcibly ejected from the car. He then brought an action of trespass *vi et armis* against the company, and, being wholly without fault, we said that, if the servants of the company, under such circumstances, laid their hands forcibly on the person of the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff, and an indignity to his feelings, for which an action will lie, and for which he is entitled to be compensated in damages; and this, too, even though the servants of the company acted without malice, and used such force only as was necessary. Such damages were not allowed as punitive damages, but as compensatory damages for the unlawful interference with the person of the plaintiff, and the indignity to which he was thus exposed in being forcibly ejected from the car. But the action in this case is for a breach of contract, and not an action of trespass *vi et armis*. It is not alleged, nor is there any proof to show that the gateman used any force or violence or interference in any manner with the person of the plaintiff, and the rule laid down in *Rice's Case* has no application to this case.

There being error in granting the plaintiff's second, fourth and fifth prayers, *the judgment must be reversed, and new trial awarded.*

PENNSYLVANIA SUPREME COURT.

Charles D. WOODRUFF, *Appl.*,

v.

George E. PAINTER *et al.*

(.....Pa.....)

1. A retail merchant is liable for the loss of a customer's watch and chain which is taken off and at the suggestion of a salesman put in a drawer while the customer is trying on clothing, if ordinary care is not exercised for its safety, but not if he has exercised such care, notwithstanding which the watch has been stolen.
2. A bailment is for hire, although no hire is paid, when it is a necessary incident of a business in which the bailee makes a profit.
3. A retail storekeeper who fails to return the watch and chain of a customer which is placed in his custody while the owner is trying on clothing has the burden of showing that he has exercised ordinary care for its safety, and of explaining his neglect to restore it.

(July 13, 1892.)

APPEAL by plaintiff from a judgment of the court of Common Pleas No. 1 for Philadelphia County in favor of defendants in an action brought to recover the value of a watch and chain which was alleged to have been placed in defendants' care for safe keeping and not returned by them. *Reversed.*

The facts are stated in the opinion.

Mr. De Forrest Ballou for appellant.

Messrs. Milton C. Work and Henry J. McCarthy, for appellees:

The burden of proof is upon the plaintiff to show a loss resulting from such degree of negligence as would render the depository liable, and mere proof of loss is not evidence of such negligence.

Giblin v. McMullen, L. R. 2 P. C. 817; *Smith v. First Nat. Bank in Westfield*, 99 Mass. 609, 47 Am. Dec. 59; *Pitlock v. Wells, Fargo & Co.* 109 Mass. 452; *Knowles v. Atlantic & St. L. R. Co.* 38 Me. 55, 61 Am. Dec. 284.

In *De Haven v. Kensington Nat. Bank*, 81 Pa. 95 (1876), the plaintiff deposited securities in a bank for safe keeping. The securities

NOTE.—The attempt to hold storekeepers responsible for the safety of property of customers which is necessarily laid aside while making purchases seems to be of recent origin. The leading case of *Bunnell v. Stern*, 10 L. R. A. 451, 22 N. Y. 539, which 16 L. R. A.

is approved in the principal case, recognizes such responsibility, and the case from the Pennsylvania lower court, cited in appellees' brief, which denies it, seems to be impliedly overruled by this one.

were stolen. The plaintiff brought suit against the bank. A nonsuit was entered, which the court below refused to take off. The supreme court affirmed, Agnew, *Ch. J.*, in his opinion saying: "We discover no sufficient evidence in this case to charge a merely voluntary bailee without reward for a loss by robbery."

This ruling was followed in *Goff v. Wanamaker*, 25 W. N. C. 358. There plaintiff entered defendant's store. When about to try on a new coat and vest the plaintiff took off those he had on and placed them on a counter, the salesman saying: "Lay off your coat and vest and try on these; nobody will disturb your clothes." Money was stolen and suit brought. Fell, *J.*, entered a nonsuit, which the court of common pleas, No. 2, of Philadelphia County, refused to take off.

Heydrick, J., delivered the opinion of the court:

The defendants were retail dealers in clothing in the city of Philadelphia. The plaintiff, in company with his wife, visited their store for the purpose of purchasing a suit of clothes, having upon his person at the time a watch and chain. Having selected a coat and vest, and being about to remove the corresponding garments for the purpose of trying on those selected, he took off his watch and chain, and was about to lay it on a pile of clothing, when the salesman who was waiting upon him said, "You had better put your watch here," indicating a drawer from which the vest had been taken; and adding, "It will be safe, I guess." The watch and chain were accordingly put in the drawer, and the drawer was closed by the salesman. The plaintiff, his wife, and the salesman then went to another part of the store, where there was a mirror, and the coat and vest, having been tried on, were found to be satisfactory. They next turned their attention to the selection of a pair of pantaloons, in doing which the plaintiff went twice to a dressing room connected with the store. While he was thus engaged in trying on pantaloons, the salesman conducted his wife to a seat some distance from the drawer in which the watch and chain had been placed, and to the vicinity of which she had returned after the coat and vest had been selected, and there entertained her during the time her husband was in the dressing room. When the entire suit had been selected, and the plaintiff had replaced the garments which he wore when entering the store, he said to the salesman, "Now we will take the watch." The salesman opened the drawer in which it had been placed, but it was not there. Several persons who had been in the store during the selection of the suit, but who had left, were sent for and questioned by one of the defendants, but the watch and chain were not found and returned to the plaintiff. While search was being made for the watch, the plaintiff asked the salesman whether they were in the habit of putting things like it in the drawers, and he replied that they had done so many times, and nothing of the kind had happened before. Having paid for the suit purchased, the plaintiff asked one of the defendants whether he thought it was right that he, the plaintiff, should lose the watch. The reply was that he would have to

lose it, but the defendants would do all they could to assist him in finding it. The watch has never been returned to the plaintiff. Upon proof of these facts the court below nonsuited the plaintiff, and its refusal to take off the nonsuit is the single error assigned.

When the defendants opened a retail clothing store they thereby invited the public to come into their place of business and purchase clothing in the usual manner, and when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places. 1 Addison, Torts, 208. So, too, a shopkeeper is liable for neglect on leaving a trap-door open without any protection by which his customers receive injury. *Farnaby v. Lancaster Canal Co.* 11 Ad. & El. 228. In like manner it cannot be doubted that, if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence,—guilty of a neglect of a duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that, if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profit from their patronage. Upon principle the contract must be held to extend to the safety of such property as the customers necessarily or habitually in pursuance of a universal custom carries with him. Whatever thus necessarily, or in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And, this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in *Bunnell v. Stern*, 123 N. Y. 539, 10 L. R. A. 481, a case differing from the present in this only: that the article lost was a lady's cloak, and the saleswoman took no care whatever of it.

Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person, and lay it aside; and, further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store,—the defendants thereby became chargeable as bailees. The

principles which govern that relation are briefly and clearly stated by *Judge Story*, in his work on Bailments, thus: "When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or *eo nomine*, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that *Lord Holt* said, in *Lane v. Cotton*, 12 Mod. 483, an action was sustainable against an innkeeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in *Bunnell v. Stern*, *supra*. In Massachusetts the proprietor of a liquor store, who permitted an order slate for an expressman to be kept in his store, and allowed people to leave packages there to be taken away by the expressman, was held to be a bailee for hire on the theory that what he thus permitted brought him an increase of business. *Newhall v. Paige*, 10 Gray, 866. This, however, would seem to be pushing the principle to a dangerous extreme; it would render it unsafe for any business man to allow another's property to be left about his premises, and would be in seeming conflict with our own case of *First Nat. Bank of Carlin v. Graham*, 79 Pa. 106, and *De Haven v. Kensington Nat. Bank*, 81 Pa. 95. The safer rule is to hold a bailment to be for hire when no hire is paid in such cases only as it is a necessary incident of a business in which the bailee makes profit; and such the jury might have found the present case to have been.

The remaining question is whether, upon the assumption that there was a bailment for hire, proof of failure of the defendants to return the watch and chain upon demand was, under the circumstances, sufficient to carry the case to the jury. If what was said by the plaintiff should be taken as proof that the property was lost, we would be met with a conflict of authority elsewhere as to the effect of it, and find little in our own books to help us determine whether the burden was upon the plaintiff to prove negligence, or upon the defendants to repel the inference of it. But the plaintiff's evidence amounts to no more than that the salesman examined the drawer in which the watch had been placed and some others, and did not find it, and that several persons, not employes of the defendants, who had been in the store and left, were sent for and interrogated without result. All this did not prove a loss, nor even that the defendants said the watch was lost or had been stolen.

In *Logan v. Mathews*, 6 Pa. 417, it was held that if a bailee for hire return the property in a damaged state, and give no explanation how the injury happened, the burden of proof to show that there was no negligence is upon him. In harmony with this judgment, a bailee who fails to give any such explanation of his neglect to restore the property intrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it. Doubtless the defendants were entitled to the benefit of any inferences fairly deducible from their conduct when the watch was demanded, but such inferences were for the jury. If the case had been submitted to them, and they had found as an inference from the facts proved that the watch had been stolen, such finding would have been a complete exculpation, unless they further found that the defendants had not exercised ordinary care.

The judgment is reversed, and a venire facias de novo is awarded.

WISCONSIN SUPREME COURT.

FISH BROS. WAGON CO., *Recept.*,

v.

Titus G. FISH *et al.*, *Appts.*

(.....Wis.....)

1. The good-will of a business including the right to use trade-marks even where these consist of the names of individuals engaged in the business and of a picture representing such name, pass with a transfer of all the property and assets of the business although not specifically mentioned.

2. The words "Fish Bros. & Co." and the picture of a fish may be applied by brothers named Fish to vehicles manufactured by them although such

words and picture were previously used by them in a business which has now passed with its good-will and trade-marks to a corporation, provided their use is not such as to induce persons to buy their vehicles as and for those manufactured by the corporation.

3. Persons have no right to represent their business as the same formerly conducted by them where that has been transferred with all its assets to other parties, although they have a right to do the same kind of business.

(Winslow, J., dissents from proposition 2.)

(June 15, 1892.)

NOTE.—For note on name of business establishment as part of the good-will of the business, see *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462.

16 L. R. A.

APPEAL by defendants from an order of the Circuit Court for Douglas County refusing to vacate an injunction restraining them from using certain trade marks and names,

and also refusing to restrain plaintiff from using them. *Reversed.*

Statement by Cassoday, J.:

It appears from the record that in 1863 the defendant Titus G. Fish and one Bull, under the firm name of Fish & Bull, commenced the business of manufacturing wagons in the city of Racine; that, as such firm, they employed one Edwin B. Fish, a brother of Titus G.; that about 1864 Bull went out of the firm, and Abner C. Fish, a brother of Titus G., became a member thereof, and they continued the business of manufacturing wagons under the firm name of Fish Bros., and as such continued Edwin B. Fish as an employé; that about 1868 Edwin B. Fish became a member of the firm of Fish Bros.; that about that time the firm became embarrassed, and thereupon entered into an agreement with Jerome I. Case, whereby Fish Bros. transferred to Case all the personal property they then had in the wagon-making business at Racine, and he advanced a large amount of money for the purpose of carrying on said business under an agreement in writing whereby said business was thereafter to be carried on by Fish Bros., acting as his agents, and they to draw out a certain amount per year for the support of their respective families, and to have the privilege of redeeming the property and the business or repurchasing the same upon payment to Case of the amount advanced and the interest agreed upon as stipulated; that the business was thereupon conducted by and in the name of "Fish Bros., Agents;" that about 1872 or 1873 one Huggins became a member of said firm and the same became known as "Fish Bros. & Co., Agents," composed of Titus G., Abner C., Edwin B. Fish, and John C. Huggins; that in 1878 the catalogue used by said Fish Bros. & Co., Agents, had thereon a picture of Titus G. Fish on the left-hand corner, and underneath the picture were the words, "Titus G. Fish, founder of the firm of Fish Bros. & Company, 1864," and upon the right-hand side of the picture was "1878," being the date of the catalogue, that there was also a picture of a fish on the catalogue and cars; that such pictures and statements were continued on subsequent catalogues down to the time of the incorporation of the plaintiff; that in 1880 the wagons and vehicles so manufactured by Fish Bros., Agents, and by Fish Bros. & Co., Agents, had become somewhat celebrated to the trade, so that in 1880 they manufactured and sold about 15,000 in different parts of the country, and the capital involved in the business then was about half a million; that in 1880 a disagreement arose between Jerome I. Case and Fish Bros. & Co., Agents, as to their respective rights under said agreement, and thereupon Case commenced a suit against Fish Bros. & Co., which twice came to this court, and will be found reported in 58 Wis. 56, and 63 Wis. 475; that in 1882 or 1883 Abner C. dropped out of the firm, and D. J. Morey and S. S. Lyon became members thereof, under the firm name of Fish Bros. & Co., composed of Titus G. and Edwin B. Fish, Huggins, Morey, and Lyon; that the business was conducted and managed by Fish Bros. & Co., Agents, until after the first decision in 16 L. R. A.

this court; that October 16, 1883, Jerome I. Case was appointed a receiver, and took possession of all the property standing in the name of Fish Bros. & Co., Agents, or otherwise represented in said business, and excluded the members of said firm therefrom otherwise than and as employés; that Case continued such receiver down to September 26, 1885, when he resigned, and A. O. Hall was appointed in his place, and he continued the same as such receiver, advertising the business as "Fish Bros. & Company; A. W. Hall, Receiver; T. G. Fish, Superintendent;" and placing on the wagons and their catalogues "Fish Bros.," "Fish Wagons," "Fish Bros., Agents," "Fish Bros. & Company, Agents," and the picture of a fish with "Bros." on it, or "Bros. & Co.;" that Titus G. Fish continued in the employ of said Hall as such receiver during his entire connection with the business; that in December, 1886, Case being desirous of getting his money out of the business, one O. R. Johnson proposed to buy from Hall, as such receiver, the entire real and personal property of the business for \$48,603.96 besides the outstanding accounts; that in pursuance of such order Johnson thereupon gave notes for such purchase to the amount of about \$115,000; that January 22, 1887, by way of effecting such transfer, Case and wife conveyed the real estate to said Johnson, and also his interest in the personal estate, that January 25, 1887, the court ordered such sale by the receiver to said Johnson, and the same was made accordingly; that January 28, 1887, the plaintiff, Fish Bros. Wagon Company, became incorporated under chapter 86, Rev. Stat., for the manufacture and sale of wagons at Racine, with Titus G. and Edwin B. Fish, Johnson, Booth, and Deane, as stockholders, which corporation had a capital stock of \$250,000; that Edwin B. Fish and one Fred C. Fish, a son of said Titus G., were employed in the business; that Johnson was the principal stockholder and president of the company; that Booth was secretary; that Titus G. Fish was vice president and manager, that Deane was treasurer, and Edwin B. Fish superintendent; that Titus G., as such manager, made an illustrated catalogue having thereon, "Fish Bros. Wagon Company, Racine, Wisconsin;" the picture of a fish, with the word "Wagon" thereon, a portrait of Titus G. Fish, with the figures "1864" on the left and "1888" on the right; together with the words, "Titus G. Fish, founder of the Fish Bros. Wagon," in the middle; also with the words, "The Fish Bros. Wagon;" "Fish Bros. & Company, Racine, Wisconsin," and the picture of a fish with "Fish Bros. Wagon Company, Racine, Wis." thereon, and another picture of a fish with "Bros." thereon, and another picture of a fish with "Bros. & Co." thereon; that the articles of incorporation of said plaintiff company are dated January 27, 1887, and signed by Johnson, Booth, Titus G. Fish, and Edwin B. Fish, that April 22, 1887, Hall, as such receiver, deeded the real estate connected with said business to O. R. Johnson, in pursuance of the order of the court and a public sale at auction, April 7, 1887, reciting the consideration of \$15,000; that Titus G. Fish was one of the directors of said company; that he was

present at a meeting thereof, May 12, 1887; that on that day he entered into a written agreement with said Johnson, reciting that Johnson had advanced money to purchase the business of Fish Bros. & Co., and to purchase the real and personal assets of said business, and had transferred the said property to Fish Bros. Wagon Company, being the plaintiff corporation herein, and that he held substantially all of the capital stock of the corporation; therefore it was mutually agreed that said Titus G. Fish should give his entire time and efforts to making said assets productive, and containing an optional right to purchase by him from Johnson; that on the same day Johnson and wife conveyed said real estate, including the factory and buildings situated thereon, to the plaintiff company; that July 17, 1887, said Hall, as such receiver, made a further deed to said Fish Bros. Wagon Company, the plaintiff herein; that August 1, 1887, Titus G. Fish and Johnson entered into an agreement extending the former agreement between them to July 1, 1888, and the same was afterwards extended to December 1, 1888, by written agreement; that Titus G. Fish was present and participated in a directors' and stockholders' meeting of the plaintiff company held October 24, 1887; that November 7, 1887, Hall, as such receiver, made a further deed of such property to said plaintiff company; that at a meeting of the directors of the company, August 13, 1888, said Huggins was elected a director and treasurer of said company; that December 29, 1888, Titus G. Fish verbally agreed to take 500 shares of the capital stock of the plaintiff company, and certificates therefor were issued, but not paid for, and were finally canceled April 2, 1889; that at a stockholders' meeting of the plaintiff company held January 21, 1889, Titus G. Fish and said Huggins participated in and were each elected directors for another year; and thereupon said directors elected said Huggins vice-president and general manager, and said Titus G. Fish, secretary, of said plaintiff company; that at a stockholders' meeting of the plaintiff company held March 30, 1889, the stock of said Titus G. Fish was voted by proxy; that at the same meeting he presented his resignation as a director and secretary of the company, and the same was accepted; that Edwin B. Fish continued in the employ of the plaintiff company until June 17, 1890, when he went out; that June 17, 1890, Titus G. Fish, Edwin B. Fish, and Fred. C. Fish entered into copartnership by an agreement in writing to prosecute the business of manufacturing or procuring to be manufactured and dealing in wagons and other vehicles, under the name of Fish Bros. & Co., Titus G. Fish to have a one half interest and Edwin B. and Fred. C. each one-fourth interest therein; that it was provided therein that each party was at liberty to engage in other business on conditions named; that said business was to be located and conducted at such places as they might mutually deem advantageous; that on the same day the said Titus G., Edwin B., and Fred. C. Fish, of Racine, under the name of Fish Bros. & Co., entered into an agreement with the defendant, the La Belle Wagon Works, a corporation then organized and existing under the laws of

Wisconsin, in Douglas county, to the effect that said La Belle Wagon Works therein agreed to manufacture for said Fish Bros. & Co., and to deliver to such persons as may be by them designated and accepted, farm wagons to be known as "Fish Bros. & Co. Wagons," and to be marked on the rear axle "Fish Bros. & Co.," and upon the side of the box "Fish Bros. & Co. Wagon," said wagons to be manufactured of material and pattern selected and designated by said Fish Bros. & Co., and the manufacture thereof to be under their supervision and direction, and of the net proceeds thereof Fish Bros. were to have 2½ per cent, and the La Belle Wagon Works the balance; that the La Belle Wagon Works were to have the exclusive right to fix prices on all wagons sold, and to reject any and all orders of persons unworthy of credit, unless they paid cash; that Fish Bros. & Co. were to save harmless the La Belle Wagon Works from any and all litigation which might thereafter be instituted against it, by reason of the manufacture or sale of said Fish Bros. & Co. wagon; that said Titus G. Fish was to be employed as superintendent of sales and collection by said La Belle Wagon Works, under the supervision and instruction of its board of directors, and to have a salary of \$3,000 per year, and that Edwin B. Fish was to have a salary of \$1,500 per year, and Fred. C. Fish a salary of \$1,000 per year, with other stipulations, and it was therein agreed that said contract should terminate June 17, 1900, subject to the provisions therein contained, and was signed by each of the members of said firm of Fish Bros. & Co. and said corporation; that thereupon Titus G., Edwin B., and Fred. C. Fish, under the firm name of Fish Bros. & Co., issued a circular addressed "To Our Old Customers and the Implement Trade," stating, among other things, that they desired to advise them of the change of location and change in their firm name; that the firm of Fish Bros. & Co., of South Superior, Wis., succeeds Titus G. Fish, of Fond du Lac, Wis., the senior member and head of the present firm, comprising Titus G., Edwin B., (Fish Bros.) and Fred. C. Fish, formerly of Racine, Wis., and stating that for the first time since 1883 they were able to furnish their patrons with "the genuine Fish Bros. & Co. wagon, fully up to our old standard of that date;" that their experience of over a quarter of a century in the manufacture of farm wagons for each and every section of the United States had led them into quarters where they found the best advantages for the manufacture of first-class wagons; that they were located in the finest timber belt in the country, and using the best hard-wood timber; and they guaranteed the trade a wagon made of a first-class butt-cut stock, thoroughly dry; that their former patterns and styles had been changed in but a few minor particulars, and then only where they could find opportunity to do better work; and inviting the trade of their old customers; that on or about July 27, 1891, the plaintiff commenced this action for the purpose of restraining the defendants herein from using the words "Fish Bros.," "Fish Bros. & Company," "Fish Bros. Wagons," the picture of a fish with "Bros.," "Brothers," "Bros. & Co." printed thereon, or in adver-

tising their wagons, and that the plaintiff be adjudged the exclusive right to the same as trade marks; that upon the application of the plaintiff for a preliminary injunction thereon, and on August 17, 1891, the court ordered, in effect, that the defendants be, and were thereby enjoined and restrained until the further action of the court from using the words "Fish Bros.," "Fish Bros. Wagons," or the trade-mark or device consisting of the picture of a fish with the words "Bros." or "Brothers" or "Bros. & Co." printed thereon, or from in any wise using said words, phrases, or devices, or any of them, in any way designating any wagons or vehicles, or printing, publishing, circulating or distributing catalogues containing such words in imitation of the plaintiff, or in any way giving out that the defendants, or any of them, are the manufacturers of or dealers in, or authorized to manufacture or deal in, Fish Bros. wagons, or to use the words "Fish Bros." or "Fish Bros. Wagons" in designation of their manufacture; that thereupon the defendants moved to dissolve said injunction, upon affidavits, etc. whereupon the court, September 13, 1891, ordered that so much of said temporary injunction as enjoins the defendants, or any of them, from using in their business of making and selling wagons or other vehicles the words "Fish Brothers & Company," "Fish Bros. & Co.," or either of them, is hereby dissolved, annulled, and set aside, upon giving the requisite bond; that thereupon the defendants answered upon the merits, and by way of counterclaim, and asking a counter injunction restraining the plaintiff from using the words "Fish Brothers," "Fish Bros.," or "Fish Brothers Wagons," or the picture of a fish with the words "Fish Brothers" or "Bros." or "Fish Brothers & Company" or "Fish Bros. & Co." stamped thereon; that thereupon these defendants moved the court November 12, 1891, on due notice, for an order setting aside and vacating the injunctive order theretofore entered therein on the plaintiff's application, and for a temporary restraining order in favor of the defendants; and, after consideration thereof, the same was and is thereby denied, with costs. From that order the defendants bring this appeal.

Meers, Turner & Timlin and Ross, Dwyer & Smith, for appellants:

The plaintiff never acquired the exclusive use of the device of the fish or the trade-name "Fish Bros." "Fish Brothers" "Fish Bros. Wagon" or "Fish Wagon."

The plaintiff could only acquire these rights by:

- a. Adoption and use.
Browne, Trade-Marks, § 46.
- b. Assignment.
Id. § 57.
- c. Operation of law.

Ibid.

No matter how long Fish Brothers may have permitted the plaintiff or others to use the trade-mark and trade-name they do not thereby lose their exclusive right to the same. Such user creates only the relation of licensor and licensee.

McCardel v. Peck, 28 How. Pr. 120; *Cox, Trade-Mark Cas.* 312. See *Stephens v. De* 16 L. R. A.

Conto, 4 Abb. Pr. N. S. 47, 7 Robt. 343; *Cox, Trade-Mark Cas.* 445; *Browne, Trade-Marks*, § 364.

By permitting another to use his trade-mark a man does not loose his ownership of it, even though such user may be by him in conjunction with his partner.

Kidd v. Johnson, 100 U. S. 617, 619, 25 L. ed. 769, 770; *Huwer v. Dannendhoffer*, 82 N. Y. 499; *Hazard v. Canwell*, 93 N. Y. 259.

The good-will of an established and successful business is undoubtedly of much value to the possessor of such business and may be sold with it. But, while such sale will entitle the purchaser to a certain limited protection, it will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind in the same village or city.

Washburn v. Dosh, 68 Wis. 459, 60 Am. Rep. 873; *Bergamini v. Bastian*, 35 La. Ann. 60, 48 Am. Rep. 216.

The defendants Fish have the right to use their own name in their business, notwithstanding the organization of the corporation.

Marshall v. Pinkham, 53 Wis. 585, 88 Am. Rep. 756; *Carmichel v. Latimer*, 11 R. I. 895, 23 Am. Rep. 481; *Symonds v. Jones*, 8 L. R. A. 570, 83 Me. 802, 17 Am. St. Rep. 496, *note*.

Even if the defendants Fish, at the time of the organization of the corporation, transferred the good-will of their trade to the corporation, such sale would not import an agreement by them not to engage in similar business in some other place at a subsequent time, in their own name.

Hoxie v. Ohaney, 3 New Eng. Rep. 709, 143 Mass. 592.

It is only upon the ground of identity with the place of manufacture and character of the goods, and not on the ground of its indicating the manufacture, or his personal supervision, that a trade-name or trade-mark is permitted to be transferred, sold, or assigned; it is only when an individual name becomes an adjective as describing the article sold as distinguished from the personal work or supervision employed in the manufacture, that it can be transferred as a trade-mark or trade-name.

Symonds v. Jones, 8 L. R. A. 570, 83 Me. 802, 17 Am. St. Rep. 496; *Connell v. Reed*, 128 Mass. 477, 85 Am. Rep. 397; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Wilmer v. Thomas* (Md.) 13 L. R. A. 880; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401.

The right of a person to use his name as a brand does not pass to his assignee in bankruptcy.

Mattingsly v. Stone (Ky.) Nov. 23, 1889; *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 113.

The plaintiff does not come into court with clean hands and is therefore not entitled to any relief in the action.

Browne, Trade-Marks, §§ 474, 525, 584; *Stachelberg v. Pence*, 23 Fed. Rep. 490; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706.

A lack of truth debars a trade-mark from protection. The tale told by the symbol must be sincere. The instant it ceases to be truthful

in spirit as well as letter, it becomes an instrument of fraud and is not lawful.

Abbott v. Siebert, 61 Md. 276; *Samuel v. Berger*, 24 Barb. 164; *Leather Cloth Co. v. American Leather Cloth Co.* 4 De. G. J. & S. 187, 11 H. L. Cas. 544; *Kochler v. Sanders*, 9 L. R. A. 576, 132 N. Y. 65; *Sherwood v. Andrews*, 5 Am. Law Reg. 588; *Pidding v. How*, 8 Sim. 477; *Browne, Trade-Marks*, §§ 71, 477, 478, 494.

Defendants had the right to use their own name in the business, and they had the right to refer to their personal reputation to secure further business, and also the right to refer to the superior quality of goods theretofore manufactured by them.

Hazleton Boiler Co. v. Hazleton-Tripod Boiler Co. (Ill.) March 24, 1892.

Years. Quarles, Spence, Hoyt & Quarles, for respondent:

The rebus and brands used by plaintiff are trade-marks, and the words "Fish Bros. Wagon," and "Fish Wagon" are trade-names.

They "point out the true source, origin, or ownership of the goods to which the mark is applied, and point out and designate the dealer's place of business."

Marshall v. Pinkham, 52 Wis. 572-578, 38 Am. Rep. 756; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 895; *McLean v. Fleming*, 96 U. S. 245-254, 24 L. ed. 828-832; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 811, 20 L. ed. 581; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 81 Fed. Rep. 788.

And the name has come to be used as a name for distinguishing the wagons by "which they may be bought and sold."

Dunbar v. Glenn, 42 Wis. 118-138, 24 Am. Rep. 895; *Carroll v. Ertheiler*, 1 Fed. Rep. 688-691.

There is a distinction, and a difference as well, between a trade mark and a trade-name.

Rapalje & L., Law Dict. title, Trade Name.

The word or phrase, whether arbitrary or descriptive, will be protected when it has come to be a short name used between the buyer and seller to designate the article sold, as

"Glenfield Starch," *Wotherspoon v. Currie*, L. R. 5 Eng. & Irish App. 521; "Apollinaris," 14 Blatchf. 890; "The Chatterbox," 21 Fed. Rep. 189; "Durham," 3 Hughes, 151; "Lone Jack," 1 Fed. Rep. 688; "Bethesda," 42 Wis. 118, 24 Am. Rep. 895; "Thorley's Cattle Food," L. R. 14 Ch. Div. 766, 87 Moak, Eng. Rep. 77; "Day & Martin's Blacking," 7 Beav. 84; "Sapallo," 48 Fed. Rep. 420.

The trade-name is impersonal and belongs to the factory.

Filly v. Fassett, 44 Mo. 169, 100 Am. Dec. 275.

A trade-name, when it has once been acquired, has ceased to be personal, and attaches to the factory, even as against the original manufacturer.

Pepper v. Labrot, 8 Fed. Rep. 29-41; *Hall v. Barrows*, 4 DeG. J. & S. 157; *Motley v. Downman*, 3 Myl. & C. 1; *Kidd v. Johnson*, 100 U. S. 620, 25 L. ed. 771; *Wotherspoon v. Currie*, L. R. 5 Eng. & Irish App. 521, *Bury v. Bedford*, 4 DeG. J. & S. 868.

The right to use a trade-mark or trade name can be founded only upon actual user.

16 L. R. A.

Neither adoption nor claim of right can confer the right.

Trade-Mark Cases, 100 U. S. 82-94, 25 L. ed. 550-551; *Candee v. Deere*, 54 Ill. 439.

This right is in the plaintiff both by purchase and by estoppel.

There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. It constitutes a part of partnership assets, and is properly sold with the firm property.

Morgan v. Rogers, 19 Fed. Rep. 596; *Browne, Trade-Marks*, §§ 860, 861; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmsley*, 35 L. J. Ch. 852; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Walton v. Crowley*, 3 Blatchf. 440; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 57 Barb. 526; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321.

For a trade-mark to pass under a bill of sale it is not necessary that it should be specifically mentioned.

See *Witthaus v. Braum*, 44 Md. 303-305.

Where a trade-mark is used to designate the place and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

Witthaus v. Braum, 44 Md. 303-305; *Pepper v. Labrot*, 8 Fed. Rep. 41.

The office thenceforward of the trade-name is to refer to the origin of the product, that is, to the factory, and no one except the owner of the factory can use the name without practicing a deception upon the public.

Pepper v. Labrot, supra; *Hoxie v. Chaney*, 3 New Eng. Rep. 709, 143 Mass. 592.

The claim that the trade-mark and trade-name did not pass to the plaintiff is against conscience.

If permitting Fish now to make this claim will work injury to the plaintiff, then Fish is, both by the law of morality and by the law of the land, forever precluded from making this claim.

Broom, Legal Maxims, p. 169; *Dickerson v. Colgrove*, 100 U. S. 678-580, 25 L. ed. 618, 619; *Dair v. United States*, 83 U. S. 16 Wall. 1-4, 21 L. ed. 491, 492; *Gregg v. Von Phul*, 68 U. S. 1 Wall. 274-281, 17 L. ed. 586, 587.

There is no misrepresentation in the plaintiff's use of the trade-mark and trade-name.

By such use, the plaintiff, according to the ordinary usages of trade, "is not to be understood as saying more than that it is carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark."

Leather Cloth Co. v. American Leather Cloth Co. 11 Jur. N. S. 513; *Oakes v. Tonmierre*, 49 Fed. Rep. 447-451; *Marshall v. Pinkham*, 52 Wis. 572-582, 38 Am. Rep. 756; *Russia Cement Co. v. LePage*, 6 New Eng. Rep. 577, 147 Mass. 208-209; *William Rogers Mfg. Co. v. Rogers & S. F. Mfg. Co.* 11 Fed. Rep. 495-499.

When the plaintiff in any way, by purchase or otherwise, succeeded to the business of the original Fish Bros. and their successors, it had the exclusive right to use the trade-mark and the trade-name to indicate that it was carrying on the same business.

Witthaus v. Braun, 44 Md. 808-805; *Bury v. Bedford*, 4 DeG. J. & S. 368, *Kidd v. Johnson*, 100 U. S. 617-620, 25 L. ed. 769, 770; *Hozia v. Ohaney*, and *Pepper v. Labrot*, *supra*; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748-755.

The use made by the defendants of the trade-mark and trade-name is fraudulent and in violation of the plaintiff's right.

If the defendants' advertisements were calculated to mislead an unwary purchaser of the machines into the belief that he was purchasing those manufactured and sold by the plaintiff then the plaintiff is *prima facie* entitled to an injunction.

Marshall v. Pinkham, 53 Wis. 572, 586, 587, 38 Am. Rep. 756; *Welch v. Knott*, 4 Kay & J. 747; *Millington v. Fox*, 8 Myl. & C. 338; High, Injunctions, § 1087.

It is apparent that the defendants by their combinations and doings have attempted and are attempting to steal away the business of the plaintiff for the benefit of the defendants. Whenever and however this is done, whether by active misrepresentation or by silence when one should speak, or by any kind of springe, automatic or otherwise, to catch the unwary, a court of chancery will interfere and prevent the fraud.

Enoch Morgan's Son's Co. v. Wendover, 43 Fed. Rep. 420; *Celleloid Mfg. Co. v. Cellonite Mfg. Co.* 82 Fed. Rep. 97; *McLean v. Fleming*, 96 U. S. 245, 251, 252, 255, 24 L. ed. 828, 880, 881, 882; *Newman v. Alford*, 51 N. Y. 192, 10 Am. Rep. 588; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 587-549, 34 L. ed. 997-1004; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35-50; *Partridge v. Menck*, 2 Barb. Ch. 101, 103, 5 L. ed. 572, 573.

The fact that certain of the defendants are using their own names does not justify them.

Massam v. Thorley's Cattle Food Co. L. R. 14 Ch. Div. 748-760; *Rogers v. Rogers*, 1 New Eng. Rep. 411, 53 Conn. 121; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495-499; *Levy v. Walker*, L. R. 10 Ch. Div. 447; *Shaver v. Shaver*, 54 Iowa, 208-211, 37 Am. Rep. 194; *Croft v. Day*, 7 Beav. 84.

Cassoday, J., delivered the opinion of the court:

The plaintiff, Fish Bros. Wagon Company, was incorporated in January, 1887, and since that time has been engaged in the manufacture of wagons at Racine, and selling the same throughout the country. The defendant La Belle Wagon Works and the other defendants have since June 17, 1890, been engaged in the manufacture of wagons at South Superior, and selling the same in different parts of the country. This suit was commenced in July last to restrain the defendants from using the words "Fish Bros.," "Fish Bros. & Co.," "Fish Bros. Wagons," and the picture of a fish as trade marks on the wagons, and in the advertisements of the defendants, on the ground that the plaintiff has the exclusive right to the same. The defendants, insisting upon the right to use such words, counterclaim an exclusive right to the same, and ask for an injunction accordingly. The history of the use of those words by the firm of Fish Bros. and Fish Bros. & Co. as copartners

at Racine up to the time when Mr. Case became the ostensible owner or mortgagee, and from that time down to October 16, 1883, in connection with the word "Agents," when he was appointed receiver of all the property and assets connected with that business, and from that time down to September 26, 1885, when he was superseded by Mr. Hall, as such receiver, and from that time down to 1887, when all the property and assets connected with the business were sold by the receiver and the parties interested to the plaintiff company, is sufficiently set forth in the foregoing statement. The first question presented is whether the plaintiff, by such purchase and subsequent use, acquired the right to continue the use of such words and pictures on their wagons and in their advertisements as trade-marks, as indicated. Two of the Fish brothers, Titus G. and Edwin B., and Huggins, of the firm of Fish Bros. & Co., remained in the business as managers under such receivers, not only down to such transfer of the property and assets to the plaintiff company, but for more than two years thereafter, acting as directors and officers of the plaintiff company. Such conduct on their part was a continued sanction of the use of such words and symbols as trade-marks on the plaintiff's wagons sold during the time throughout the country, and advertisements of the same. It is conceded that the office of a trade-mark is to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. *Marshall v. Pinkham*, 53 Wis. 578, 38 Am. Rep. 756; *Gessler v. Grieb*, 80 Wis. 24. "Such trade mark usually includes the name of the manufacturer or dealer as the best designation of such source, origin, ownership, or place of business. . . . Sometimes, however, it consists of some novel device, arbitrary character, or fancy word, applied without special meaning, and which, by use and reputation, comes to serve the same purpose. *Gessler v. Grieb*, *supra*, and cases there cited. From these several authorities it is obvious that a trade-mark may perform one or more of three several functions, depending upon what it is and its manner of use. One of these is to point out the true source or origin of the goods to which the mark is applied. Manifestly, the words "Fish Bros." and "Fish Bros. & Co.," as used, pointed out Titus G. as the founder, and him and his brothers and other members of the firm as originators, of the particular make and style of wagon and vehicle first manufactured by them, and afterwards by them as agents, and subsequently by receivers and the plaintiff, under their supervision or with their acquiescence, at Racine. The mere fact that each and all of the Fishs withdrew from that business did not prevent the words mentioned from continuing to point to the old place of business and the old firm of Fish Bros. and Fish Bros. & Co. at Racine, as the true source and origin of their particular make and style of wagon and vehicle to which the plaintiff company succeeded, and continued to manufacture at Racine.

It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and

that the words "Fish Bros." and "Fish Bros. & Co." partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers, respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned. As indicated, one of these is to point out and designate the dealer's place of business, distinguishing it from the business locality of other dealers. Such trade-mark is, in effect, an extension or perambulation of the dealer's trade sign. It advertises the home business to all who may observe the article on sale or in use in other parts of the country. It attaches to every such article on sale or in use the reputation it has acquired with the trade, and informs all observers desiring a like article where the manufacturer or dealer may be found. The picture of a fish and the manner of its use, as well as the words mentioned, designated, not only the plaintiff's place of business at Racine, but also the true source and origin of the make and style of the wagons and vehicles so previously made by Fish Bros. and Fish Bros. & Co., as agents, and under the receivers at Racine, and hence may fairly be regarded as trade-marks for the plaintiff, even after all the Fishs had withdrawn from that business. Upon the facts in this case, as found in the foregoing statement and the law applicable, we are constrained to hold that the plaintiff acquired the goodwill of the business, including the right to use the picture and words mentioned as trade-marks, notwithstanding they were not specifically named in any of the transfers or conveyances to the plaintiff. Thus in *Menendez v. Lott*, 128 U. S. 514, 82 L. ed. 526, it was in effect held that when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the old place of business and the future conduct of the business by them under the old firm name, the goodwill of the business, including the trade-marks, remain with the latter, as of course. To the same effect, *Merry v. Hoopes*, 111 N. Y. 415; *Re Welcomes Trade-Mark*, L. R. 83 Ch. Div. 213; *Hoxey v. Chaney*, 148 Mass. 592, 3 New Eng. Rep. 709; *Witthaus v. Braun*, 44 Md. 303; *Morgan v. Rogers*, 19 Fed. Rep. 596.

In quoting from *Lord Cranworth* it was said, in *Marshall v. Pinkham*, 52 Wis. 581, 88 Am. Rep. 756, that "difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren, or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected because, according to the ways of the trade, they would be understood as meaning no more, by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a pur-

chaser. The question in every such case must be whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark." *Leather Cloth Co. v. American Leather Cloth Co.* 11 Jur. N. S. 513; *Hazard v. Caswell*, 93 N. Y. 259.

2. But the more serious question is whether such right is exclusive. Notwithstanding the good-will of an established and successful business may be sold in connection with the property and assets, so as to entitle the purchaser thereof to a certain limited protection, yet such transfer will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind, and to solicit the customers of the old business, even in the same city or village, much less in a city or village 200 miles or more distant. "In order to preclude the seller from engaging in such separate and independent business, there must be an agreement to that effect, based upon a good and valuable consideration, and not contrary to law or public policy." *Washburn v. Doach*, 68 Wis. 439, and cases there cited; *Williams v. Farrand*, 88 Mich. 478; *Vernon v. Hallam*, L. R. 34 Ch. Div. 748. True, the transfer of the goodwill to the plaintiff included the trade-marks; but it is to be remembered that a trade-mark gives no exclusive right to the device or article to which it is applied. It is in no sense a patent, and gives the proprietor thereof no exclusive right or monopoly of the thing manufactured and sold. The theory upon which actions for the infringement of trade-marks are maintained is that the law will not allow one person to sell his own goods as and for the goods of another. *Marshall v. Pinkham*, 52 Wis. 580, 88 Am. Rep. 756. To the same effect are *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997; *Jay v. Ladler* L. R. 40 Ch. Div. 649.

It is only the dealer's own trade and his own business which are thus to be protected by his own trade-mark. *Gessler v. Grieb*, 80 Wis. 25. It does not relate to the nature, quality, or mode of operation of the thing sold, but merely to the designation, name, or mark by which it is sold. Such being the functions of a trade-mark, it is obvious that the plaintiff's right to the marks in question would not be infringed by the manufacture and sale of wagons and vehicles of similar make and style by any person, even in Racine, much less by the Fish brothers themselves at South Superior.

The right of the defendants to manufacture and sell similar wagons and vehicles being admitted, as it must, the question remains whether they also had the right to affix thereto the words "Fish Bros.," "Fish Bros. & Co.," and the picture of a fish. The picture of a fish, as used, must be regarded simply as another way of designating the surname "Fish" as the founder and originator of the particular make of wagons and vehicles thus manufactured and sold. In *Burgess v. Burgess*, 17 Eng. L. & Eq. 257, 292, John Burgess and his son William R., as partners under the firm name of John Burgess & Son, sold "Burgess'

Essence of Anchovies" at No. 107 Strand. The father died, and the son, William R., continued the same business, selling the same article at the same place, in the name of the old firm. William R. had a son William H., whom he employed in the business on a salary. Subsequently William H. left the employ of his father and went into the same business for himself, selling the same article under the same name, but at a lower price, and advertised the same as "Late of 107 Strand." The father filed a bill in equity to restrain the son from conducting that business in that way, and, in giving the opinion of the court, Knight Bruce, L. J., said: "All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their fathers; and nothing else has been done in that which is the question before us. . . . He [the defendant] carries on business under his own name, and sells essence of anchovy as 'Burgess' Essence of Anchovy,' which it is. . . . The only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Burgess' essence of anchovy. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy and selling it under his own name." The court did, however, restrain the son from advertising as "Late of 107 Strand." See *Marshall v. Pynkham*, 53 Wis. 588-586, 88 Am. Rep. 756, and other cases there cited. In *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, it was held that "an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name who are using it for a legitimate purpose, although cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it. The owner of a trade-mark bearing his own name, which is affixed to articles manufactured at a particular establishment, may, in selling the latter, confer upon the purchaser exclusive authority to use the trade-mark." In the case at bar there is no agreement giving such exclusive right to the plaintiff, and hence we must conclude that the defendants are at liberty in good faith to apply to the wagons and other vehicles manufactured by them the words "Fish Bros.," or "Fish Bros. & Co.," or the picture of a fish, provided they do it in a way not calculated to induce persons to buy the same as and for those manufactured by the plaintiff at Racine.

8. The defendants ask to enjoin the plaintiff from the use of those words and that device as a trade-mark in their business at Racine. In *Thynne v. Shore*, 45 Ch. Div. 577, the plaintiff, A. Thynne, sold his stock in trade and business of a baker, and the good-will thereof, including trade cards bearing the name of "A. Thynne, Baker," to the defendant. The deed and transfer contained an assignment of "all the beneficial interest and good-will of the said Arthur Thynne in the said trade or business,"

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but contained no express assignment of the right to use the plaintiff's name. After the purchase the defendant used the trade cards bearing the plaintiff's name until they were exhausted, and then printed further trade cards bearing the plaintiff's name, as before. In an action to restrain the defendant from printing or publishing any such cards, or otherwise trading in the name of the plaintiff, it was held that the defendant, "by virtue of the assignment to him of the good-will of the business, was entitled to use the name of the plaintiff for the purpose of showing that the business was that formerly carried on by the plaintiff, but must not so exercise that right as to expose the plaintiff to liability, and held that, under the circumstances, an injunction must be granted to restrain the defendant from using the plaintiff's name in such a way as to expose him to any liability." In the case at bar we discover nothing to indicate that the plaintiff is using the words "Fish Bros." or "Fish Bros. & Co." in a manner to expose any of the defendants to liability. In fact no claim of that kind is made; and hence so long as the plaintiff uses those words honestly and truthfully, and for the legitimate purpose designed, the defendants have no ground for complaint. On the authorities cited, and others which might be cited, we are constrained to hold that the defendants are not entitled to an injunction against the plaintiff. On the same theory the defendants have the lawful right to honestly and truthfully state where they formerly resided, the experience they have respectively had, and the skill they, respectively, possess in the manufacture of wagons and other vehicles, but they have no right to represent their present business as the same which they formerly conducted at Racine. The circular addressed "To Our Old Customers and the Implement Trade," issued by Fish Bros. & Co., and mentioned in the complaint and the foregoing statement, is to a limited extent objectionable on this ground; as, for instance, where it speaks of their "change of location" and "firm name," Fish Bros., "formerly of Racine, Wis.," and for the "first time since 1883 we shall be able to furnish our patrons with the genuine Fish Bros. & Co. wagon, fully up to our old standard of that date." But the defendants may truthfully and in good faith publish the good qualities and material of the wagons and vehicles manufactured by them, and their superior facilities for the manufacture of the same at South Superior. In other words, their advertisements and marks must truthfully and in good faith refer to their own manufactures, trade and business, and not to those of the plaintiff.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

Winslow, J., dissenting:

I agree that the words "Fish Bros. Wagon" and the rebus of the fish were trade names or labels appertaining to the business transacted at the Racine factory, and that the right to use such names or labels upon wagons was acquired by the plaintiff by its purchase of that business. Such a right is in its very nature exclusive, and, if the plaintiff owns it, the defendants

manifestly do not own it. In my judgment, the defendants have no right to mark their wagons with either the words or the rebus. Probably they have the right to use the firm name Fish Bros. & Co., if they do not use it in such a way as to mislead the public, but this

would not give them the right to use a trade-name or label on their wagons which is the distinctive mark of the product of the Racine factory, and the right to use which has passed from the defendants T. G. and E. B. Fish to that concern.

CONNECTICUT SUPREME COURT OF ERRORS.

Clapp SPOONER
v.
Daniel PHILLIPS *et al.*

(.....Conn.)

Shares of increased stock which represent the increase in value of the property of an association resulting from the development of its business, and which are not, strictly speaking, the product of stock dividends and do not represent surplus earnings in the ordinary sense, and which are apportioned *pro rata* among existing shareholders, constitute capital and not income or dividends as between a person entitled to the income or dividends of the original shares during life and a person entitled at her death to the reconveyance of the stock.

(May 23, 1892.)

PRESERVATION from the Superior Court for Fairfield County for the advice of the

NOTE.—*Right to increased stock and stock dividends as between owner of capital and income.*

The intention of the one creating the trust will govern so far as it can be ascertained. *Clarkson v. Clarkson*, 18 Barb. 646; *Bushbee v. Freeborn*, 11 R. I. 150; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 523; *Minot v. Paine*, 99 Mass. 101.

If his intention cannot be ascertained then the courts seem to agree that dividends which do not come from the earnings of capital invested belong to the remainderman. *Re Curtis*, 29 N. Y. S. R. 217.

Thus where a fund from which a stock dividend is declared has been created by a sale of a portion of its real estate the dividend should be treated as capital. *Riggs v. Cragg*, 26 Hun. 108.

So dividends representing the sum realized from the sale of part of the assets of the corporation belong to the capital. *Vinton's App.* 99 Pa. 441, 44 Am. Rep. 116; *Wheeler v. Perry*, 18 N. H. 807; *Heard v. Eldredge*, 109 Mass. 258.

So dividends declared in winding up the concern are capital. *Gifford v. Thompson*, 115 Mass. 478.

When neither of the above rules applies the courts have attempted to fix a rule to govern the right to the extra stock but the results reached are not entirely harmonious.

The English rule.

The question was brought before the English courts at an early date and it was decided that where government annuities had been received by a bank in exchange for subscriptions of funds to the public service, and they were divided among the stockholders of the bank, they went to the remainderman and the income from them to the tenant for life. *Brander v. Brander*, 4 Ves. Jr. 800.

And in case of a similar dividend by the Bank of Scotland it was ruled that extraordinary or un-

usual dividends go to augment the principal. *Irvine v. Houston*, 4 Paton, Sc. App. Cas. 531.

The facts are stated in the opinion. *Messrs. H. H. Knapp and C. R. Ingersoll*, for plaintiff:

Even if the several "increases" made by the Adams Express Company in the number of shares into which its property was divided could be regarded as of the nature of "stock dividends," such increased number of shares would not belong to the life-tenant as "income" under the trust instrument.

It is for the corporation to determine whether its surplus earnings shall be capitalized and retained for corporate use, or divided as income among the stockholders. And nothing can be "income" to the stockholders that has not been made so by the act of the corporation.

Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269; *Brinley v. Gros*, 50 Conn. 66, 47 Am. Rep. 618.

usual dividends go to augment the principal. *Irvine v. Houston*, 4 Paton, Sc. App. Cas. 531.

In *Paris v. Paris*, 10 Ves. Jr. 125, it was ruled that there could be no distinction between dividends of money and stock, and that all extraordinary bonuses went to the remainderman.

But where the dividend appears to be an ordinary dividend it will go to the life-tenant although it has increased in amount from time to time according to the earnings of the corporation over what it was during the testator's lifetime. *Barclay v. Wainwright*, 14 Ves. Jr. 79.

Later, in *Price v. Anderson*, 15 Sim. 473, it was ruled that whatever the corporation declares to be dividends will go to the life-tenant, however large, and a dividend of twelve pounds ten shillings per cent was given to the life-tenant although the regular dividend was only two pounds ten shillings per cent.

Where in addition to the regular dividend a stock dividend is declared which represents profits which have been invested in the business, the new shares go to the remainderman. *Re Barton's Trust*, L. R. 5 Eq. 242.

So a bonus on an augmentation of the capital of bank stock goes to the remainderman. *Hooper v. Roessiter*, 18 Price, 774.

In *Re Bouch*, L. R. 29 Ch. Div. 685, the corporation had accumulated a large amount of undivided profits. It finally decided to issue new shares of stock to an amount equal to the surplus and declare a dividend which should enable each stockholder to take and pay for the shares allotted to him. The trustees took the shares allotted to their estate and paid for them with their dividend. The *nisi prius* court awarded them all to the remainderman. The court on appeal regarded them as income. But the house of lords reversed the chancery division and held that the corporation had no intention to pay any sum as a dividend, but intended to ap-

Nor will the corporation be controlled by the courts in the reasonable exercise of this right.

Pratt v. Pratt, 33 Conn. 440; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Brown & Larned Petitioners*, 14 R. I. 371; *Greene v. Smith* (R. I.) Index GG, 29; *Re Keronochan*, 7 Cent. Rep. 90, 104 N. Y. 618; *Williams v. Western U. Teleg. Co.* 93 N. Y. 162; *Beveridge v. New York Elev. R. Co.* 2 L. R. A. 648, 112 N. Y. 27; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525.

The principle of the rule here sanctioned must apply to all associations of commercial partnership, with a joint-stock or capital, whether formally incorporated or not.

Lockwood v. Weston, 61 Conn. 211; *People v. Wemple*, 6 L. R. A. 303, 117 N. Y. 136; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445.

Mr. M. W. Seymour also for plaintiff.

Messrs. Levi Warner and Lockwood & Beers, for Henry R. Parrott, defendant:

Upon the facts found, H. R. Parrott, administrator, is entitled to the new shares of stock of this association.

They are issues of shares based upon the earnings of the association, after the creation of the trust, and it seems to be the rule that when the interest, income, and dividends of a trust fund are given to a person, with no limitation as to the amount or value of the same, such interest, income, and dividends, whether in cash or in stock dividends based upon earnings, belong to the tenant for life.

Earp's App. 38 Pa. 368; *Wittbank's App.* 64

appropriate the undivided profits as an increase of capital stock which went to the remainderman. 12 App. Cas. 385. In the house of lords it is said that when a testator permits the subject of his disposition to remain as shares in a corporation which has power either to distribute its profits as dividends or to convert them into capital, and the corporation validly exercised this power, such action is binding on all parties interested, and consequently whatever is paid by the corporation as dividends goes to the tenant for life and whatever is appropriated as increase of capital inures to the benefit of the remainderman. And that a corporation which has power to increase its capital cannot be considered as having intended to convert any part of its profits into capital when it has in fact made no such increase.

In that case, the authority of the early case of *Irving v. Houston*, *supra*, is expressly recognized and distinguished on the ground that the Bank of Scotland had no power to increase its capital, so its failure to do so was not a conclusive test as to the character of the dividends. From these cases it would seem that by the present English rule whether a dividend is to be considered capital or income depends largely on the intention of the corporation, and that if it transforms surplus into capital and declares a stock dividend the new shares will go to the remainderman.

How far such rule followed in this country.

In *Minot v. Paine*, 99 Mass. 101, the court states that a simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital; and conclude that as the corporation has power to give to the shareholders either an increase of income or an increase of capital, according to the discretion of its direct-

Pa. 256, 3 Am. Rep. 585; *Moss's App.* 83 Pa. 264, 24 Am. Rep. 164; *Biddle's App.* 99 Pa. 278; *Vinton's App.* 99 Pa. 434, 44 Am. Rep. 116; *Roberts's App.* 92 Pa. 407; *Thomson's App.* 89 Pa. 86; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Ashhurst v. Field*, 26 N. J. Eq. 1; *Lord v. Brooks*, 52 N. H. 72; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Riggs v. Cragg*, 26 Hun. 89, 103; *Clarkson v. Clarkson*, 18 Barb. 646; *Cook, Stock & Stockholders*, § 554 (a), note 2, and cases cited; 2 Beach, Priv. Corp. § 600; 1 Morawetz, Priv. Corp. §§ 463, 469.

The application of the rule above stated would seem to be more in accordance with the principles of justice and equity, than the adoption of the Massachusetts rule, sometimes called the rule in the *Minot Case* (*Minot v. Paine*, 99 Mass. 101), which is, to regard cash dividends however large as income, and stock dividends however made as capital, as the application of the former rule gives to the life-tenant all the earnings of the trust fund, which, in the absence of limitations, it is to be presumed the creator of the trust intended him to receive; and preserves the principal of the trust fund intact for the remainderman; while the latter rule may entirely defeat the purposes of the trust and increase the principal of the trust fund for the remainderman.

Cook, Stock & Stockholders, § 557.

Carpenter, J., delivered the opinion of the court:

The plaintiff, in 1857, transferred to Daniel Phillips, in trust for the use of Mary Ann Gar-

ora, it would seem to follow that an increase of capital should be kept for the remaindermen and an increase of income should be paid to the tenant for life.

Where a corporation, some of whose stock was held in trust to pay the income for life, with remainder over, having on hand a large accumulated surplus of profits and it being unlawful to declare a stock dividend, voted to increase its stock to a sufficient amount to absorb the surplus, and then declared a dividend of an amount equal to the surplus, and authorized the treasurer to receive this dividend in payment of new shares, and issue certificates of stock therefor, it was held that this was in reality a stock dividend and belonged to the remaindermen, the court holding that the substance of the transaction is to determine its character. *Daland v. Williams*, 101 Mass. 571.

So where the corporation, in the stock of which the trust fund was invested, out of net earnings, bought in the market part of its own stock and invested other net earnings in property a large portion of which was not required for its immediate use, and voted to increase its stock and declared a dividend payable, one half in the shares which it had purchased and one half in cash, from the fund derived from the sale of its increased shares, it was held that so much of the dividend as was represented by the shares of old stock which the corporation distributed was income and should go to the life-tenant; but so much as was represented by the amount exchanged for increased capital was capital and should go to the remainderman. *Leland v. Hayden*, 102 Mass. 542.

So dividends declared for the purpose of enabling shareholders to take up the shares of new stock awarded to them on the increase of the capital, and which cannot be distributed directly because of a law prohibiting stock dividends, go to

land for life, or until she should marry, ten shares of the stock of the Adams Express Company, a joint-stock association, organized under the laws of the state of New York, by an instrument in writing, as follows:

"Know all men by these presents, that I, Clapp Spooner, of the city of Bridgeport, in Fairfield county, Connecticut, for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer, unto Daniel Phillips, of Hartford, ten shares of the capital stock of the Adams Express Company, a joint-stock association, established under and by virtue of the laws of the state of New York, standing in my name on the books of said association, in trust to and for the use of Mrs. Mary Ann Garland, of said city of Bridgeport, to have and to hold the same as such trustee, and for the use aforesaid, and to pay over to her the dividends and income thereof during the natural life of the said Garland; and upon her decease, or sooner determination of said trust, to convey and transfer said stock to me, or my heirs, executors, and administrators; provided, this assignment is made upon the express condition that the said Garland shall remain sole, single, and unmarried during her life; and, further, that, in the event of her marriage, all right, title, and interest which she has in or to said stock, by virtue of said trust, shall thereafter cease and determine, and the same shall revert to me, my heirs, etc., as hereinbefore provided. In witness whereof I have hereunto set my hand and seal this 3d day of March, 1857. Clapp Spooner. [L. s.]"

the remaindermen. *Rand v. Hubbell*, 115 Mass. 451, 15 Am. Rep. 121.

But a cash dividend declared out of profits, by a corporation, indebted nearly to the amount of such profits for permanent improvements, which is exactly sufficient to pay for the proportion of the new stock at par, issued at the same time and allotted to each stockholder for subscription, and which the stockholders may elect to invest in the new stock, or may retain, selling the right to subscribe for the new stock, which is worth more than the par, belongs to the life-tenant, while the premium which can be derived from the sale of the right to subscribe belongs to the remainderman. *Davis v. Jackson*, 152 Mass. 58.

In Georgia stock dividends are part of the principal. *Millen v. Guerrard*, 67 Ga. 292.

Where a bank reduced the par value of its shares because of certain supposed losses, and afterwards upon recovering the sums supposed to have been lost issued additional stock to its shareholders, the tenant for life is not entitled to an unconditional certificate of the new shares. *Parker v. Mason*, 8 R. I. 427.

New shares of capital stock representing surplus property and distributed among stockholders are not to be considered as income and do not belong to the life-tenant. *Brown's Petition*, 14 R. I. 371.

Where the corporation doubles its original capital from its earnings and issues additional stock, the amount of the increase of which it divides among its stockholders in proportion to the amount originally held by them, the new shares belong to the remaindermen and not to life-tenants. *Gibbons v. Mahon*, 4 Mackey, 130, 54 Am. Rep. 263.

Where the corporation purchased its own stock paying for it by an issue of its own bonds, and distributed the stock so purchased among its remain-

The true consideration for said transfer and said instrument was friendship and affection. The ten shares were increased from time to time by the action of the association, so that, at the time of the death of Mrs. Garland, there stood in the name of Mr. Phillips sixty-six shares. The new shares were not, strictly speaking, the product of stock dividends, nor do they represent, in the ordinary sense, surplus earnings; but as the business of the concern increased by its extension over new routes, and into new territory, and perhaps by the purchase of local express firms, as the articles of association clearly contemplate, it is evident that the property and facilities for doing the increased business would also increase, the plant would become more valuable, and its earning capacity increase. In this state of things the association deemed it expedient to increase the number of shares into which its property was divided. This was done by apportioning the new shares, *pro rata*, among existing shareholders; so that after each increase, as before, each share represented a definite proportion of the property of the association, including the good-will. Mr. Spooner now claims that the sixty-six shares belong to him. Henry R. Parrott, the administrator of Mrs. Garland's estate, claims that the increase of stock, fifty-six shares, belongs to the estate, and should be transferred to him. The parties interpleaded pursuant to an order of the superior court. The facts were found by a committee, and the case was reserved for the advice of this court.

Our first inquiry is as to the intention of the

ing stockholders, such dividend does not pass to the life-tenant as net annual income but goes to the remainderman. *Gilkey v. Paine*, 6 New Eng. Rep. 554, 80 Me. 319.

In *Gibbons v. Mahon*, 130 U. S. 549, 34 L. ed. 525, Mr. Justice Gray very fully examines the authorities and concludes that the weight of authority is in favor of the proposition that whether or not the distribution of earnings is an apportionment of additional stock representing capital or division of profits and income depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution, and that ordinarily a dividend declared in stock is to be deemed capital and a dividend in money is to be deemed income of each share. See also *dictum* in *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 423.

In *Re Kernochan*, 7 Cent. Rep. 90, 104 N. Y. 630, the court says the rule is a reasonable and proper one which limits the right of a stockholder to profits by the action of the managers of the corporation, and the late English cases are quoted with apparent approval.

The act of the corporation in capitalizing profits is binding upon all concerned. *Hotchkiss v. Brainard Quarry Co.* 58 Conn. 120.

Departures from the English rule.

In *Gilkey v. Paine*, 6 New Eng. Rep. 554, 80 Me. 319, it is stated that the effort has been made in this country generally to maintain the integrity of the capital and to give all surplus earnings in whatever form distributed to the life-tenant.

Where the fund represented by the stock dividend consisted of accumulations of profits for a long period of time before and after the death of the testator, all that had accumulated at his death is to be regarded as capital and all the rest is in-

parties. What did Mr. Spooner intend to give, and what did he intend to reserve to himself? and what did Mrs. Garland suppose at the time that she was to receive? In this, as in other cases where the parties have put their transaction in writing, we must look to the writing itself for the purpose of ascertaining their intention. The language is very brief and very simple. "In trust to and for the use of Mrs. Mary Ann Garland." "To have and to hold the same, as such trustee and for the use aforesaid, and to pay over to her the dividends and income thereof during the natural life of the said Garland, and, upon her decease, . . . to reconvey and transfer said stock to me or my heirs," etc. This language can have but one interpretation. The use which includes and consists in fact of the dividends and income belonged to Mrs. Garland. The stock itself, which carries with it any appreciation in value, or any depreciation, belongs to Mr. Spooner. It will hardly be admitted by the representative of Mrs. Garland that if the business had been unfortunate, and the stock had depreciated in value, her estate should make good the deficiency. If Mr. Spooner should bear the loss in the one case, why should he not in the other receive the gain? Loss and gain in commercial enterprises

usually fall to the lot of the same party. What is the ordinary meaning of the "use" of a thing? It is not the thing itself, or any part thereof, but is that which the thing will produce. If a house or other building, or any other form of real estate, it is the rent which can be obtained for it. If it is money, it is the interest which it will earn. If stock in a corporation or other form of commercial partnership, it is the profit which may be reasonably set apart, and is in fact set apart, by the management as the separate property of the shareholder. Such profit is usually denominated "dividends" or "income." But it may be said that the increase of shares represents earnings which might have been, and therefore ought to have been, distributed to the shareholders in the form of dividends; and that Mrs. Garland during her lifetime had, and her estate now has, an equitable claim to such earnings. That brings us directly to the real debatable question in the case.

We remark, in the first place, that, the transaction between Mr. Spooner and Mrs. Garland being in the nature of a gift, we fall to discover any ground on which equitable considerations can be urged in favor of Mrs. Garland, the donee. It is a question of intention,—the intention to be gathered from the transaction and the lan-

come, regardless of the character of the dividend. *Earp's App.* 28 Pa. 368.

In Philadelphia, Trust, S. D. & Ins. Co's App. (Pa.) 24 W. N. C. 187, the entire dividend appears to have been awarded to the life-tenant regardless of whether the profits were accumulated before or after the death of testator.

In *Smith's Estate*, 140 Pa. 844, the court goes back to the doctrine established in *Earp's App.*, 28 Pa. 368, and declares that to be the law of the state.

Where trust funds of which the income is to go to one person for life, with remainder over, are invested either by the trustees or by the testator in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital and together with the par value of the shares must be kept intact for the benefit of the remainderman. *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 680; *Ashhurst v. Field*, 26 N. J. Eq. 11.

In New York the earlier cases decided that where after the death of the testator, money, the income of which was directed to be paid to the life-tenant, was invested in stock upon which a stock dividend was afterward declared, the original investment should be maintained intact and that all above what was necessary to effect such a result should be considered income and paid to the life-tenant. *Clarkson v. Clarkson*, 18 Barb. 648; *Simpson v. Moore*, 30 Barb. 637.

This of course was an entirely different question from the one under discussion, but those cases have been used as authority for the rule afterwards followed by the lower courts in that state.

Stock dividends issued to the holders of stock of a corporation which is about to consolidate with another one for the purpose of equalizing the stock of the two are capital. *Goldsmith v. Swift*, 26 Hun, 201.

But stock dividends representing earnings are income. *Ibid.*

Dividends created by and declared from the surplus earnings of the company are income (*Riggs v. Cragg*, 26 Hun, 103), and belong to the life-tenant. *Re Warren*, 33 N. Y. S. R. 584.

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Stock dividends belong to the life-tenant. *Re Woodruff's Estate*, Tucker, 68.

To what extent these decisions represent the present rule in New York is doubtful. See *Re Kernochan*, 7 Cent. Rep. 90, 104 N. Y. 629; *Gibbons v. Mahon*, 126 U. S. 549, 34 L. ed. 535.

The question is at present before the court of appeals of Kentucky, upon appeal from the chancellor, who awarded the stock dividends to the life-tenant. *Hite v. Hite*, 2 Ky. & Corp. L. J. 538.

Right to subscribe for stock.

Options to subscribe for new stock belong to the remainderman. *Re Kernochan*, 7 Cent. Rep. 90, 104 N. Y. 630.

The right to take and pay for new shares at par is principal. *Greene v. Smith* (R. L.) Index GG, 30.

Profits realized by selling the right to take new shares go into the principal. *Re Bromley*, 55 L. T. N. S. 145; *Atkins v. Albree*, 12 Allen, 386; *Brimley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618.

In the absence of evidence that the right to take new shares arises from earnings of the corporation it will be regarded as capital. *Petree v. Burroughs*, 58 N. H. 302.

In contrast with the above it has been held in Pennsylvania that the advantage arising from the right to subscribe for new stock is income. *Wiltbank's App.* 64 Pa. 280, 3 Am. Rep. 585.

Unless by the increase of stock the value of the original shares is diminished, in which event enough of the profit realized by the sale will go to the remainderman to make good the diminution of his original shares. *Moss's App.* 83 Pa. 270, 24 Am. Rep. 164.

And *Biddle's App.*, 99 Pa. 233, amounts practically to an adoption of the rule recognized in other jurisdictions, that the right to subscribe for new shares is capital.

But where the corporation purchased shares of its own stock with profits made after the stockholder's death and distributed them to its stockholders at par the profits made by the trustees by the purchase of the shares allotted to the estate were decreed to belong to the life-tenant. *Thompson's Estate*, 11 W. N. C. 493.

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guage of the instrument creating the gift. And here it is proper to add that the intention we are seeking after is mainly the intention of the donor. In mutual contracts, where both parties expect to derive some benefit, we look for the intention of both parties; and anything of which it can be said that either party did not agree to will not be considered as within the intention. Not so with a gift. That is not the subject of negotiations. It is the act of one party. He alone fixes the terms and conditions to please himself. The other simply accepts or rejects. He ordinarily is not in a situation to impose conditions, or even to ask for more favorable terms. The law raises no presumptions and no equities in favor of the donee which are not expressed by, or fairly inferred from, the language or conduct of the donor. As in wills it is the intention of the testator which governs, so in gifts it is the intention of the giver which prevails.

Let us examine this record with some care, for the purpose of discovering what the will of Mr. Spooner was with respect to these earnings, conceding that the new shares represent earnings. We have already examined the instrument creating the trust, for another purpose. We will add, in this connection, that we find in it no language sufficiently comprehensive to include earnings which the management never set apart to be the separate property of the shareholder, nor in any other way placed to his credit. Until some such act is done, the earnings can, in no proper sense, be said to be the separate property of the individual shareholder. Until then they are within the exclusive control, and must be regarded as the property, of the association. The declaration of a stock dividend is not sufficient. That merely gives the receiver of the stock certain rights, but it gives him no title to any portion of the property of the corporation, and no individual right to control it, or interfere with its management. If it had been intended that Mrs. Garland should have all the earnings, even though they remained a part of the common property, it would have been very easy to have expressed that intention. A few words of general, but comprehensive, import—"all stock dividends," "all earnings, whether capitalized or not," or any similar words—would have been sufficient. The absence of any such language is significant.

The use of the stock seems to be limited to the receipt of dividends and income. The word "dividends," if unqualified, signifies dividends payable in money. The word "income" has a broader meaning, but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with "increase." The value of stock may be increased by good management, prospects of business, and the like. But such increase is not income. It may also be increased by an accumulation of surplus; but so long as that surplus is retained by the corporation, either as surplus or increased stock, it can, in no proper sense, be called "income." It may become producing, but it is not income. Is there anything in the situation of the parties, the object they had in view, or in the circumstances attending the transaction which will justify the inference that Mr. Spooner in-

tended that Mrs. Garland should have any portion of the property in controversy as her own? On the contrary, do they not all unite in suggesting that the interpretation we have placed upon the transaction is the correct one? Mrs. Garland was the mother of his deceased wife. In consideration of "friendship and affection" purely, he was desirous of contributing towards her support. Beyond the power of revocation he placed property in the hands of a trustee that would, in all probability, yield a cash income at stated intervals. He carefully provided that she should be relieved from all care and responsibility in the management of the property. We may presume that he intended that she should have the benefit of the increased income arising from any probable increase in the number of shares, by stock dividends or otherwise; for that is precisely what she did receive without objection from any source. On the other hand, we may not presume that he intended that she should receive the increment of stock as her own absolute property; for that was precisely what she did not receive. At one time, about fifteen years since, she claimed it, but her claim was denied, and she did not further press it,—a pretty strong instance of a practical construction of a transaction by the parties. And now, after so long a time, and after the death of Mrs. Garland, her administrator renews the claim. We cannot see that the claim in his hands is stronger or more equitable than it was when presented by Mrs. Garland. Mr. Spooner's relation to the association, his knowledge of its business and prospects, and his anticipations of gain from it are circumstances which ought not to be overlooked. The association was formed in 1854. Mr. Spooner was one of the original promoters. The fact is not expressly found, yet we can perceive, and may safely assume, that the association was formed by a combination of several companies, firms, and individuals previously engaged in the express business; the object being to bring the business, then extensively carried on over a large part of the United States, under one management. It will be observed that the articles provide for no definite amount of capital, and there is no par value to the shares of stock. It would seem that the property then invested or employed in the business was brought together in one concern, and, either with or without an appraisal, was divided into 12,000 shares, and the shares divided among the persons concerned according to their respective interests, except about 1,200 shares, which were to belong to the association. It is easy to see that the advantages resulting from the consolidation would cause the business to increase to such an extent that it would hardly fail to be profitable. Moreover, it was foreseen that the business of the concern would be likely to increase in another direction. That was provided for in the following extract from the articles of association: "And for the purpose of enabling us to carry on our said business more advantageously to the public, and satisfactorily to ourselves, other persons and corporations or companies who shall contribute to the joint stock, or shall be permitted to acquire interests in the business of the company, shall be admitted to participate in its profits and share

in its losses, according to the stipulation herein contained." It is also provided that the number of shares "may from time to time be increased or diminished." Accordingly the ninth article provides that "the board of managers may, with the consent in writing of three fourths in interest of the shareholders, from time to time increase the number of shares of the association, and, when so increased, may issue the increased shares to the existing shareholders, *pro rata*, according to their existing interests, or dispose thereof to such others as the said board may approve, and the money or property received therefor be applied to the benefit of the association."

It is impossible for us to perceive any ground on which we can presume that Mr. Spooner intended that Mrs. Garland should have any of the increased shares thus provided for. We have little space, and perhaps there is little occasion, to speak of the legal questions discussed. We believe that the question in this case, and in all cases of like character, is one of intent. Life estates are more frequently created by will, sometimes by donation, and sometimes by contract. However created, the main question is, What did the testator, the donor, or the contracting parties, as the case may be, intend? When that intention is discovered, it should control. If we are correct in the views hereinbefore expressed, we have really no occasion to go further. But if wrong, or if there is room for doubt, then, in some aspects of the case, it may be important to consider the legal questions. It is well settled in this state that a corporation, an association in the nature of a corporation, and even an ordinary business partnership, own the undivided earnings of the business, rather than the stockholders, shareholders, or partners; also that the latter cannot become the separate owners of any part of the common property until set apart by the management for that purpose, by declaring a dividend or otherwise; also that the courts will, in the absence of fraud, allow the management to exercise its powers and duties, and will not interfere to compel dividends at the instance of a minority in interest, and much less at the instance of one entitled only to the use of stock for life, as a gift, against the interest of a donor. It follows conclusively that in the case of a concern continuing a successful business, and after a life estate is ended the courts will not, except for very strong reasons, go back for a period of a quarter of a century or more, and treat assets, which the company has converted into stock for the benefit of the donor, as dividends for the benefit of the estate of the life-tenant. It need hardly be added that no reason whatever appears in the present case why the court should take that course.

A reference to a few only of the many cases bearing upon this general subject will suffice. In *Pratt v. Pratt*, 83 Conn. 446, this court refused to interfere in behalf of a minority of stockholders, and restrain the company from using a large surplus as capital in erecting a large building, etc., and also refused to decree a distribution of the surplus in dividends. If the court will not require the company to make a dividend, it is difficult to see upon what principle it will itself make a dividend. In *Phelps v. Farmers & M. Bank*, 26 Conn. 16 L. R. A.

269, it was held that "the profits of a bank, no matter when made, until separated from the stock by declaring a dividend, are mere increment and augmentation of the stock. They are properly stock themselves, composing a part of the stock of the bank, and will pass with the stock under that name, either by contract or by levy of execution." In *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618, the facts were briefly these: A testator left to trustees for his four children, equally during their lives, the "rents, dividends, increase, and income thereof," to be paid to them annually. Some years later the accumulated profits of a fire insurance company, of which the trustees held a large amount of stock, equaled the capital of the company. The company then increased its capital from three to four millions, apportioning the new shares *pro rata* among the stockholders at par. The trustees subscribed for a portion of the shares to which they were entitled, and sold the right to subscribe for the remaining shares at a considerable premium. The court held that the right to subscribe for the new shares, the profit on a sale of the right, and the new shares taken went to the trustees as a part of the principal of the fund, and not to the children as a part of the income. See also *Hotchkiss v. Brainerd Quarry Co.* 58 Conn. 120. It is conceded that the law of Massachusetts is in substantial harmony with our own. We therefore content ourselves with referring to two cases: *Minot v. Paine*, 99 Mass. 101; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121. We quote at some length from the cases in the state of New York, inasmuch as it is claimed that the law of that state differs from our own. We think it is substantially the same. In *Hyatt v. Allen*, 56 N. Y. 553, the head note is: "A shareholder in a corporation has no legal title to its property or profits until a division is made; and a contract by him in reference to dividends and profits upon his stock includes only dividends or profits ascertained and declared by the company and allotted to the stockholders, and not profits to be ascertained by third persons or courts of justice, upon an investigation of the accounts and transactions of the company." In *Re Kernochan*, 104 N. Y. 618, 7 Cent. Rep. 90, the court says: "As soon as the profits on shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life tenant may be entitled as income can only be that which the company declares after that relation is acquired." On another point in the same case it is said: "The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator, and so doing applied a rule which may be founded on general equity, viz., that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after his life tenancy begins, and the remainderman the balance. I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other

than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life tenant, should be applied. The direction to his executors is to receive the rents, interest, and income of his estate, and apply the net amount of such rents or other income . . . to the use of his wife. From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company, and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise." In *Beveridge v. New York Elev. R. Co.*, 112 N. Y. 27, 2 L. R. A. 648, the court says: "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared. He acquires no right or title to the accumulated gains from the revenues of the corporation, which entitles him to sue for his aliquot share of dividends. Until divided by the directors or trustees of the corporation, all of its property is held in joint ownership by the corporators, and no several right is possessed by the individual stockholder until a dividend is declared. The declaration of a dividend from a surplus, or a division of profits, is within those discretionary powers of the directors or trustees, which will not be controlled by the courts. *Williams v. Western U. Teleg. Co.* 93 N. Y. 162."

An important case on this subject is *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, which so thoroughly sustains the views we entertain that we quote from it at some length. It is there said: "Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings, and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.

"Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of pre-16 L. R. A.

ferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, 'in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors.'

"Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and remainderman, legal or equitable thereof.

"Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock, for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee, or should be distributed and paid out as income, to the tenant for life or for years, excluding the remainderman from any participation therein, is a question to be determined by the action of the corporation itself, at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts, as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation," etc. The case then goes on to hold that, in ascertaining the rights of such persons, the intention of the testator, so far as manifested, must, of course, control; and that, "when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares." It then holds that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of such share."

The superior court is advised that the equitable title to said sixty-six shares of the *Adams Express Company* is in *Clapp Spooner*, and that said Daniel Phillips should be required to transfer and deliver to said Spooner, by proper instrument, said sixty-six shares, together with all dividends received by him since the death of Mrs. Garland, (subject to the payment of the charges stated in the preliminary order), and to give judgment accordingly.

The other Judges concurred.

NEBRASKA SUPREME COURT.

WALTON FLOW CO., *Appt.*,
v.

L. S. CAMPBELL *et al.*

(.....Neb.....)

- *1. In an action to foreclose a real-estate mortgage, the petition alleges the execution and delivery of the note to secure which the mortgage was given, and sets out a copy of the note. *Held*, that evidence showing that the note has been materially altered after its execution is admissible, under an answer denying each and every allegation contained in the petition.
2. An unauthorized alteration of a non-negotiable promissory note by the payee, after the execution thereof, by the insertion of the word "bearer" after the name of the payee, is a material alteration which will nullify the instrument.
3. Where a promissory note has been altered by the payee in a material matter, and with a fraudulent purpose, no recovery can be had upon the instrument, or upon the original consideration for which it was given.
4. The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced, and discharges the mortgage.

(July 1, 1902.)

A PPEAL by plaintiff from a judgment of the District Court for Phelps County in

*Head notes by NORVAL, J.

NOTE—Effect on mortgage of alteration of note secured by it.

In *Gillett v. Powell*, 1 Speers, Bq. 144, which seems to be the first case in which this question was treated, a person purchased some property at an administrator's sale and gave a bond for the amount, and on the same day executed a mortgage which did not refer to the bond. The penalty of the bond was subsequently raised so as to render it void, but the court held that this did not prevent an enforcement of the mortgage. Several attempts have been made in South Carolina to distinguish subsequent cases from that one and take them out of the rule established in it, but thus far none of them seem to have succeeded.

In *Plyler v. Elliott*, 19 S. C. 264, the same rule was followed, the court apparently placing the decision on the ground that the mortgage was an independent security for the debt and could be enforced although the note had been destroyed.

Again, in *Smith v. Smith*, 27 S. C. 166, 13 Am. St. Rep. 633, the question arose and an attempt was made to take the case out of the rule established in the *Gillett* Case by contending that in the one case the mortgage did not refer to the note, while in the other it did. But that fact was held to be immaterial. It was also contended that in the *Gillett* Case, the alteration was innocent while in the case at bar it was fraudulent, but the court held that there was nothing to show that the alteration in the *Gillett* Case had not been fraudulent.

In the next case in which the question arose, *Heath v. Blake*, 28 S. C. 406, it appeared that the alteration was made with no intention of fraud and it was held that under those circumstances the mortgage was not avoided.

In marked contrast with the above cases is the 16 L. R. A.

favor of defendants in an action brought to foreclose a mortgage. *Affirmed*.

The facts are stated in the opinions.

Messrs. Atkinson & Doty, for appellant:

An alteration of an instrument is not material which does not change its meaning. If what is written upon or erased from the instrument had no tendency to produce this result or to mislead any person it is not an alteration.

Oliver v. Hawley, 5 Neb. 444.

Where the alteration was not fraudulently made, although the identity of the instrument may be destroyed, it ought not to cancel the debt of which the instrument was merely the evidence.

Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; *Crowell v. Labree*, 81 Me. 44; *Wilson v. Hayes*, 4 L. R. A. 196, 40 Minn. 531, 12 Am. St. Rep. 758; *Shepherd v. Whetstone*, 51 Iowa, 457; *Rosley v. Jewett*, 56 Iowa, 492.

The assignment made, not only of the note but of the mortgage given to secure the note to the plaintiff, was entirely sufficient to enable the plaintiff to maintain this suit.

First Nat. Bank of Port Huron v. Carson, 60 Mich. 432; *Weaver v. Bromley*, 8 West. Rep. 190, 65 Mich. 212.

An alteration that is not material, *i. e.*, does not give the instrument a different legal effect, will not avoid it.

Greenl. Ev. § 655; Robinson v. Phentz Ins. Co. 25 Iowa, 430; *Briscoe v. Reynolds*, 51 Iowa,

Indiana rule where, it would seem, an alteration of the note which will destroy it whether fraudulent or not is sufficient to defeat an action on the mortgage. *Tate v. Fletcher*, 77 Ind. 105; *Sherman v. Sherman*, 3 Ind. 337.

So releasing one of the makers of the note will discharge from the lien of the mortgage the property of one who joined in it as surety and who did not know of or consent to the release. *Crawford v. Hazelrigg*, 2 L. R. A. 129, 117 Ind. 63.

In *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298, the rule is stated as follows: Where a mortgagee has released or discharged the debt by a fraudulent alteration or destruction of the written evidence of it he ought not to be permitted to sustain a suit for its recovery, but where the alteration is not fraudulent, although the identity of the instrument may be destroyed, it should not cancel the debt of which the instrument was merely evidence.

Hence a mortgage executed to secure a promissory note which has been altered so as to destroy it is not, in the absence of fraud, affected by the alteration and may be enforced. *Clough v. Seay*, 49 Iowa, 111; *Elliott v. Blair*, 47 Ill. 342.

And where there is no ground for a belief that the alteration was made for any evil purpose the mortgage may be enforced. *Gillette v. Smith*, 18 Hun. 10.

In *Mersman v. Werges*, 113 U. S. 139, 28 L. ed. 641, the court decides that adding the name of a married woman to the note which her husband has given and which is secured by a mortgage in which her husband and herself joined, is not such an alteration of the note as to release her liability on the mortgage,—reversing 1 McCrary, 532.

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678; *Church v. Fowle*, 2 New Eng. Rep. 862, 142 Mass. 12.

There is no evidence in this case that the alteration, if made at all, was made fraudulently, and with a view to obtain an improper advantage. The plaintiff in this case, as assignee of said Duperon, is justly entitled to whatever equity the assignor had in the property at that time.

State Sav. Bank of St. Joseph v. Schaffer, 9 Neb. 1.

The plaintiff had a remedy in an action on the mortgage if the note was barred.

Hale v. Christy, 8 Neb. 264; *Longworth v. Taylor*, 1 McLean, 395; *Gillette v. Smith*, 18 Hun, 10.

Alteration of a note, secured by a mortgage, while it avoids such note does not affect the mortgage, and the latter may be enforced to compel payment of the debt for which the note was given.

Smith v. Smith, 27 S. C. 166, 13 Am. St. Rep. 633; *Wilson v. Hayes*, 4 L. R. A. 196, 40 Minn. 531, 12 Am. St. Rep. 778; *Vogel v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Jones, Mortg.* § 353; *Clough v. Seay*, 49 Iowa, 111.

Messrs. Sam A. Dravo and Leese & Stewart for appellees.

Norval, J., delivered the opinion of the court:

This is an action to foreclose a real-estate mortgage given by L. S. Campbell and wife to one D. H. Duperon, to secure the payment of a promissory note for the sum of \$100, with interest at 10 per cent from date thereof. Plaintiff is the owner and holder of said note and mortgage. The defendants answered, denying each and every allegation of the petition. The lower court found the issues in favor of the defendants, and dismissed the action. The court permitted the defendants, over plaintiff's objection, to introduce testimony tending to prove that the note had been materially altered since its execution, by writing in the word "bearer," although the note was non-negotiable when signed. At the close of the trial the defendants, with the permission of the court, filed an amended answer denying each and every allegation of the petition, and alleging that, on or about the date of the note sued on, they executed and delivered to D. H. Duperon a note calling for \$100, due in six months from date; that the note read "D. H. Duperon," the words "or order" being erased by defendants before the same was signed; that after the defendants signed said note, and without their consent, the word "bearer" was fraudulently written therein over the words erased.

The first question presented for our decision is, Was evidence showing that the note had been altered after its execution admissible under the general denial in the original answer? We think the answer must be in the affirmative. The petition alleges the execution and delivery of the note by the defendants, and the instrument is set out in the body of the pleading in its altered form. The general denial put in issue every material averment of the petition, and the affirmative was upon the plaintiff to prove the making and delivery of the identical note

mentioned in the petition, and so continued to the close of the case. *Donovan v. Fowler*, 17 Neb. 247; *First Nat. Bank of Madison v. Carson*, 30 Neb. 107. Under a general denial, the defendants were entitled to disprove the material facts stated in the petition. Evidence that they did not sign the instrument sued, or that it had been materially altered after delivery, was clearly admissible under the original answer. It is only affirmative defenses that the Code requires to be pleaded. The defense of alteration was not new matter required to be set up in the answer. If the note was altered without defendant's consent, after its execution and delivery, by inserting therein the word "bearer," then it was not their note, and evidence tending to establish such fact tended to rebut or disprove the evidence offered by the plaintiff that the defendants made the note described in the petition and introduced on the trial. We do not think it was necessary to allege the alteration in the answer, and the court did not err in receiving the evidence offered on the question under the general denial. *Abbott, Tr. Ex.* 407; *Boomer v. Koon*, 6 Hun, 645; *Lincoln v. Lincoln*, 13 Gray, 45. It follows from what has been said that plaintiff was not prejudiced by the filing of the amended answer, as it presented no issue not raised by the general denial of the first answer. No objection was made to the granting of permission to file an amended answer; therefore the defendants cannot now urge the ruling as a ground for reversing the case. It is undisputed that the note when signed by defendants was non-negotiable, and that after its delivery, but before the instrument came into the possession of plaintiff, it was changed by inserting the word "bearer." The writing of this word in the body of the note changed its character, and invalidated the instrument. The alteration is a material one, and, being unauthorized by the makers, no action could be maintained thereon. *Booth v. Powers*, 56 Y. Y. 23; *Union Nat. Bank v. Roberts*, 45 Wis. 873; *Croswell v. Labree*, 81 Me. 44; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 63; *Morrehead v. Parkersburg Nat. Bank*, 5 W. Va. 74; *Needles v. Shaffer*, 60 Iowa, 65.

But it is contended by counsel for appellant that the payee having indorsed the note, and plaintiff having received the same in good faith, in the usual course of business, the indorsee has a right of action upon the note, notwithstanding the alteration thereof. We cannot agree with counsel in this contention. This court has more than once held that the unauthorized material alteration of a negotiable note by the payee nullifies the instrument, even in the hands of a bona fide holder. *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Davis v. Henry*, 13 Neb. 497.

It is finally insisted the district court erred in ruling that the mortgage given to secure the note was no lien upon the property described in the mortgage; in other words, that plaintiff was entitled to a decree of foreclosure, notwithstanding the alteration of the note it was given to secure. Authorities

are to be found which sustain the position contended for by counsel. The leading case so holding is *Gillett v. Powell*, 1 Speers, Eq. 144. This case was followed by the Supreme Court of South Carolina in *Phylor v. Elliott*, 19 S. C. 257, and *Smith v. Smith*, 27 S. C. 166. The court of last resort in the state of Illinois had held that where a mortgagee has fraudulently made a material alteration of a note, to secure which the mortgage was executed, the debt is thereby discharged and defeats a foreclosure of the mortgage; but if the alteration, although material, was not made with a fraudulent purpose, it will not have that effect. *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Elliott v. Blair*, 47 Ill. 342. So far as we are advised, the question is now presented to this court for the first time.

The effect of the material alteration of a note depends upon the person by whom, and the intention with which, it was made. If changed by a stranger, without the consent of the parties to the instrument, the rights of the holder will not be affected thereby. The material alteration of a note by the payee, although made without any fraudulent intent, renders the paper void. Yet the holder may recover in an action brought upon the original consideration. The effect of an alteration of such paper, innocently made, under an honest mistake of right, was considered by this court in *State Sav. Bank of St. Joseph v. Shafer*, 9 Neb. 1, and it was there ruled that, while the alteration vitiates the instrument, it would not defeat a recovery upon the original consideration for which such note was given. The weight of authority is in favor of the doctrine that a fraudulent alteration of a promissory note in a material matter not only avoids the instrument, but works a forfeiture of the debt for which it was executed. In such case no recovery can be had in any form of action. The law will not permit the holder to take the chances of gain by fraudulently altering the note, without risk of loss in case of detection. Dan. Neg. Inst. § 1410a; *Newell v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 261; *Martendale v. Follet*, 1 N. H. 95; *Smith v. Mace*, 44 N. H. 553; *Bigelow v. Stilphen*, 35 Vt. 521; *Whitmer v. Frye*, 10 Mo. 349; *Waring v. Smyth*, 2 Barb. Ch. 135, 5 L. ed. 586; *Warder v. Willyard*, 46 Minn. 581.

It is inferable from the record that the insertion of the word "bearer" was not made for an honest purpose. Applying the above principles to the case at bar, we are unable to perceive upon what ground it can be held that the mortgage should be enforced. If the fraudulent alteration avoided the note and extinguished the debt, it also discharged the mortgage by which it was secured. The cancellation of the debt released the lien of the mortgage. The plaintiff not only lost his right of action on the note, but on the mortgage as well. *Sherman v. Sherman*, 3 Ind. 337; *Tate v. Fletcher*, 77 Ind. 102; *McCorkle v. Doby*, 1 Strobb. L. 396. In *Gillett v. Powell*, *supra*, it does not appear that the alteration was fraudulently made; hence that case is not an authority against the principle

for which we contend. The case of *Phylor v. Elliott*, *supra*, was decided by a divided court. The opinion of the majority is placed upon the untenable ground that the fraudulent material alteration of a note does not discharge the debt, but merely takes away all remedy upon the note itself. The writer of that opinion, in substance, contends that as to the effect upon the debt, there is no substantial difference between that of a note barred by the Statute of Limitations, and that of one made void by fraudulent alteration, and that both are controlled by the same principle of law. In this it seems to us that the author of the opinion has fallen into a grave error. The Statute of Limitations only takes away the remedy, while the fraudulent alteration of a note goes further. It reaches to the debt itself, and extinguishes it. The fact that an action can be brought on a mortgage, though the note which it secures is barred, is no ground for holding that the mortgage cannot be enforced in this case to compel the payment of the debt for which the altered note was given. A barred note secured by a mortgage continues as evidence of debt until the statute runs against the mortgage. *Cheney v. Woodruff*, 20 Neb. 124; *Cheney v. Janssen*, 20 Neb. 128.

It is the judgment of this court that the judgment appealed from be affirmed.

Post, J., concurs.

Maxwell, Ch. J., dissenting:

I am unable to give my assent to the decision of the majority of the court, for the following reasons: The plaintiff brought an action in the district court of Phelps county, against the defendants, to foreclose a mortgage upon real estate. The action was brought upon the 19th day of December, 1889. No answer was filed until the 7th day of April, 1890, which seems to have been the day on which the trial took place, when the defendants, by leave of court, filed a general denial. The note appears to have been introduced in evidence without objection. The defendant L. S. Campbell was called as a witness in his own behalf, and testified as follows: "Question. State if that note is in the same condition it was when you signed it. (Counsel for plaintiff objects as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.) Answer. No, sir. Q. What change has been made, if any? (Objected to as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.) A. The word 'bearer' has been written in there. Q. Any words been erased out,—were the words 'or order' erased? A. Yes, sir; I erased them myself." Upon this evidence the court held that there was an alteration, and that it was fraudulent; and thereafter, but so far as it appears not in open court, permitted an amended answer to be filed to conform to the alleged proof, and rendered judgment in favor of the defendants, and against the plaintiff, dismissing the action. It is very clear that the court erred in permitting an affirmative defense to be proved under a general denial. The requirement of the Code, that affirmative defenses shall be pleaded, is reasonable and

just, and it is the duty of the court to see that this rule is not infringed. If a party has a defense, he must set it forth so that the adverse party may be prepared to meet it. Otherwise, if he rests his case upon a general denial, his proof will be restricted to controverting the facts stated in the petition. To permit a defendant, against the objection of the plaintiff, to prove a defense entirely different from that set forth in his answer, and then amend his answer to conform to his proof, is a gross violation of the rules of pleading, and is liable to be fraught with great injustice; and particularly is this true where, as is evident in this case, the wrong was deliberately planned. The plaintiff is the indorsee of the note. He evidently is an innocent purchaser. Now, had the defendant set up in his answer the defense that the note had been altered by adding the word "bearer," the testimony of the payee and others could have been taken, and thus the indorsee have been prepared to defend his rights. Here was a snap judgment taken which deprived the plaintiff of a trial upon the real question decided, viz., the alteration. That question has not in fact been tried yet. If the defendant may conceal his defense under a general denial, and on the trial prove a defense which, in the absence

of counteracting proof, will defeat the action, and which the plaintiff, taken by surprise, cannot be prepared to meet, why may he not prove payment, release, accord and satisfaction, or other defense, and thus the beneficial effects of the Code, as to pleading affirmative defenses, be lost? This is a step, and a most important one, in that direction. But the defendants, by filing an amended answer, in effect admit that such an answer is necessary. It is the duty of the courts to uphold honesty and fair dealing, and protect and enforce the rights of every one. From time immemorial, courts of equity have granted continuances to permit one or both parties to obtain proof, add new parties, or otherwise protect and save their rights, and under the Code this practice is still in force. In addition to this, a court will not determine without a hearing that an alteration is fraudulent. The presumption of innocence prevails until overcome by proof. It is not claimed by the defendants that they have any defense against the note itself that would be defeated by a transfer thereof to an innocent purchaser. How, then, are they defrauded, or can be? They can lose nothing by the transfer. The judgment should be reversed, and the cause remanded for trial upon the amended answer.

TEXAS SUPREME COURT.

GULF, COLORADO & SANTA FÉ R.
CO., *Appt.*,

v.

Isaac LOONEY.

(.....Tex.....)

1. A ticket over connecting roads limited as to the time but which is a joint contract of the carriers, entitles a passenger

who is delayed by a wreck on one of the roads to complete his journey although the time expires before he reaches the last of the connecting roads.

2. A coupon ticket over connecting roads limited as to time and expressly providing that the carrier selling it is not responsible beyond its own line, but is only an agent of the connecting roads, will not entitle a passenger to be carried over the last

NOTE.—How far ticket may be used for passage after expiration of time limited.

It is only required that the holder of the ticket present himself at the cars of the company and take passage at any time within that limited by the terms of the contract. It is not necessary for him to complete the journey within such time. *Lundy v. Central Pac. R. Co.* 66 Cal. 191, 56 Am. Rep. 100.

If the holder of the ticket enters upon his journey before midnight of the day on which the ticket expires, and presents it to the conductor for passage, it is used within the meaning of the contract, and the holder will be entitled to be carried to his destination, although it cannot be reached on such day. *Evans v. St. Louis, I. M. & S. R. Co.* 11 Mo. App. 564.

But in Canada the rule seems to be that the whole journey must be completed within the time limited. *Craig v. Great Western R. Co.* 24 U. C. Q. B. 509.

Although it might be different if the company by its own acts rendered it impossible to complete the journey within the time specified. *Briggs v. Grand Trunk R. Co.* 24 U. C. Q. B. 510.

A ticket issued on the 6th of the month and limited to be used within two days from the date sole, does not expire until twelve o'clock on the night of the 8th. *Georgia S. R. Co. v. Bigelow*, 68 Ga. 212.

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If the journey covered by the last coupon on a ticket for passage over several connecting roads is begun before the expiration of the time limited the ticket will carry its holder to his destination although the limit expires before it is reached. *Auerbach v. New York Cent. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290.

But passage must be taken on last coupon before the expiration of limitation of the ticket to render it good; and delay by fault of the connecting road will not entitle the holder of the ticket to use it if he does not reach the train on which the coupon is to be used before its expiration. *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

It seems that actual passage on the train must be taken, and that it is not sufficient to reach the station from which the journey is to be begun if the last train going out on the day of the expiration of the limit has departed. *Arnold v. Pennsylvania R. Co.* 6 Cent. Rep. 630, 115 Pa. 135.

Where the last day of the time limited is on Sunday and the last road over which the ticket is to be used runs no trains on Sunday the holder of the ticket who has reached the terminus of such road in time to take a train on Sunday if it had run will be entitled to passage by the first train on Monday. *Little Rock & Ft. S. R. Co. v. Dean*, 48 Ark. 421, 51 Am. Rep. 584.

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road in the series after the time has expired although his failure to complete the journey on time was due to a wreck on one of the other connecting roads.

(June 7, 1892.)

APPEAL by defendant from a judgment of the District Court for Milam County in favor of plaintiff in an action brought to recover damages for the alleged unlawful ejection of the plaintiff from defendant's cars. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. J. W. Terry and Alexander & Clark for appellant.

Messrs. Ford & Ford for appellee.

Garrett, P. J., filed the following opinion:

This action was brought by Isaac Looney against the Gulf, Colorado & Santa Fé Railway Company to recover damages, because, as alleged, the defendant's conductor unlawfully ejected the plaintiff from defendant's cars while he was traveling thereon as a passenger. The petition alleged that on August 6, 1886, at Birmingham, Ala., plaintiff purchased a limited ticket from the Louisville & Nashville Railroad Company, which entitled plaintiff to transportation from said city of Birmingham, Ala., to McGregor, Tex., and thence on the line of the defendant's railway, to Cameron, Tex.; that in issuing said ticket, the Louisville & Nashville Railroad Company acted for itself and as agent of defendant company; that the ticket was purchased August 6, 1886, and was limited to August 9; that plaintiff left Birmingham on the day the ticket was issued, in ample and sufficient time to have reached his home in Cameron before the limit expired; but while traveling with all possible dispatch, and while on the cars of one of the connecting lines of defendant, at Belden, Tex., he was unavoidably detained, without fault on his part, about eighteen or twenty hours, and did not reach the said town of McGregor until the morning of August 10; that plaintiff, on August 10, entered the first passenger cars of defendant bound for Cameron after his arrival at McGregor; that the defendant company recognized the validity of said ticket, but refused to carry plaintiff thereon, claiming it had expired, and compelled plaintiff to pay the sum of one dollar to be carried to Temple, on defendant's line of road; that, after passing Temple, defendant did, without any lawful cause, with force and violence, eject plaintiff from its cars, and turn him off at a place other than a usual stopping place, in the open prairie and hot sun, and declined to transport plaintiff further. Whereby, to plaintiff's great injury and mortification, he has been damaged, including lost time and additional price paid for ticket, in the sum of \$2,510, for which amount he prays judgment. Defendant's answer embraced general and special exceptions, general denial, and a special plea that, at the time plaintiff first reached defendant's line of railway, the time within which his limited excursion ticket

was to be used had expired, of which fact plaintiff was notified by defendant's conductor; that plaintiff, upon demand of the latter paid his fare from McGregor to Temple, Tex., the last-named point being the divisional terminus of defendant's line of railway, where a change of conductors was made; that, after leaving Temple, on the route to Cameron, defendant's second conductor demanded of plaintiff his fare or ticket from Temple to Cameron, and plaintiff refused to produce either; that plaintiff courted a forcible eviction of himself from defendant's train as a basis for a damage suit against defendant. Defendant says its conductor ejected plaintiff, without force, solely because he utterly refused to pay his fare or produce a valid ticket. Defendant's demurrers were overruled by the court, to which the defendant excepted. Trial before a jury resulted in a verdict and judgment for the sum of \$484.

Appellant's first and second assignments of error are based upon the action of the court in overruling its general demurrer that the facts alleged in the petition showed that, "when the plaintiff was ejected, it was in consequence of his insisting upon riding upon an expired ticket, and if plaintiff had any cause of action it was clearly not against defendant;" and in overruling defendant's special exception, "because the allegation as to delay or default, being the express act of the carrier other than the defendant, and the same not occurring upon defendant's line, defendant is not liable." From the allegations in the plaintiff's petition it would seem that the agent of the Louisville & Nashville Railroad Company at Birmingham, Ala., sold the plaintiff a ticket which entitled him to through passage from Birmingham to Cameron, Tex., and that in doing so he acted also as the agent of the defendant. It does not appear that the ticket was composed of the separate tickets or coupons of each of the connecting lines, or that the ticket was limited in any other manner than as to the time within which it should be used. Looking only to the petition, as we must in the disposition of the demurrers, the ticket appears to have been the joint contract of the Louisville & Nashville Railroad Company and its connecting lines, including that of the defendant, to transport the plaintiff from Birmingham, Ala., to Cameron, Tex., with a limitation only as to the time within which it should be done. Such a limitation may be made when reasonable, and the purchaser of the ticket must use it within the time stipulated, but it is subject to the implied condition that the train shall make the passage within the time limited, and that the company shall, upon its part, perform its obligation. 2 Wood, Railway Law, 1398, 1400, 1402. It appears from the petition that the failure of the plaintiff to reach McGregor before the expiration of the ticket was owing to the fault of one of the connecting lines; that the plaintiff commenced his journey immediately after the purchase of the ticket on August 6, but was detained at Belden on a connecting line which failed and refused to move its train

for eighteen or twenty hours; and that, but for such delay, plaintiff would have reached McGregor in time to take defendant's train on the 9th of August, before the expiration of the ticket. Since it appears from the petition that the ticket was the joint undertaking, or evidence of such undertaking, on the part of all the lines of railroad, the defendant would be responsible for the default of the connecting line causing the delay, to the extent at least that it was bound to honor the ticket when presented to it at McGregor for passage from McGregor to Cameron. A joint undertaking having been shown by the petition of all the connecting lines to transport the plaintiff from Birmingham, Ala., to Cameron, Tex., the limitation of time in the ticket also applied to the time within which the journey should be commenced at Birmingham, and the plaintiff having commenced his journey within the time prescribed, and continued the same without a stopover at McGregor he was entitled to be transported by defendant from McGregor to Cameron, notwithstanding the limitation to his ticket had expired when he reached McGregor. 2 Wood, Railway Law, 1897, 1898; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, 56 Am. Rep. 100. Since the averments of the plaintiff's petition show a through contract for passage, as we think, there was no error in overruling defendant's demurrer.

But the facts, as developed upon the trial of the case, show that plaintiff's ticket was a coupon ticket, the unused portion of which was as follows: "Issued by Louisville and Nashville Railroad Company. Good for one passage of the class designated, to the point on Gulf, Colorado and S. Fé Ry. Co. indicated by punch marks and in check attached, when stamped by company agent, subject to the following contract: It is understood and agreed between the purchaser of this ticket and all the companies named in it and its coupons, as follows: '*First.* That in selling this ticket and coupons over connecting lines, the Louisville & Nashville R. R. Co. acts only as agent and is not responsible beyond its own line. *Second.* That baggage liability is limited to wearing apparel, not exceeding one hundred dollars in value. *Third.* That no stopover will be allowed unless permitted by the local regulations of the various lines. *Fourth.* That if the ticket and coupons are punched to indicate destination only, they are good until used. *Fifth.* That if this ticket and coupons are sold at a reduced rate, and punched to denote that they are limited, they are not good after the date so canceled in the margin of this contract, and that if more than one date is canceled they are void. *Sixth.* That if no punch marks are used to indicate "class," then this ticket and coupons are good for first-class passage, but, when punched to denote second-class, they entitled the holder only to the privileges usually accorded to second-class passengers. *Seventh.* This ticket and coupons are void if they show any alteration or erasure, or if more than one station is designated as the terminal point; and that the coupons are void if de-

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tached. *Eighth.* That none of the companies named in this ticket or coupons will be held liable for damages on account of any statement, not in accordance with this contract, made by an employé or employés of said companies. *Ninth.* That it is especially agreed and understood that no agent or employé of any of the companies named in this ticket or coupons has any power to alter, modify, or waive, in any manner, any of the conditions named in this contract. *Tenth.* That the right exists to declare this ticket or either of the coupons forfeited for violation of either of the companies (?) [conditions] named in this ticket or coupons; the right of forfeiture being a continuous one. C. P. Atmore, Gen. Pass. & Ticket Agent." In the margin of the contract, "August 9, 1888," is punched, indicating August 9, 1888, as the canceled date referred to in the fifth clause of the ticket. Its only coupon attached reads: "Issued by Louisville & Nashville R. R. Co. on account of Gulf, Colorado & Santa Fé Ry. Co. McGregor to point indicated by punched marks;" Cameron being the point indicated by punched mark. "Not good if detached." In one corner of the coupon are the letters "Limited when punched," printed around a half circle, and the half circle is punched out with the letter "L." The coupon is so punched in another corner to denote that it entitles the holder to first-class passage. The balance of the coupons were detached by the conductors of connecting lines. The ticket was by way of the Louisville & Nashville, "The Cotton Belt" or St. Louis, Arkansas & Texas, and the Gulf, Colorado & Santa Fé Railway lines to Cameron, Tex. Plaintiff bought the ticket at Birmingham, Ala., from the agent of the Louisville & Nashville Railroad Company, on August 6th. He called for the cheapest ticket. He commenced his journey at once, and did not stop over *en route*, but was detained on the Cotton Belt by a wreck, and had to stop over there, without fault on his part, eighteen or twenty hours. But for this delay he would have reached McGregor in time to take the defendant's train bound for Cameron on August 9th. He reached McGregor on August 10th, and took the first train leaving for Cameron over defendant's road. The conductor refused to honor the coupon, because it had expired, and plaintiff paid him the regular local fare as far as Temple. After passing Temple, plaintiff was ejected by another conductor because he failed to produce a ticket other than the expired coupon, or pay the fare.

The court, in its charge to the jury, held the defendant responsible for the act or omission of the connecting line, and instructed the jury, in substance, to find for the plaintiff if he failed to make the connection at McGregor from no fault of his own, but by reason of the act or omission of the defendant, or either of the connecting lines. Defendant requested the following charge, the refusal of which has been assigned as error: "You are instructed that, the evidence, without contradiction, showing that plaintiff's ticket was a limited ticket, and that the period of limitation had expired when

plaintiff first boarded defendant's train on its line of railway, the conductor was justified in refusing to recognize the expired ticket, and, upon refusal of plaintiff to pay fare or produce a valid ticket, the conductor was justified in ejecting plaintiff, using no more force than was necessary." It is further contended that the verdict of the jury is not supported by the evidence in the case, to the effect that the "ticket upon its face expresses that, in issuing the same with coupons over connecting lines, the Louisville & Nashville Railway acts only as agent, and is not responsible beyond its own lines, which stipulation in the ticket negatives the existence of any partnership or joint interest between the various companies over whose roads the different coupons read, and the evidence fails to show that there was any partnership or joint interest. The ticket upon its face, in connection with the coupons, shows in legal effect that, if the defendant company was in any respect connected with or bound thereby, it was a contract on the part of defendant company to transport the plaintiff from McGregor to Cameron, provided the ticket was presented, for passage, to it on or before the 9th day of August, 1888, and the evidence shows that the plaintiff failed to present said ticket for passage to the defendant within said time; and under the contract evidenced by the ticket, in connection with all the testimony in the case, the defendant not being liable for the defaults or negligence of other lines which may have prevented the plaintiff from presenting his ticket, in the required time, to the defendant, the verdict is entirely without evidence to support it, and should have been for the defendant;" and that the court should have charged the jury to return a verdict in favor of the defendant. As the ticket upon which the plaintiff traveled, in this case, contained the stipulation that, in selling this ticket and coupons over connecting lines, the "Louisville & Nashville Railroad Company acts only as agent, and is not responsible beyond its own line," we are relieved of the difficulty presented in the consideration of a case where separate coupon tickets are sold without such limitation. But Mr. Hutchinson, in his work on Carriers, (sec. 152,) says it is "well settled that one passenger carrier may sell his own and at the same time the tickets of connecting carriers, entitling the purchaser to through transportation to his destination over all the lines, and may receive the fare for the whole distance, without becoming responsible for the passenger's carriage beyond its own line; and in fact, where nothing else appears in the transaction, this will be the legal construction put upon it." Each coupon is the separate contract, voucher, or token of the respective connecting carriers, and the selling carrier is the agent of the several lines in selling them. *Knight v. Portland, S. & P. R. Co.* 56 Me. 234, 96 Am. Dec. 449; *Milnor v. New York & N. H. R. Co.* 53 N. Y. 363; *Hartan v. Eastern R. Co.* 114 Mass. 44; *Ellsworth v. Tartt*, 26 Ala. 783, 62 Am. Dec. 749; *Hood v. New York & N. H. R. Co.* 22 Conn. 1. The coupons are not the contract of the first or

selling carrier, but it sells them as the agent of the several connecting carriers.

When, as in the present case, it is expressly stipulated that the selling carrier acts as the agent of the connecting carriers, and will not be responsible beyond its own line, each coupon becomes the separate contract for the line for which it is issued, and the ticket does not imply a joint obligation resting on each of the companies. A carrier may limit its liability to its own line, (*Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 263,) and our supreme court sees no distinction between carriers of freight and of passengers, (*Harris v. House*, 74 Tex. 584.) It appears from the evidence that the limitation of the ticket to four days was reasonable, and that the plaintiff would have easily reached McGregor in time for the defendant's train on August 9 but for the delay in the line of the Cotton Belt. Being reasonable, the limitation of the ticket was binding upon the plaintiff, and the coupon evidencing the plaintiff's right to be carried from McGregor to Cameron over defendant's line was defendant's contract, and entitled the plaintiff to be transported if he presented himself within time; and defendant should not be held liable for the default of its connecting line to have the plaintiff there in time. *Mosher v. St. Louis, I. M. & S. R. Co.*, 127 U. S. 893, 32 L. ed. 250. Plaintiff has a right of action against the Cotton Belt Company for its failure to transport him to McGregor within time; but his coupon for transportation over defendant's line having expired by limitation, the defendant was not bound to carry him, because it was no fault of plaintiff that he did not reach there in time; neither was it the fault of the defendant.

Appellee relies upon the fact that the journey was commenced at Birmingham within the time to which the ticket was limited, to compel the defendant to recognize its coupon, though presented after the expiration of the limit, and has cited, as authority for his position, 4 Lawson, Rights, Rem. & Pr. p. 3235, and the cases cited in support of the text, which is: "When a limited ticket is issued, 'not good for passage' after a certain number of days from its date, or to be 'used' by a certain day, the passenger need not have completed his journey by that date; it is sufficient that he has commenced it,"—citing *Lundy v. Central Pac. R. Co.* 66 Cal. 191, 56 Am. Rep. 100; *Auerbach v. New York Cent. & H. R. Co.* 89 N. Y. 261, 42 Am. Rep. 290; *Evans v. St. Louis, I. M. & S. R. Co.* 11 Mo. App. 463. In *Auerbach v. New York Cent. & H. R. Co.*, the plaintiff had purchased a ticket from St. Louis, over several railroads mentioned in coupons annexed to the ticket, to the city of New York. When ejected from defendant's cars he had commenced his journey upon the last coupon, before its expiration, and had not completed it when the time expired. It was held that the acceptance of the coupon by the conductor before midnight of the last day was in time, although the journey could not be completed until afterwards. This case is not in point, and ap-

plies only to a continuous trip. The case in 11 Mo. App. 443 (*Evans v. St. Louis, I. M. & S. R. Co.*) is not accessible to us. *Lunde v. Central Pac. R. Co.* would, at first, seem to be in point, as the ticket was a coupon ticket issued by the Union Pacific Railroad over its line and that of defendant, and the court said: "In our view it was only required of plaintiff that he present himself at the cars of the Union Pacific Railroad Company, or of the defendant, and take passage at any time within nine days from the 12th day of March, 1874." Plaintiff's time had expired when he presented the coupon to defendant's conductor. But an examination of the case will show that the liability of the Union Pacific was not limited, nor that of the defendant, by the terms of the ticket, and a verbal agreement was shown between the passenger agents of the companies to honor each other's tickets. It was put on the ground that a contract was made by authority of the defendant by the Union

Pacific Railroad Company for carrying the plaintiff through from Omaha, on the line of the Union Pacific to San Francisco, on the line of the defendant. We are of the opinion that the defendant made no contract except to carry the plaintiff from McGregor to Cameron, and only then in case he presented himself for carriage at the defendant's cars for that purpose within the time fixed in the ticket, and that the defendant was not bound to carry out said contract after the limited time on account of the failure of its connecting line to perform its obligation to expeditiously carry the plaintiff, and have him at McGregor before the expiration of his ticket. Consideration of the remaining assignments of error is unnecessary.

For the error of the court herein indicated, we conclude that *the judgment of the court below should be reversed*, and the cause remanded.

Adopted by Supreme Court, June 7, 1892.

MICHIGAN SUPREME COURT.

William McPHERSON, Jr., *et al.*, *Relators*,

Robert R. BLACKER, Secretary of State,
Resp't.

(.....Mich.....)

1. A state Legislature has power to direct that presidential electors shall be chosen by congressional districts instead of by the state at large under U. S. Const., art. 2, § 1, providing that each state shall choose electors "in such manner as the legislature thereof may direct."
2. Nonuser will not defeat a power to exercise rights expressly delegated in a written Constitution.
3. The constitutional provision as to the manner of choosing presidential electors is not affected by the 14th and 15th Amendments.
4. The title "An Act to Provide for the Election of Electors of President and Vice-President, etc.," sufficiently expresses the subject of an Act which provides for the election of alternate electors as well as electors.
5. Lack of any provision for filling the vacancy in case of the death of both an elector and alternate elector does not make a statute providing for the election of presidential electors by congressional districts invalid.
6. Failure to provide for notice of the election of presidential electors is not a defect in a statute providing for such election by congressional districts where the general statutes of the state sufficiently provide for notice of elections.
7. The lack of any provision in a statute providing for a choice of presiden-

tial electors by congressional districts for a separate canvass of the votes cast in different electoral districts within one county, is not material as the inspectors can designate the district in which an elector is voted for.

8. The invalidity of a provision as to the time of meeting of presidential electors in a statute providing for the choice of such electors which in that respect conflicts with an Act of Congress does not make the whole Act inoperative.

(June 17, 1892.)

PETITION for a writ of mandamus to compel the Secretary of State when giving out notices for the election of presidential electors to ignore the Act passed in 1891 and follow the law previously in force. *Writ denied.*

The facts are stated in the opinion.

Mr. Henry M. Duffield, for relator:

By the United States Constitution there are certain rights and powers which are reserved to the states, as bodies politic, and there are certain rights and powers which are not reserved to the states, but are reserved to the people.

As early as the case of *Hepburn v. Ellzey*, 6 U. S. 2 Cranch, 445, 2 L. ed. 882, the court said: "These clauses show that the word 'state' is used in the Constitution as designating a member of the Union; and excludes from the term the significance attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive department is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."

In the case of *Penhallows v. Doane*, 8 U. S.

NOTE.—The above case, being the first adjudication on the question, offers little opportunity for annotation. The purely legal aspects of the case are overshadowed by its public importance. It involves more than a mere question of partisan

advantage, and suggests a possible relief from the present undue concentration in a few pivotal states of the political struggle in each presidential campaign.

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§ 8 Dall. 54, 1 L. ed. 507, (read page 98, L. ed. 523, 524), *Mr. Justice Iredell*, speaking for the court, says: "A distinction was taken at the bar between a state and the people of the state. It is a distinction I am not capable of comprehending. By a state forming a republic, speaking of it as a moral person, I do not mean the Legislature of the state, the executive of the state, or the judiciary, but all the citizens which compose that state, and are, if I may so express myself, integral parts of it; together forming a body politic."

See also *Ware v. Hylton*, 8 U. S. 8 Dall. 225, 1 L. ed. 579; *Buckner v. Finley*, 27 U. S. 2 Pet. 586, 7 L. ed. 528.

In *Texas v. White*, 74 U. S. 7 Wall. 700, 19 L. ed. 227, *Chief Justice Chase* said: "A state, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of definite boundaries, and organized under the government's sanction, and limited by a written constitution, and established by the consent of the governed."

In the letter from Mr. Madison to Mr. Everett, cited by *Judge Cooley* in his note to Story on the Constitution, vol. 1, p. 89, the eminent writer says: "It (the Constitution of the United States) is formed by the states, that is by the people in each of the states acting in the highest sovereign capacity, and formed consequently by the same authority which formed the state Constitution . . . and being a compact among the states in their highest sovereign capacity . . . it cannot be altered or annulled at the will of the states, as the Constitution of a state may be at its individual will."

The Declaration of Independence, appealing to the Supreme Judge of the world, declares and publishes "that these united colonies are, and of right ought to be, free and independent states, and that as free and independent states they have full power to do all acts and things which independent states might by right do."

In the face of these provisions the contention cannot prevail that "the state" need not appoint the electors, but that they may be appointed by fractions of the territory of the state, and by the votes of portions of its electors. It is worthy of note that nowhere in the Constitution is any reference made to "districts," either congressional or otherwise. The earliest allusion to districts in Federal legislation was the Act of Congress of 1842, 5 U. S. Stat. 591, which required, for the first time in the history of the country, the election of members of Congress by districts.

What the Constitution meant was the sovereign state, a legal although artificial being, a great political corporation with imperial prerogatives and powers, the great state, the state that in the minds of most of the men of the convention which framed the Constitution was greater almost than the United States; the state of whose proper sovereignty they would not give up one jot or tittle; which had a great seal; which had a seat of government; which had a system of courts to decide any controversy concerning an appointment; which had a military and civil power; which could record its decree; and which from its high plane of sovereignty could command respect for its 16 L. R. A.

choice, and if its choice was not respected could command obedience to its will.

In the whole proceedings of the convention which adopted this Constitution nothing whatever was done by districts, nothing whatever was done by the people, nothing whatever was done by the Legislatures of the states, but every vote recorded the vote of a state, just such a state as we are now contending here should appoint these electors. It was those states, and that kind of state, that formed the Constitution, and it was those states and that kind of state that the Constitution meant when it declared "each state shall appoint electors."

As to contemporaneous construction, it is stated in *McMasters History of the People of the United States*, vol. 1, p. 526, that all of the states choose by direct vote of the people, or by Legislature.

This continued until in 1800 the trouble began. Party strife ran high. The federalists began to lose power, the republican party were coming into power, largely through the extreme popularity in New York of one of their members. And then we see at once the district plan is brought into play in case it will help the federalists, and again abandoned in case that course will help the federalists.

Whatever legislation took place then was the legislation of partisan heat and excitement, and should have no more weight with your honors or any other court who will look into it, as a construction of the Constitution than the law that we are discussing would have weight, for the legislation then was prompted by and born of the very same spirit that this law is born of—a mad desire for temporary power.

All the states which had originally adopted a district system soon abandoned it, and as early as 1884 presidential electors in every state in the Union were appointed by the state, being chosen either by the popular vote or by the Legislature.

Mr. F. A. Baker, also for relator:

The language of the Constitution, in its literal or exact meaning, contemplates and requires that the state shall act as a unit in appointing presidential electors.

In what sense was the word "state" used?

It is evident the Legislature was not considered the state, because the Legislature is mentioned as the "Legislature thereof," that is, of the state, so that the power of appointment was not by the Constitution vested in the Legislature, as in the case of the appointment of United States senators.

On the other hand, it seems equally clear that the word "state" was not used as a convenient way of describing the people residing within the territorial limits of a state, on the theory that the state in one and its simplest sense consists of the people. If that had been the intention, it is reasonable to believe this constitutional provision would have followed the language of article 1, section 2, that "the House of Representatives shall be composed of members chosen every second year by the people of the several states," etc.

The word "state" was used to describe the people residing within certain described territorial limits, organized into a state govern-

ment, republican in form, constituting one body corporate and politic, and in and of itself a unity.

An unorganized body of inhabitants is not a state.

Texas v. White, 74 U. S. 7 Wall. 700, 721, 19 L. ed. 227, 236.

This interpretation is abundantly sustained by an examination of the convention debates. They are stated and reviewed in 2 Bancroft's History of the Constitution of the United States, pp. 165-185.

The process of constitutional development, by construction and usage, has been such that it is not now competent for a state to break and destroy the homogeneity of the electoral colleges, by dividing itself into separate and independent districts for the election of presidential electors, to voice the will of such districts in the choice of the chief magistrate, as distinguished from the will of the state as a political unit.

See 1 Bryce's American Commonwealth, p. 350.

Messrs. Henry A. Haigh and B. M. Cutcheon counsel for relators.

Mr. A. A. Ellis, Atty-Gen., for respondents:

In the mode devised by the National Convention, as exhibited in the Constitution, it was presumed that the electors would consist of well-informed citizens, who should exercise their own judgments in selecting candidates for the offices of president and vice-president.

See Life of Timothy Pickering, vol. 3, 103; Miller on the Constitution of the United States, 149, 150.

The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted; and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular states which had set the example.

Writings of James Madison, vol. 3, 338, 334; Hildreth, History of the United States.

It was the intention of the framers of the Constitution to leave that power in the hands of the several states to be exercised in the manner the Legislature of each state shall deem proper.

McKnight, "The Electoral System of the United States," p. 37.

The right to make these directions is complete and conclusive, subject to no control or revision, and placed entirely with them [state legislatures] for the best and most unanswerable reasons.

The Electoral System of the United States, McKnight, 377; *Judge Cooley* in Michigan Law Journal of February, 1892, p. 6; Story, Constitution, 4th ed. p. 304.

The report made by the committee on Privileges and Elections in 1874 discusses the question of the relative merits of the two systems. It appears clear from such report that the district system is more equitable and more fairly represents the wishes of the entire people.

Report, 395, 43d Cong. 1st Session, Senate Report; Report containing Reports Nos. 281 to 478.

The word "state" in the Federal Constitution is used in four or five different senses.

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Texas v. Wright, 74 U. S. 7 Wall. 700, 19 L. ed. 227.

In reply to the play on the word "state" I refer the court to the clause in article 1, section 10: "No state shall make any law impairing the obligations of contracts."

The word "state" in this clause is used in the sense of "legislature of a state" and as a prohibition against the state Legislature, and prohibits the Legislature from directly or indirectly making such a law. It extends to a city ordinance.

Saginaw Gas Light Co. v. Saginaw, 28 Fed. Rep. 533; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921.

Mr. J. W. Champlin, also for respondent:

Where the words of a constitutional provision, taken in their ordinary sense, and in the order of their grammatical arrangement, embody a definite meaning, which involves no absurdity or conflict with other parts of the same instrument; the meaning thus apparent on the face of the provision is the only one that can be presumed to have been intended, and there is no room for construction. It is not allowable in a constitution any more than in a statute, to interpret that which has no need of interpretation.

Newall v. People, 7 N. Y. 9, 97; *Hills v. Chicago*, 80 Ill. 86; *Springfield v. Edwards*, 84 Ill. 626; *Cooley, Const. Lim.* 68, 71; *Beardstown v. Virginia*, 76 Ill. 34.

Nor can the inconvenience or hardship that may ensue the enforcement of a provision couched in such unmistakable language justify its modification by construction, and no considerations of supposed public policy, nor of political expediency, or party success, can be regarded in arriving at the meaning.

Wall v. Kenfield, 54 Cal. 111; *Wayne County v. Detroit*, 17 Mich. 401.

Messrs. Otto Kirchner and F. E. Barkworth also for respondent.

Montgomery, J., delivered the opinion of the court:

The relators, who are candidates for the office of electors of president and vice-president, placed in nomination by the Republican party, ask for a mandamus to compel the respondent to give notice of an election to be held on the first Tuesday after the first Monday in November, to fill said offices, under the statute in former years providing for an election of electors by the state at large. The relators allege that Act No. 50 of the Public Acts of 1891, known as the "Miner Law," is unconstitutional and void. It is first averred that the law in question is in conflict with article 2, § 1, of the Federal Constitution, in this: that it attempts to delegate to portions of the state fixed as districts by the Legislature the power to name electors, whereas the section referred to, it is contended, confers this authority and duty upon the state at large, acting as a corporate unit in its corporate capacity. Secondly, it is contended that, even though the Legislature may thus delegate the authority to districts, the law enacted is fatally defective in the following respects: (a) That it violates article 4, § 20, of the Constitution of this state, which provides that no law shall em-

brace more than one object, which shall be expressed in its title, in that it provides for an election of alternate electors, whereas the title relates only to choosing electors; (b) that the Act is inoperative, for the reason that it fails to provide means for canvassing the votes of electors in those portions of Wayne county which constitute the first and portions of the second, sixth, and seventh electoral districts; (c) that, even if the election of alternate electors is valid, the act makes no provision for filling the office in case both the elector and the alternate shall die or become disqualified before performing their duties.

Most evidently the question of greatest importance is that relating to the true interpretation of section 1, art. 2, of the Federal Constitution. The provision of that section is that "each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress." On both sides it appears to be conceded that the word "state," as here employed, means the body politic and corporate. On the part of the relators it is contended that the state must, in the choice of electors, act as a unit, and cannot delegate the authority to name electors to any fractional part of the state, as a district fixed for that purpose alone, or for that and other political action. On the part of the respondent it is contended that the section in question gives the Legislature plenary power to prescribe how and in what manner the state may choose its electors, whether by the Legislature, or by all the electors voting for a general ticket, or by electors voting in districts.

In *Story on the Constitution*, (vol. 2, p. 804, 4th ed.,) it is said: "It is observable that the language of the Constitution is that, 'each state shall appoint, in such manner as the Legislature thereof may direct,' the number of electors to which the state is entitled. Under this authority the appointment of electors has been variously provided for by the state Legislature. In some states the Legislature have directly chosen the electors themselves; in others they have been chosen by the people by a general ticket throughout the whole state; and in others by the people in electoral districts, fixed by the Legislature, a certain number of electors being apportioned to each district. No question has ever arisen as to the constitutionality of either mode, except that of a direct choice by the Legislature. But this, though often doubted by able and ingenuous minds, has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it."

If the question were to be determined solely by reference to the language employed, it may be admitted that there would be much force in the contention that the state must act as a unit, and that no lesser body could be delegated to perform any portion of the duty vested in the state as a body corporate, and it might possibly be held that the words,

"in such manner as the Legislature thereof may direct," conferred only the limited power of directing how the state acting as an entirety shall make its appointment. But in my judgment these words are clearly susceptible of a construction which confers upon the Legislature the power to say how the state action shall be voiced. In such a case resort is properly had to contemporaneous construction. *Judge Cooley* in his work on the Constitution says: "Contemporaneous construction may consist simply in the understanding with which the people received it at the time, or in the acts done in putting it in operation, and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding, when nothing had been done under the provision in question, must always necessarily be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that strong presumption exists that the construction rightly interprets the intention." *Cooley, Const. Lim.* p. 67. This rule has been so frequently recognized both by this court and the Supreme Court of the United States as to require little more than a reference to the authorities. *Martin v. Hunter*, 14 U. S. 1 Wheat. 351, 4 L. ed. 109; *Bank of United States v. Halstead*, 28 U. S. 10 Wheat. 63, 6 L. ed. 267; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 290, 6 L. ed. 632; *People v. Dean*, 14 Mich. 406; *People v. State Treasurer*, 28 Mich. 499; *Detroit City R. Co. v. Mills*, 85 Mich. 646. Speaking of this rule in *Ogden v. Saunders*, *Mr. Justice Johnson* says: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them." In *People v. State Treasurer*, *supra*, it was held that Constitutions are to be construed as the people construed them in their adoption, if possible, and the public history of the times should be consulted, and should have weight in arriving at that construction. See also *People v. Harding*, 53 Mich. 481.

The practical construction which was placed upon the section under consideration was certainly such as to maintain the contention of the respondent that the contemporaneous interpretation was that by this section plenary power was reposed in the several Legislatures of the states to prescribe methods for choosing electors other than that by a vote of electors of the entire

state, or by any agency which, in the performance of other public functions, represented the entire state. In the first presidential election Maryland and Virginia each adopted the district plan.

Maryland continued to so choose her electors down to and including the year 1832. Massachusetts in 1788 adopted a plan of nominating electors in districts by a vote of the people, to whom the Legislature was limited in making a choice. In 1796 they were chosen by districts. In New York the method of choosing electors first adopted was by vote of the Legislature, but in 1825 the district system was adopted, and was in use in the election of 1828. In North Carolina the district system was adopted in 1803, and in use in 1804 and 1808. In Kentucky the district system prevailed until 1828. In Tennessee the district system prevailed from 1796 to 1836. In Indiana the district system was used in 1824 and 1828. In Illinois the district system prevailed from its admission into the Union until 1827. In Maine also the district system prevailed from 1820 until and including the election of 1828. It will be seen, therefore, that the exercise of the right to choose electors by districts began at the first election held under the Constitution, and continued to be exercised by some of the states for a period of forty years. Nor was an abandonment of this method due, except possibly in a single instance, to growing doubts as to its constitutionality. The states in which it had been invoked adopted a general ticket method, is believed, not because of any doubt of the authority to choose electors in districts, but in order that more power could be wielded by the state in political conventions. Madison, who acted as a member of the committee which reported to the Federal convention the method finally adopted for electing the president, in a letter written in 1823, and in which a constitutional amendment which should make the choice of electors by districts imperative was recommended by him, in referring to the action of the convention, said: "The district system was mostly, if not exclusively, in view when the Constitution was framed and adopted, and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular states which had set the example." 8 Madison Papers. 338.

Another persuasive fact in determining whether the intention was to limit the exercise of the right of the state to choose electors to a method which involved action by the state as a unit is the practical construction placed upon section 2 of article 1, which provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states," and that until enumeration shall be made "the state of New Hampshire shall be entitled to choose three, Massachusetts eight," etc. There is certainly the same ground for contention that the authority given to a state to choose three or eight representatives involves action by the state as a unit as there is to say that the provision

that each state shall appoint electors in such manner as the Legislature thereof may direct requires action by the state as a unit, and yet, from the time of the adoption of the Constitution, the power of the state to provide for choosing representatives by districts has not been questioned, nor has the power to choose by an election at large been questioned, (where no law of Congress intervenes,) so that there has been the practical construction which has continued down to this day, which establishes that, under the provisions of section 2, art. 1, the state having authority to choose representatives has the choice of methods, and may elect by districts or *en masse*.

But it is urged that the fact that the district system has been abandoned is evidence from which it may be inferred that there has been a growing belief in the unconstitutionality of that method; and it is further stated in the briefs of the counsel that "any examination of the history of the methods of choosing presidential electors which approximates philosophic or scientific inquiry can only result in the conclusion that the states, in coming to the use of the general ticket, by a common consent and practice gave to the Constitution a construction and meaning which it might not otherwise now have, but which is nevertheless of the most conclusive and binding character." There would doubtless be great force in the practical construction which has obtained for sixty years, even though not contemporaneous, if such construction involved of necessity a negation of the right claimed by the Legislature in this case, but the fact that the several states have provided by their Legislatures for choosing electors on a general ticket does not involve an assertion that the power to choose by districts does not exist. And, in so far as the argument of counsel assumes that our Constitution is subject to growth, it is, in my judgment, inconsistent with the purpose and duty to sacredly maintain the integrity of that instrument, to treat it as subject to modification except by the prescribed agencies and by the prescribed methods. And, especially is it inconsistent with established rules to say that by nonuser a commonwealth may lose the power to exercise rights expressly delegated in a written constitution. If, under the Constitution, and after forty years of practical construction, the state had the right to choose electors by districts, it does not lie with any court to assert that that right had been lost to the state by nonuser.

In *People v. State Treasurer*, 23 Mich. 499, Mr. Justice Cooley, speaking for the court, said: "Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of

progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power." It has evidently not been the view of eminent statesmen either that the original construction of this section should have been such as to exclude the power of the Legislature to adopt the district method, or that that power has been lost by nonuser, for as late as 1874 the committee on privileges and elections of the United States senate made a report, in which, speaking, of this section, it was said: "The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. They may be chosen by the Legislature, or the Legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of Congress, which was the case formerly in many states."

But it is urged that the Act in question is in conflict with the Fourteenth and Fifteenth Amendments, and it is said that at the time these Amendments were adopted the method of choosing electors actually in vogue in all the states was by vote of the people at large for a general ticket, and that it is provided by the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" and also provided that, "when the right to vote at any election for the choice of electors of president and vice-president . . . is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation shall be reduced;" and as the Fifteenth Amendment, provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," that these Amendments are to be held to have relation to the conditions then existing, and that, in effect, they operate to repeal by implication so much of article 2, § 1, as to prescribe the manner of choosing electors. It would, in our opinion, be a strained construction which should give to either of these Amendments the effect to annul the power expressly delegated in section 1, art. 2. But here again we are not without the aid of contemporaneous construction. As already pointed out, the committee of privileges and elections of the Senate, composed, as it was of men who participated in the adoption of these Amendments, reported in 1874, in the most unequivocal terms, that this power still rested with the Legislature. The question was also discussed by eminent members of the electoral commission of 1877. Commissioner Frelinghuysen, speaking of the power of the state to appoint electors, said: "Under this power, the Legislature might direct that the electors should be appointed by the Legislature, by the executive, by the judiciary, or by

the people. In the earliest days of the republic electors were appointed by the legislatures. In Pennsylvania they were appointed by the judiciary. Now, in all the states except Colorado, they are appointed by the people." Commissioner Hoar said: "Upon the whole matter, therefore, I am of opinion that the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the state. The state acts by such agencies as it selects." Justice Field said: "The Constitution declares that each state shall appoint electors 'in such manner as the Legislature thereof may direct'. . . . With the exception of these provisions as to the number of electors and the ineligibility of certain persons, the power of choice on the part of the state is unrestricted. The manner of appointment is left entirely to its Legislature." Justice Miller, commissioner, said: "If elected by the Legislature, as they may be, an appropriate mode [of certifying the election] would be the signatures of the presiding officers of the two Houses to the fact of such appointment, or a certified copy of the Act by which they were elected." In *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, it was said: "The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal government to each other and of both governments to the people." See also *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627. It is very clear that the Fifteenth Amendment was intended to preclude the state from making any discrimination against citizens on account of color. No reasoning could make this plainer than does the mere reading of the provision: "The right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude." There is no attempt to place limitations upon the power of the state, except that in any case where the right of suffrage is involved the class protected by this Amendment shall not be discriminated against. Neither by the Fourteenth nor Fifteenth Amendments was there any attempt to place limitations upon the authority of the state as to the choice of officers theretofore existing. Presidential electors are still regarded as state officers. *Nitzgerald v. Green*, 184 U. S. 877, 33 L. ed. 951. And to hold that because, at the time of the adoption of the Fourteenth Amendment, the general custom was to elect by the states at large, this secured irrevocably the right of each citizen twenty-one years of age to vote directly for the number of electors to which the state is entitled, would be to hold also that the method of choosing state officers, including judicial officers, which at the time of the adoption of this Amendment obtained, was irrevocably fixed beyond the power of the Legislature of the several states to change. We do not think the Amendment is susceptible of this construction.

Does this Act embrace more than one object, and, if not, is that object sufficiently expressed in its title? It is held that the provision of the Constitution requiring that the subject shall be expressed, etc., is fully

accomplished when the statute has but one general object, and when such object is fairly indicated by its title. Every end and means necessary to the accomplishment of the general object need not be provided for by a separate Act relating to that alone. *People v. Mahaney*, 13 Mich. 481; *Kurtz v. People*, 33 Mich. 279; *Ryerson v. Utley*, 16 Mich. 270. The title of this Act is "An Act to Provide for the Election of Electors of President and Vice-president of the United States, and to repeal all other Acts and Parts of Acts in Conflict herewith." It is said that the body of the Act provides for the elections of alternate electors as well as electors, and that alternate electors are not named in the title. It would hardly be contended that it was not competent under this title to provide for filling vacancies occasioned by the death or disability of one of the electors first chosen. This Act, in effect, does no more than that. Technically, also, alternate electors are, before they become officials vested with any functions whatever, electors. The sole object of their election is that they shall, in a certain event, exercise the function of electors. The question might be quite different if they were elected to a distinct office, having duties to perform, and with a provision that they should have added to these duties the function of electors in the event of the disability of their principal.

It is also urged as an objection to the validity of this law that, in case of the death or disability of both the elector and alternate, no provision is made for filling the vacancy, and it is therefore claimed to be inoperative. But it is only necessary to say that, if this be true, then any attempt to appoint electors would fail; for, under the former statute existing in this state, and under all statutes vesting power to fill vacancies in the electoral college, death might intervene, and prevent the exercise of that function.

Can the Act be said to be inoperative and void because so defective that its provisions cannot be given effect? It is first claimed that the law is defective in not requiring notice of election of the district electors provided for, but we think this criticism without force. Section 147 of Howell's Statutes remains in force, and by the express terms of that statute the secretary of state is required to give notice that there are to be chosen as many of the following officers as are to be chosen at such general election, namely, a governor, electors of president and vice-president. The electors provided for in this Act are to be chosen at this general election, and it is the plain duty of the secretary of state to give notice of that fact.

It is next urged that the law is defective and inoperative, for the reason that no means are provided either by the Act itself or the general law for canvassing votes in Wayne county. The general law (Act 190, Pub. Acts 1891) provides, by section 1, for inspectors of election for elections at which presidential electors may be voted for. Section 26 provides for a canvass of the votes. Section 38 requires duplicate statements of the result to be prepared, one copy of which

is to be filed, and the other delivered to the inspector appointed by the board to attend the county canvass. Sections 184 and 185 of Howell's Statutes provide that the board of canvassers shall proceed to canvass the votes, and section 185 requires the statement of votes given for electors of president and vice-president of the United States each year in which such electors are to be chosen. The Act in question, in section 2, provides that, "the counting, canvassing, and certifying of the votes cast for such electors at large and their alternates, and said district electors and their alternates, shall be done, as near as may be, as is now provided by law for the election of electors of president and vice-president of the United States." The precise point appears to be that, as the votes cast in the county for the presidential electors are cast in different electoral districts, there is no provision for a separate canvass of the votes cast in each district by the board of canvassers. We do not see the least difficulty in applying the law. It would, of course, be the duty of the inspector to designate the district in which the elector is voted for; and, as the district is defined by law, there is no more difficulty in doing this than there is in the board of state canvassers crediting to the one entitled the votes cast in the proper judicial circuit for circuit judge.

The Act in question is in conflict with the law of Congress in so far as it attempts to fix a date for the meeting of electors and the method of certifying their action. Does this render the entire Act inoperative? There is no doubt of the rule that where the law of a state conflicts with the law of Congress in a matter in reference to which Congress has the right to legislate the state law must give way to the extent of such conflict. *Robinson v. Rice*, 3 Mich. 242. The law is not necessarily inoperative *in toto* because in some of its provisions the Legislature has exceeded its power. On the contrary, the rule is stated to be that the unconstitutionality of one portion of the statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the law. *People v. Mahaney*, 13 Mich. 481. See also *People v. Richmond*, 59 Mich. 570; *Atty-Gen. v. Amos*, 60 Mich. 372; *Robinson v. Miner*, 68 Mich. 549, 18 West. Rep. 471.

This general rule is conceded, but it is contended that this statute furnishes evidence upon its face that it contains provisions which would not have been adopted had it been within the understanding of the Legislature that the provision relative to the date for the meeting of electors was inoperative. The statute providing, as it does, that "in case two or more persons have an equal and the highest number of votes cast for any office created by this Act as canvassed by the board of state canvassers, the Legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the Legislature in special session immediately upon such determination by said board of state canvassers," it is urged that if it had been

understood that the Legislature which is to be chosen at the same general election at which the presidential electors are chosen was to convene before the date when, under the law of Congress, the electors are permitted to cast their vote, it is not to be presumed that the Legislature would have provided for convening the Legislature in special session at large expense; but we are not able to say, as a matter of law, that this is true. The new Legislature will sit but three legislative days prior to the date fixed by the law of Congress for the meeting of electors. Nor is it clear beyond question that it was not the purpose and intent of the present Legislature to retain the power of choosing the electors in case of tie rather than to commit it to their successors. We think there are evidences afforded by the Act itself that such was their purpose. We cannot, therefore, say that this statute would not have been passed in the form in which it is, without the provision relating to the time of the meeting of the electors, and therefore are not justified in holding that the law is wholly inoperative, because of the conflict of that provision with the law of Congress upon the same subject.

We have considered the questions presented with the care which the exceeding importance of the issue seemed to us to imperatively require, and our conclusion is that the statute must stand as the lawful edict of the Legislature. Nearly 70 years ago *Chancellor Kent* wrote in regard to the election of the president as follows: "The mode of his appointment presented one of the most difficult, momentous questions that occupied the deliberation of the Assembly which framed the Constitution; and if ever the tranquillity of this nation is to be disturbed, and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of president. This is the question that is eventually to test the goodness and try the strength of the Constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our

national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration, of the more enlightened part of mankind." 1 Kent, Com. 274. The danger in this plenary power conferred by the Constitution of the state upon its Legislatures has been recognized by the wise and patriotic statesmen of all political parties, and several attempts have been made in Congress to secure an amendment requiring a uniform mode. The language of *Chancellor Kent* was written shortly after a long debate in the United States Senate over proposed amendments. Ann. Cong. 1823-24, 167-375. To the intelligence, wisdom, and patriotism of our people is due the gratifying fact that the danger has thus far been averted, but the action resulting in the passage of the Act in question is a reminder of the danger which may at any time be precipitated upon the country for the purpose of obtaining political power. The injustice of any other than a uniform system of electing the president of the United States is manifest. As has been recently well said: "It is of the first and last consequence and importance that, in legislating upon this subject, it should not be regarded from a party standpoint." But neither the fact that this most important consideration may have been overlooked, nor that this legislation may result in serious injustice, can extend our jurisdiction, or justify us in usurping functions which under the Constitution pertain to the Legislature. As was said by *Justice Chase* today in the recent case of *State v. Cunningham*, (Wis.) 51 N. W. Rep. 1185: "It is to be remembered that even praiseworthy objects cannot be rightfully obtained by a violation of law. Every effort to fritter away the plain language of the Constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the state, and hence, to that extent, destructive of good government, besides being vicious in its tendencies."

The writ should be denied.

The other Justices concurred.

UTAH SUPREME COURT.

Eleanor B. TUFTS, *Appt.*,

v.

Elbridge TUFTS, *Respt.*

(.....Utah.....)

1. A cause of action for divorce is not taken away by the repeal of the statute under which it arose without any saving clause where this is accompanied by a new statute prescribing the same grounds for divorce although making the requirements less.

2. A general Statute of Limitations does not apply to an action for divorce.

(June 6, 1822.)

A PPEAL by plaintiff from orders of the District Court for Salt Lake County sustaining a demurrer to, and dismissing, the complaint, in an action brought to obtain a divorce. *Reversed.*

The facts are stated in the opinion.

NOTE.—For note on effect of statutes to defeat or preserve pending civil actions, see *Pritchard v. Savannah St. & R. R. Co.* (Ga.) 14 L. R. A. 721. 16 L. R. A.

For notes on effect of repeal on cause of action, see *Moore v. Kenockee* (Mich.) 4 L. R. A. 555; *Coots v. Detroit* (Mich.) 5 L. R. A. 315.

Messrs. Brown & Henderson, for appellant:

A cause of action having accrued and become complete under the old statute, a subsequent change in the law, or even a repeal, could not take it away. It had become a vested right.

Sutherland, Stat. Const. §§ 164, 480; Cooley, Const. Lim. 362; *Smith v. Louisville, N. O. & T. R. Co.* 62 Miss. 510.

A statute prescribing causes for divorce, or taking away causes before existing, should be construed to apply only to acts committed subsequent to it, unless a clear intent to the contrary is expressed.

Clark v. Clark, 10 N. H. 380, 84 Am. Dec. 165; 1 Bishop, Mar. & Div. §§ 98-108, 696-698.

The complaint states facts sufficient to constitute a cause of action under either statute.

2 Bishop, Mar. & Div. 5th ed. §§ 650, 651; Brown, Divorce, 130; *Palmer v. Palmer*, 45 Mich. 150, 40 Am. Rep. 461.

At common law, and in those jurisdictions where the common law is recognized in distinguishing between legal and equitable actions, the general Statute of Limitations does not in terms apply to equitable actions, but courts of equity in all cases where there was a concurrent remedy at law, or where the case had an analogy in a legal action, applied the Statute of Limitation governing the concurrent or analogous case in a court of law to the equitable action.

Wood, Lim. of Act. p. 108, § 58 *et seq.*; 18 Am. & Eng. Encyclop. Law, 674-680; *Smith v. Wood*, 6 Cent. Rep. 316, 42 N. J. Eq. 568; *People v. Everest*, 4 Hill, 71; *Farnam v. Brooks*, 9 Pick. 242.

In those jurisdictions where the distinction between legal and equitable actions are (so far as form is concerned) abolished and the Statute of Limitations is made applicable to all actions, courts of equity instead of applying the statute by courtesy or by analogy, are governed by it in cases where it was so applied before.

13 Am. & Eng. Encyclop. Law, 675; *Luz v. Haggin*, 69 Cal. 255; *Butler v. Johnson*, 111 N. Y. 204.

It has been held in California, from which we get our Statute of Limitations, that it applies to equitable as well as legal actions.

Lord v. Morris, 18 Cal. 486; *Royd v. Blankman*, 20 Cal. 44, 87 Am. Dec. 146.

But there is a class of cases cognizable by courts of equity where there is no concurrent or analogous legal remedy, but which are purely equitable actions to which the general Statutes of Limitations do not apply, such as express trusts, claims between husband and wife, or between partners.

Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; 18 Am. & Eng. Encyclop. Law, 688, 684, 711, and notes; Wood, Lim. of Act. p. 118, § 59.

Actions for divorce come within the principles established by these authorities, and the Statute of Limitations of actions generally does not apply.

Mosely v. Mosely, 67 Ga. 92; *Barnett v. Harshbarger*, 3 West. Rep. 750, 105 Ind. 410.

The statute does not apply and lapse of 16 L. R. A.

time is not in itself a bar and can only be considered in determining whether the action is brought in good faith or the offense condoned, and this is available only as a defense.

Brown, Divorce, 74; 2 Bishop, Mar. & Div. §§ 48, 108 *et seq.*

Messrs. Powers & Hiles, for respondent:

The Act of 1852 was repealed by the Act of 1878. There is no saving clause in the Act of 1878 saving the right of action conferred by the section of the Act of 1852. Therefore it follows that the complaint does not state facts sufficient to constitute a cause of action.

Sutherland, Stat. Const. §§ 162, 163, and cases there cited; Utah Comp. Laws 1876, p. 375, 1888, § 2602.

To justify a divorce the ground of complaint for a divorce must be given by the law of the forum. The cruel treatment must have been committed after the passage of the statute.

5 Am. & Eng. Encyclop. Law, p. 778.

Divorce statutes are given prospective effect only.

The alleged contract of separation which is set out in the complaint is not a ground for a divorce. It cannot be held as desertion. Separation by consent is not willful desertion.

Hankinson v. Hankinson, 38 N. J. Eq. 66.

Such contracts are not unlawful.

Wells v. Stout, 9 Cal. 492; *Walker v. Walker*, 76 U. S. 9 Wall. 743, 19 L. ed. 814.

Miner, J., delivered the opinion of the court:

The appellant in this case filed her complaint for divorce October 16, 1891, alleging, among other things, that she was married to the defendant in November, 1869, at Salt Lake City, where she had resided since that time; and that for several months following her said marriage she was required by the defendant to reside with his mother, and that during such residence she was subject to, and made the victim of, repeated acts of extreme cruelty on the part of the defendant and his mother, which, if true, would ordinarily entitle her to a decree of divorce. These acts are sufficiently set out to cover the requirements of the statute. She further alleges that, on account of such several acts of cruelty, she was obliged to leave his mother's house, and return to her parents; that soon after this the parties obtained what was then called a "church divorce" from the Church of Jesus Christ of Latter Day Saints, which reads as follow: "Know all men by these presents, that we, the undersigned, Elbridge Tufts and Eleanor B. Tufts, his wife, (before marriage with him, Eleanor Bringham), do hereby mutually covenant, promise, and agree to dissolve all the relations which have heretofore existed between us as husband and wife, and keep ourselves separate and apart from each other from this time forth. In witness whereof we have hereto set our hands, in Salt Lake City, this 26th day of August, A. D. 1870. Elbridge Tufts. Eleanor B. Tufts. Signed in presence of D. McKensie, George Reynolds."

It also appears that at this time the appellant was of the age of twenty years, had no experience whatever in courts, and sup-

posed that such document above recited was a valid divorce until before the commencement of this suit; that no other divorce had ever been granted; that several years after this, and while in the belief that she was legally divorced, she again married one Wickie, but she ceased living with him after she discovered she was not legally married to him; that said defendant has twice married since her marriage with him, and has never obtained any legal divorce from plaintiff, etc. To this complaint the defendant filed his demurrer, on the grounds: *First*, that said complaint does not state facts sufficient to constitute a cause of action; *second*, that it appears upon the face of the complaint that said cause of action there stated is barred by section 201 of the Code of Civil Procedure. This demurrer was sustained by the court, and the complaint dismissed. The plaintiff appeals from the order sustaining the demurrer and from the decree dismissing the complaint.

The first question here is, Was the demurrer properly sustained? The learned counsel for the defendant now contend that the cause of action arose under the Act of this territory passed 1852, (see Comp. Laws Utah 1876, p. 375,) and that this statute was repealed by the Act of 1887, (see Comp. Laws 1888, § 2602;) and that there was no saving clause to this Act saving the right of action conferred by the Act of 1852; and therefore the complaint does not state facts sufficient to constitute a cause of action. Section 2602 should not be so construed as to deprive any person of such rights as had accrued under the former Act. This Act prescribes a less degree of cruelty as a cause of divorce than was required under the former Act, but in many respects its provisions are the same. *State v. Gumber*, 37 Wis. 808; 1 Bishop, Mar. Div. & Sep. § 165; Bishop, Written Laws, §§ 86, 123, 183; *Lauds v. Chicago & N. W. R. Co.* 33 Wis. 640.

In Pennsylvania it is held that before a statute should be construed to take away a remedy for a prior injury it should clearly appear that it embraces the cause of the injury within its provisions. *Chalker v. Ives*, 55 Pa. 81.

In New York it has been held that positive enactments are not to be construed as interfering with previously existing rights of action, contracts, or suits, unless the intent thus to interfere be expressed in the enactment. *Butler v. Palmer*, 1 Hill, 325; *Hitchcock v. Way*, 6 Ad. & El. 943; *Bedford v. Shilling*, 4 Serg. & R. 401, 8 Am. Dec. 718. So, also, a statute prescribing causes for divorce, or taking away causes before existing, should be construed to apply only to acts committed subsequent to its passage, unless a clear intent is expressed to the contrary. Bishop, Mar. & Div. 8d ed. § 802; 1 Bishop, Mar. & Div. 5th ed. §§ 93-103, 696; *Jarvis v. Jarvis*, 3 Edw. Ch. 462, 467, 6 L. ed. 726, 728; *Clark v. Clark*, 10 N. H. 380, 81 Am. Dec. 165; *Green v. Marr*, 27 Me. 212; *Scott v. Scott*, 6 Ohio, 534.

The rights and liabilities of these parties grew out of a contract governing the marriage relation which existed at the time the

alleged cruelty was inflicted. These rights and liabilities were so sacred and binding between the parties that they could not be severed by mutual consent; nor could the parties forcibly break away from their binding force. *Mr. Justice Field*, in *Pacific Mail S. S. Co. v. Jolliffe*, 69 U. S. 2 Wall. 458, 17 L. ed. 807, said: "When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or any action for its enforcement. It has then become a vested right, which stands independent of the statute."

This new Act took effect simultaneously with the repeal of the first Act. Its provisions may therefore more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original Act, rather than to have abrogated and annulled them." Bishop, Written Laws, § 181, lays down the rule that "the repeal of a statute, accompanied by a re-enactment of its terms, or of its substantial provisions in any other form of expression, does not break its continuity, and there is no moment when, whatever words of repeal are employed, it can be said to be repealed." *Martindale v. Martindale*, 10 Ind. 566; *Fullerton v. Spring*, 3 Wis. 667; *Collins v. Warren*, 63 Tex. 314; *State v. Gumber*, 37 Wis. 298; Sutherland, Stat. Const. §§ 164, 165; *Middleton v. New Jersey W. L. R. Co.* 26 N. J. Eq. 269, 274. It is clear that the Legislature did not intend, by repealing the Act of 1852, to take away or impair the rights which had arisen under it. *Pacific Mail S. S. Co. v. Jolliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 805; *Wright v. Oakley*, 5 Met. 406; *Randolph v. Larned*, 27 N. J. Eq. 557; Bishop, Written Laws, § 183; *Willamette Falls T. & Mill. Co. v. Riley*, 1 Or. 183; *Capron v. Strout*, 11 Nev. 304.

The complaint states facts sufficient to constitute a cause of action under the statute. The cause of action having accrued and become complete under the Laws of 1852, we think it sufficient, unless barred by the Statute of Limitations. Section 3150, Comp. Laws 1888, is the general Statute of Limitations applicable to actions not otherwise specified. Actions for divorce are nowhere referred to in any provision of the Limitation Act. The question is therefore presented whether the general Statute of Limitations is applicable to actions for divorce under the laws of this territory. Bishop, in his work on Marriage, Divorce, and Separation, (vol. 2, § 428,) says "that the Statutes of Limitations, in the mere ordinary words common in our statutes, are not extended by interpretation to suits for divorce." But, where the statute by express terms limits the period within which a matrimonial suit must be brought, such statute operates absolutely. By the practice of the English parliament in granting divorce bills, delays in the preliminary steps and in the final application are taken into account; yet there, as in some of the states, where no express

statutory bar is created, any reasonable explanation contained in the pleadings or the proofs excusing the delay is to be considered by a court of equity in granting or refusing relief. And lapse of time, when excused, is by no means treated as an absolute bar. In one case cited, poverty being the excuse for delay, the petitioner was granted relief, although sixteen years had passed since the adultery was committed. So, also, absence abroad, sickness, and mistake of fact as to the relation existing between the parties, have been held sufficient to excuse the delay in presenting a complaint for relief. Bishop, Mar. Div. & Sep. §§ 428, 429; *Mosely v. Mosely*, 67 Ga. 92. *Mr. Justice Swayne*, in *Sullivan v. Portland & K. E. Co.* 94 U. S. 807, 24 L. ed. 824, says: "Every case is governed chiefly by its own circumstances. Sometimes the analogy of the Statute of Limitations is applied, sometimes a longer period than that prescribed by the statute is required; in some cases a shorter is sufficient, and sometimes the rule is applied where there is no statutory bar. It is competent for a court to apply the inherent principles of its own system of jurisprudence, and decide accordingly." And "where the relief sought is based on a right purely equitable, then that court acts solely upon its own inherent rules, altogether outside of and independent of the Statute of Limitations." *Kline v. Vogel*, 90 Mo. 239, 6 West. Rep. 647; 13 Am. & Eng. Encyclop. Law, 675-679.

Taking the facts as presented in this case in connection with the peculiar relations then existing between husband and wife as recognized by the church of which these parties were evidently members, we can come to no other conclusion than that the delay on the part of the plaintiff in presenting her complaint should be recognized as excusable. Indeed, delay in complaining of family difficulties, and in bringing such matters before the court, is to be encouraged, rather

than punished, in the hope that a better state of things may be established by the voluntary action of the parties. The marriage relation is a continuing one. In legal contemplation, husband and wife are one. In their dealings with each other they are governed by the same rules that are applied to others. Neither should be allowed to claim laches as to the other, but the policy of the law should be to encourage tranquillity and forbearance between parties sustaining that relation. While the relation is based upon a contract, yet it is a contract that differs from all others, and is the basis of civilized society. It cannot, like other contracts, be dissolved by mutual consent of the contracting parties. It may be entered into by parties not capable of forming any other lawful contract. It can be annulled by law, and its rights and relations are derived rather from the law relating to it than from the contract itself. In dissolving this contract by judicial procedure, we cannot conclude the Legislature intended to class it with other causes of actions to which acts of limitations apply. *Mosely v. Mosely*, 67 Ga. 92; *Johnson v. Johnson*, 50 Mich. 293.

Our conclusion is that the Statute of Limitations is not a bar to this action. We do not mean to say that long unexplained delay in bringing this action may not be the subject of inquiry by the court at the hearing. This delay may defeat the action upon a full and fair investigation, if it is not satisfactorily explained. All the facts concerning the allegations in the complaint should be presented to the court, and from them the court can determine the rights of the parties.

The several orders of the Third District Court in sustaining the demurrer and dismissing the complaint are vacated and set aside, with costs, the defendant to be allowed to answer, and the case proceed to a hearing upon the merits.

Anderson and Blackburn, JJ., concur.

INDIANA SUPREME COURT.

City of VINCENNES, *Appt.*,

v.

CITIZENS' GAS LIGHT & COKE CO.

(.....Ind.....)

1. An ordinance which is in effect an offer by the city when accepted creates a contract to be construed and interpreted like any other written contract.

2. An ordinance granting the privilege to lay gas mains and pipes in the city streets for twenty-five years on certain conditions, containing a provision that the city shall take sufficient gas for certain lamps, without mentioning any other period, makes a contract to take the quantity of gas specified for a term of twenty-five years.

3. The interpretation which the parties themselves have put upon an indefinite or ambiguous contract will be adopted by the court.

4. An exclusive use of the streets of a city for gas-pipes is not implied by an ordinance granting merely the privilege of laying gas mains and pipes and also constituting a contract for a certain quantity of gas.

5. The agreement of a city to take gas for certain lamps for a specified time, and also for such additional lamps as the city council may from time to time direct, does not prevent the city from purchasing gas from any other company for any lamps except those specified.

6. A municipal contract for gas being the exercise of a purely business power is not void as a surrender of legislative power.

NOTE.—For note on the power of public officers to make contracts binding on their successors or for a term of years, see *Shelden v. Fox* (Kan.) *ante*, 287.

16 L. R. A.

For note on power of municipality to create a monopoly, see *Altgelt v. San Antonio* (Tex.) 13 L. R. A. 383.

7. A city has power to contract for a supply of gas or water for a reasonable period of time extending beyond the tenure of office of the individual members of the common council making such contract.
8. Twenty-five years cannot be said to be an unreasonable time for which to contract for the supply of light or water to a city.
9. The passage of an ordinance constituting an offer which is accepted as a contract, if the contract is included within the terms of a prior ordinance requiring proposals for work, is a repeal of the prior ordinance *pro tanto*.
10. To present a question as to damages on appeal, it must have been assigned as a cause for a new trial.

(June 17, 1892.)

APPPEAL by defendant from a judgment of the Circuit Court for Knox County in favor of plaintiff in an action brought to recover the contract price of certain gas which had been furnished by plaintiff for lighting defendant's streets. *Affirmed*.

The facts are stated in the opinion.

Messrs. John T. Goodman, Cullop & Kessinger and McDonald, Butler & Snow for appellant.

Mr. W. H. DeWolf, with Messrs. Riley & Ermison, for appellee:

The contract in this case is clearly within the contractual power of the city to enter into, and does not in the slightest particular restrict the city in the fullest and most extensive exercise of its legislative powers.

Indianapolis v. Indianapolis Gas Light & C. Co. 66 Ind. 396.

A municipal corporation acts as a private corporation when it enters into a contract with its inhabitants, as to supply gas, and is subject to the same duties, liabilities, and disabilities as individuals. It cannot therefore impair the obligations of its contracts so entered into because it may deem it for the benefit of its citizens so to do.

Western Sav. Fund Soc. v. Philadelphia, 81 Pa. 175; *Bailey v. New York*, 8 Hill, 588, 88 Am. Dec. 669.

An ordinance authorizing a gas company, on condition of its furnishing gas at specified rates, to lay its pipes in the streets, is, after it has been accepted by the company, a contract and not a mere revocable license.

Chicago M. Gas Light & F. Co. v. Lake, 180 Ill. 42; *East St. Louis v. East St. Louis Gas Light & C. Co.* 98 Ill. 415.

There is a distinction between the powers of a municipal corporation which are governmental or political in their nature, and those which are to be exercised for the management and improvement of property. As to the second the municipality represents the pecuniary and proprietary interests of individuals, and within the limits of corporate power the rules which govern the responsibility of individuals are properly applicable.

Cincinnati v. Cameron, 88 Ohio St. 336.

Although there may be a defect of power in a corporation to make a contract if a contract made by it is not in violation of the charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying

upon such promise, and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable on the contract.

State Board of Agriculture v. Citizens St. R. Co. 47 Ind. 407; *Logansport v. Dykeman*, 116 Ind. 15.

A contract is only *ultra vires* when it is wholly outside of the legal powers of the corporation.

Dillon, Mun. Corp. § 985.

If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous.

Crowder v. Sullivan, 128 Ind. 486.

This contract must be construed as a whole, and if, upon examination, it is found throughout to be consistent with itself, and in all its parts, and the contracting parties had authority under the law to enter into it, then the courts will regard it as a valid contract, and enforce its provisions.

5 Lawson, Rights, Rem. & Pr. § 2316; 2 Parsons, 683.

Miller, J., delivered the opinion of the court:

The appellee brought this suit against the appellant to recover for gas supplied to appellant for public street lighting for a period of ten months, under the provisions of an ordinance enacted by the common council of the city and accepted by the appellee. The ordinance is as follows:

"An ordinance to provide for the lighting of the city of Vincennes, Indiana, with gas. Section 1. There is hereby granted and secured to Laz. Noble and associates, their successors and assigns, the privilege of laying gas mains and pipes for supplying illuminating coal gas along the several streets, alleys, thoroughfares, and public grounds of the city for twenty-five years from the date of this ordinance, the said mains and pipes to be so laid as not to interfere with the drainage or sewerage of said city; but before laying down any such mains or pipes five days' notice shall be given to the mayor of the commencement of the work, and such mains or pipes shall be laid with reasonable diligence, and the streets and alleys shall be repaired and restored to their original condition without delay. Sec. 2. That for the purpose of supplying gaslight upon the several streets of said city the said Laz. Noble and associates, their successors and assigns, shall lay down the required mains and pipes to supply gas for lighting the street lamps at the several street crossings along the following streets, viz., [omitted.] Sec. 8. The said Laz. Noble and associates, their successors or assigns, may erect within said city all suitable and necessary buildings and works for making illuminating coal gas of the most approved quality and purity for supplying the public lamps and private consumers of said city, and shall at all times supply the same in sufficient quantities for the public use as well as for private consumption. Said works to be completed and in operation on or before the 1st day of September, 1876, and in case they are not so completed the rights and privileges hereby granted shall cease and be void. Sec. 4. Upon the laying of the mains and pipes as

above provided the city of Vincennes shall erect and maintain at the several street crossings within the limits prescribed in the above section 2 at least two public lamp-posts with lamps having all the needed fittings and fixtures for lighting, and may also erect and maintain along the lines of said mains and pipes such additional lamp-posts and lamps as the city council may from time to time direct; and upon the erection of said lamps said city shall take from the gas works so to be erected sufficient gas to keep said lamps lighted as similar lamps are usually lighted in other cities. The public lamps already located on the lines of said proposed mains, belonging to the city, where the same are properly located, are to be included as part of the number provided for in this ordinance. Sec. 5. The said Laz. Noble and associates, their successors and assigns, shall at all times supply all the public lamps with illuminating coal gas of approved quality and pureness, and of illuminating power equal to standard, fourteen sperm candle light, the burners to be used to be five-foot burners; and they further agree to light and extinguish the public lamps according to the 'American Meter Company's' time-tables in use for lighting and extinguishing similar lamps in cities generally, and to furnish gas, light, clean, and extinguish such lamps, for all of which the said city of Vincennes shall pay them at the rate of three dollars per month for each and every lamp so furnished with gas, lighted, extinguished, and cleaned, in monthly payments. And they also agree to supply all other lamps of the city, and the inhabitants who may desire it, with coal gas, as aforesaid, for their private use, at the rate of three dollars per 1,000 cubic feet, payable on bills rendered monthly. They shall make all needed repairs to the public lamps, purchase the material therefor, and render bills therefor against the city at cost, for payment. Sec. 6. The said Laz. Noble and associates, their successors and assigns, agree to extend their mains along the same or other streets whenever so required by the city council: provided, there shall be found at least three average private consumers upon each square upon such proposed extension; and if the city council shall determine at any time to light any street or thoroughfare beyond the limits hereinbefore specified, the said city council may, at the city's expense, extend the pipes, erect such additional posts and lamps as they may deem proper, and such lamps may be lighted, extinguished, and cleaned on the same terms as others are. Any pipes so laid shall only be used for supplying the public lamps, unless said Noble and associates, their successors and assigns, shall pay the city for said extended pipes. Sec. 7. The said Laz. Noble and associates may organize as a joint-stock company, under the laws of the state of Indiana, for the purpose of constructing, equipping, and operating the gas works contemplated in this ordinance; and, in case they shall so organize, all the rights, privileges, and agreements contained herein shall inure to such company. Sec. 8. The city reserves the right to test at all times the accuracy of the meters, and the quality and purity of the gas, by any competent agent that may be appointed by the city council. Sec. 9. The said Noble and as-

sociates shall enter into bond with surety for the performance of the stipulations in this ordinance in the penalty of ten thousand dollars within forty days from the passage hereof, and, on failure so to do, this ordinance, and all the rights conferred therein, shall be null and void. W. H. H. Beeson, Mayor. Passed December 27th, 1875.

"Attest: Emil Gull, City Clerk."

The complaint shows that after the passage of the ordinance the appellee company was organized and received from Laz. Noble and associates an assignment of all their rights conferred by the ordinance, and that on the 22d day of May, 1876, the appellee notified the appellant in writing of their acceptance of the terms and provisions of said ordinance; that the company erected the works, laid the mains authorized by the ordinance, and in all respects complied with its terms and conditions. The complaint shows that within a short time after the completion of the works as originally agreed upon petitions were filed with the common council by citizens and tax-payers, and extensions of the mains and the location of additional lamps were ordered. This was continued from time to time until April, 1880, when the city ordered the mains so extended as to provide for fifty additional lamps. The gas company hesitated in agreeing to the extension, but after some negotiations between the city and gas company a proposition was made in writing by the company to the city council, in which this language was used: "As this work will necessitate a very large expenditure of money by the company, and many years will probably elapse before any adequate returns will be realized, the company will require that upon the first of each month lamps upon any streets that are ready for lighting shall be put in use without waiting for the completion of the entire work. As a large quantity of materials must be contracted for, and other necessary preparations be made, an early disposition of the above proposition is desired. If this proposition is agreed to, it is expressly understood that it shall in no respect affect or change the contract existing between the city and the company." In reporting this proposition to the city council the committee on gas, who were conducting the negotiations on the part of the city, said: "We recommend that the proposition be accepted, with the stipulation that it be in force for no longer a time than the original contract, and end at the time when said original contract ends." The report was received and concurred in by the council, and the mains were extended and lamp-posts put up and supplied with gas by the company. The arrangement between the city and gas company was referred to as a "contract" in many other resolutions adopted by the city council in ordering extensions of the mains and location of lamp-posts. It is averred in the complaint that the company supplied gas of the proper quality for the lamp-posts agreed upon, amounting in all to 232 posts, continuously from the time of their erection until the beginning of the suit; that the city paid the company at the rate of \$3 per lamp per month for all of the lamps up to and including November, 1889, but refused to pay the monthly bills of \$696 each from December

1, 1889, up to and including October, 1890, though demand for payment was made soon after the expiration of each month. A demurrer for want of facts was filed to the complaint and overruled, and the ruling is assigned as error here.

The appellant contends that the ordinance of December 27, 1875, and the acceptance by the appellee, do not constitute an agreement binding the city to buy gas from the company for lighting the streets of the city for 25 years; that, fairly construed, it gives the company the right to use the streets of the city for that length of time, but that the grant is not exclusive, and that the city might grant another gas company the use of the same streets; that the ordinance fixes the price to be paid by the city per lamp per month so long as the city desires to take gas from the company, but no longer. No time is fixed, in express words, during which the city was to take gas from the company for lighting its street lamps. This makes it important to determine the rules of construction to be applied to the ordinance under consideration. It is insisted by the appellant that the ordinance is simply a grant of the franchise to lay pipes and mains in the streets, alleys, and thoroughfares of the city for the purpose of supplying it and its inhabitants with gas, and that in such cases the grant is to be taken strongly against the grantee, and nothing is to be taken by implication against the public except that which necessarily flows from the nature of the grant.

Indianapolis Cable St. R. Co. v. Citizens St. R. Co., 127 Ind. 369-390, 8 L. R. A. 539, and cases there cited, sustains the doctrine where the ordinance simply grants a franchise. We are, however, of the opinion that the ordinance under consideration is something more than a grant. It is a grant in so far as it confers upon the company the right to lay its mains and pipes in the public streets; and, if the controversy in this case related to the nature and extent of that grant these authorities would be in point, and of importance. In addition to the grant above referred to, the ordinance embodies a contract between the city and the company for the supply of gas. It is this contract which is in dispute, and which furnished the subject-matter of this controversy. The ordinance was in effect an offer by the city, the acceptance of which by the company created a contract between the parties, measured, like any other contract, by the terms and conditions of the writings. We see no reason why the contract thus formed should not be construed and interpreted like any other written contract. We are to look to the language employed, and, in case terms are ambiguous, or susceptible of more than one meaning, may, in order to arrive at the intention of the parties, inquire as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution. *Beard v. Lofton*, 102 Ind. 408; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; *Lyon v. Lenon*, 106 Ind. 567, 4 West. Rep. 461.

In 2 Lawson, Rights, Rem. & Pr. § 2816, the rule of interpretation is expressed in this language: "In all contracts where the meaning of language is to be determined by the courts, the governing principle must be to

ascertain the intention of the parties through the words they have used. This principle is one of universal application. So every part of a document should be construed with reference to the intention of the parties as to the whole contract. To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view." We are forced to the conclusion that at the time the ordinance was enacted by the common council of the city, and accepted by the gas company, it was mutually understood that the company was to furnish gas for street lighting, and the city was to pay for gas so furnished, at the agreed price, for the period of twenty-five years. It is evident that the company was unwilling to put in the plant, or, after it was put in and in operation, to extend the mains, unless both the city and private consumers would agree to take gas. We cannot but know that it is the almost universal custom for companies and individuals contracting to furnish either water or gas, before undertaking the large expenditure necessary to putting in the necessary plant, to require a contract for taking water or gas for public use for a specified time and at an agreed price. The only time mentioned in the ordinance that could in any manner fix the time during which the gas for street lighting should be furnished by the company and paid for by the city is 25 years. If the contract is not for that period of time, no time is fixed, and the city might immediately, upon the completion of the work, have discontinued the use of gas in its streets. We cannot believe that the parties intended to have the use of gas for street lighting to the uncontrolled option of one of the contracting parties. If this is the construction to be placed upon the ordinance, it amounts to little more than a grant of the use of the street for laying pipes and mains; the city being able at any time to discontinue the use of its lamps unless gas was furnished at its own price.

Whatever of doubt we might have entertained upon the construction of the ordinance is dispelled by the construction and practical interpretation placed upon it by the parties themselves in their subsequent dealings. The stipulation in the contract made for extension of the mains and supply of gas for additional lamps, that the arrangement should "be in force for no longer a time than the original contract, and end at the time when said original contract ends," shows that both the contracting parties, at the time when this language was used, understood that some time was fixed in the original contract for the termination of the agreement made by the company on the one hand to furnish gas, and by the city on the other to pay for the same at the agreed price. This time must, we think, necessarily be at the end of the twenty-five years mentioned in section 1 of the ordinance. That it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves put upon the contract, and to enforce that construction, has been so often asserted by this and other courts that no doubt of its soundness can be entertained. *Ingle v. Norrington*, 126 Ind. 174:

Pate v. French, 122 Ind. 10; *Louisville, N. A. & O. R. Co. v. Reynolds*, 118 Ind. 170; *Vinton v. Baldwin*, 95 Ind. 486.

We do not think this construction of the ordinance is subject to the objection that it in effect gives the company an exclusive privilege. There is no exclusive grant to the company of the use of the streets. It may be that no other company is likely to attempt the occupancy of the same streets at or near the location of the mains and pipes of this company, but it is by no means impossible. Whatever there is of an exclusive nature in the grant for the use of the streets is such as is the necessary result of all such grants. To deny the right to make grants that will not prevent a like occupancy by another company would prevent the construction of plants for the distribution of gas and water, or the use of streets for street railways; for two railways cannot occupy the same space in a street. *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, *supra*. So far as the ordinance gives the company the use of the streets, it is in the nature of a license, and not exclusive. *Crowder v. Sullivan*, 128 Ind. 486; *Rushville v. Rushville Natural Gas Co.* (Ind. Sup.) 15 L. R. A. 851.

Neither does the contract give the company a monopoly of supplying gas to the city for street lighting. The city agrees to take a certain quantity of gas for a specified period of time, leaving it the unrestricted right to either manufacture or purchase as much more as it desires. This is not the class of contracts which the law denounces as monopolistic. The making of contracts for the supply of light and water for a considerable time at fixed prices is ordinarily necessary and permissible. *Crowder v. Sullivan*, *supra*; *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 882, 14 West. Rep. 92. There is in the ordinance no agreement or provision preventing the city from taking gas from any other company. The contract entered into relates to the street lamps mentioned in section 2, and such "additional lamp-posts as the city council may from time to time direct. The ordinance authorizes the city to compel the company to extend its mains and pipes, under certain conditions, and furnish light for additional lamps; but we do not understand the contract as one which compels the city to take gas from this company for all additional lamps which might be needed to light the city. As we construe the contract, the city might have restricted the gas company to the lamps provided for in section 2, and contracted with some other company for all additional lamps, the liability of the city to pay for gas furnished for additional lamps being dependent upon contracts with the company subsequently made, by which it was agreed that the mains should be extended and gas furnished upon the same terms and for the same period of time provided for in the original ordinance. If the ordinance contained a provision by which the city agreed to take gas from no other company, or prohibiting any other company from engaging in the business of making and selling gas, the case of *Davenport v. Kleinschmidt*, 3 Mont. 502, and cases collected in *Re Union Ferry Co. of Brooklyn*, 98 N. Y. 139-150, would be in point.

In our opinion, the contract was not void on 16 L. R. A.

account of any supposed surrender by the common council of its legislative power. Every contract, or ordinance in the nature of a contract, does to some extent limit and control the power and authority of future councils. This is and must be the unavoidable result of any binding contract. We do not regard this as being an open question in this state. In *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416, this court said: "There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water, and the like, is neither a judicial nor a legislative power, but is a purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. *Indianapolis v. Indianapolis Gas Light & C. Co.* 66 Ind. 396; *Dillon*, Mun. Corp. 3d ed. §§ 478, 474." See also *Crowder v. Sullivan*, *supra*; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188. We discover nothing in the ordinance that contains any substantial limitation of the legislative power of the common council. The question of the extent to which the common council has power to change or alter the location of the lamp-posts when once established is not before us in this appeal. We are of the opinion that nothing in the ordinance impairs the authority of the common council to make all needful changes in the grade of its streets. *Elliott, Roads & Streets*, §34.

Whatever may be the law in other jurisdictions, this court is committed to the doctrine that a city has power to contract for a supply of gas or water for a stated period of time extending beyond the tenure of office of the individual members of the common council making such contract. *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. While the facts in these cases are not precisely like the facts in the one before us, the discussion and decisions so fully cover the questions involved in this case that we do not deem it necessary to re-examine the question at length. The making of contracts for the supply of gas or water is a matter delegated to the governing powers of municipalities, to be exercised according to their own discretion; and, in the absence of fraud, while acting within the authority delegated to them, their action is not subject to review by the courts.

The length of time for which they shall bind their towns or cities depends upon so many circumstances and conditions as to situation, cost of supply and future prospects, that the courts can interfere only in extreme cases and upon seasonable application. We cannot say that twenty-five years is an unreasonable time for which to contract for a supply of light or water. Improvements made in the methods and cost of street lighting have in many instances rendered contracts that were fair and equitable when made to seem now to be grinding and oppressive. We are satisfied that the Act of March 3, 1883 (*Elliott, Supp.* § 794), did not affect the contract sued on. The first section of that Act authorizes the common councils of cities to contract for light for its streets and alleys for a period of time not exceeding 10 years. By the fourth section

of the Act existing contracts, except such as confer exclusive privileges, are declared to be valid. We have arrived at the conclusion that the contract involved did not confer exclusive privileges, and it is therefore not affected by the legislation. We do not decide that it is within the power of the Legislature to impair the obligation of such contracts, but simply that the Act does not purport to do so. See, upon this subject, *Indianapolis v. Indianapolis Gaslight & C. Co.* *supra*; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 20 L. ed. 516; *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 688, 29 L. ed. 510. In our opinion, the court did not err in overruling the demurrer to the complaint.

Errors are assigned upon the action of the court in sustaining demurrers to several paragraphs of answer; but, as the discussion of the questions involved in the ruling of the court upon the demurrer to the complaint covered all the questions presented by the answers, except the second paragraph, we will not extend this opinion by referring to the others. In the second paragraph of answer it is alleged that at the time of the passage of the ordinance mentioned in the complaint an ordinance of the city of Vincennes was in force which required that proposals for work, the estimated cost of which exceeded \$40, be let to the lowest bidder after a notice for proposals had been given by publication; that the ordinance in suit was passed in violation of the

terms of this ordinance. It was also alleged in the answer that the common council by resolution prohibited the gas company from supplying gas for ten of the lamp-posts specified after December 1, 1889. The action of the court in sustaining the demurrer to this paragraph of answer was not erroneous. The ordinance claimed to have been violated evidently referred to work done for the city, and not to contracts such as this one. If the passage of the ordinance sued on was within the prohibition of the other ordinance, its passage repealed it *pro tanto*. *Dillon, Mun. Corp.* § 814; *Burlington v. Estlow*, 48 N. J. L. 18; *Ex parte Wolf*, 14 Neb. 24.

The position of the appellant was not improved by the passage of an ordinance prohibiting the company from furnishing gas to ten of the street lamps. The contract was mutually binding upon both the contracting parties, and neither could, by its own act, prejudice the position of the other.

Objection is made to the allowance of interest upon the installments payable each month for gas furnished the city. In order to present a question on appeal relating to the damages awarded, it must be assigned as a cause for a new trial. *Ringle v. Kendall First Nat. Bank*, 107 Ind. 425, 5 West. Rep. 621. No motion was made for a new trial in this case, and no question relating to the amount of the recovery can therefore be made in this court. We find no error in the record.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary CREAMER, Admx. of Terrence Creamer, Deceased,
v.

WEST END STREET R. CO.

(.....Mass.....)

1. The relation of a passenger to the carrier is terminated as soon as he steps from a street-car to the street and does not continue during his passage to the sidewalk.
2. Stepping from a street-car which is slowing up, but is still in motion, in front of an electric car coming from the opposite direction at the rate of fifteen miles an hour, and which was lighted, and could be plainly seen, and the going of which was ringing, is such negligence as will prevent the liability of the street-car company for the resulting death of a passenger where there was nothing to show that his senses were defective or that he exercised any care or caution, although his fellow passengers shouted to him to stop.

(May 10, 1892.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court, after directing a verdict in favor of defendant, of an action brought to re-

cover damages for the alleged negligent killing of plaintiff's intestate. *Judgment on the verdict.*

The facts sufficiently appear in the opinion.

Mr. J. D. Long for plaintiff.

Messrs. M. F. Dickinson, Jr., and William B. Sprout, for defendant:

No unreasonable burden should be placed upon the common carrier. He is bound by law to furnish a reasonably safe place for passengers to alight. To hold that a person can choose, in fact dictate, where he can leave the car, and still claim the right of protection as a passenger, would place upon the carrier an unreasonable and unjust burden.

Com. v. Boston & M. R. Co. 129 Mass. 500, 87 Am. Rep. 382.

A street railway is not bound to anticipate that a passenger is to leave the car until some notice has been given by the passenger to those in charge of the car of his intention of leaving it. This is true even on the question of the due care of the passenger.

Nichols v. Middlesex R. Co. 106 Mass. 463.

In case of steam railroad relationship of passenger and carrier it has been held to continue after the passenger left the train at a station while he was leaving the station.

McKimble v. Boston & M. R. Co. 139 Mass. 543.

NOTE.—The question as to when the relation terminates between a passenger and a street-car company, which is decided in the above case, does not 16 L. R. A.

seem to have been decided directly and in terms in many previous cases, although the decision may have been made by implication.

But this rule grows out of the duty of steam railroads to provide safe places at which their passengers can alight.

If a person attempts to leave a steam-car at a point not used as a station, uninvited by the railroad and voluntarily for the purpose of abandoning his journey, he ceases to be a passenger.

Com. v. Boston & M. R. Co. 129 Mass. 500, 37 Am. Rep. 382.

Barker, J., delivered the opinion of the court:

The plaintiff's intestate was instantly killed on Warren street by an electric car, which, it was testified, was running at a speed of fifteen miles an hour. His death, under the circumstances, gave the plaintiff a right to maintain the action under Stat. 1886, chap. 140, if, when killed, he was a passenger, or if, not being a passenger, he was in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck he was walking across Warren street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street. We are of the opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *McKimble v. Boston & M. R. Co.* 139 Mass. 542; *Dodge v. Boston & B. Steamship Co.* 148 Mass. 207, 214, 2 L. R. A. 83. But one who steps from a street-railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.

The plaintiff, therefore, cannot recover unless she shows by affirmative evidence that the deceased was in the exercise of due diligence to avoid injury in traveling upon the street. As was said in *Chaffee v. Boston & L. R. Corp.*, 104 Mass. 108, 115, "the question of ordinary care is, in most cases, even when the facts are undisputed, a question of fact, which it is peculiarly the province of the jury to settle." But, as was also said in the same case, 16 L. R. A.

"if as a matter of common knowledge and experience, the court can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may be properly told, as matter of law, that he cannot recover." "If the whole evidence has no tendency to show care on the part of the person injured, but, on the contrary, shows that he was careless, it is the duty of the court to direct a verdict for the defendant." *Warren v. Fitchburg R. Co.* 8 Allen, 227, 230, 85 Am. Dec. 700, and cases cited.

All the material evidence bearing upon the question whether the deceased was in the exercise of due diligence is stated in the bill of exceptions. In the opinion of the presiding justice, it had no tendency to show that the deceased was in the exercise of due care, and, if this view of the evidence was correct, there should be judgment on the verdict which he ordered.

The time of the accident was about half past 11 o'clock at night. The car on which the deceased was riding was an open car, drawn by horses, and going southerly on Warren street, approaching Savin street, near which he lived. The car had transverse seats, and he was sitting on the extreme left of the rear seat. There were two car tracks in the street, and his car was on the right-hand track as he rode southerly. Savin street led off from Warren street to the left, and the car which struck him was running northerly on the track at his left. When the car on which he was had approached within 150 feet of Savin street, the conductor rang the bell for it to stop at Savin street. There was a stone crosswalk from Savin street across Warren street. The junction of these two streets was a regular stopping place for electric and horse cars and was so marked with the usual posts. Before the car actually stopped, and when the deceased was within five or ten feet of the crosswalk, he rose from his seat, and immediately stepped off the car, at right angles to the left. His car had slowed up, but was still in motion when he left it; and he stepped in front of another car going northerly upon the other track, and was instantly killed. The car on which he had been riding came to a stop a few feet further on. The car which struck him was coming down hill, and was moving at a speed of fifteen miles an hour. It was an electric car, of the open pattern, lighted, and crowded with people. The gong of this car was ringing, and the passengers upon it were shouting, singing, and whistling, and making a good deal of noise. The street was straight, and there was nothing except the passengers in front of the deceased, as he sat in his seat, to obstruct his view of the approaching car before he left his seat, and nothing after he rose to leave the car. When he rose from his seat, and started to get off, two men, one the conductor, and the other a fellow passenger, who were standing on the platform immediately behind him, shouted to him to stop, but he did not appear to hear, and stepped right off on the street to go across, and was on the other track, having taken the first step, and being in the act of finishing the second, when he was struck. When he rose to leave, the dashers of the two cars were oppo-

site each other, and when he touched the car which struck him was not more than five or six feet away. He made no reply to the warnings given him, and did not appear to hear them. The testimony was that he did not appear to pay attention to anything, and the witnesses saw no indication that he took any notice of the approaching car or of the warnings given, and that his movement in leaving was so sudden that there was only time to shout to him, and that he jumped from the car, and went right along. Without quoting at length from the testimony, it is sufficient to say that it discloses no single indication of the exercise of care or caution on the part of the deceased. There is no evidence that his senses were defective, and no suggestion, in the testimony, of any other reason for haste on his part in leaving the car than the fact that it was near his destination. We do not, of course, hold that it is as a matter of law negligent for one to leave a street-car while it is in motion, or to attempt to cross a street-

car track without looking to see whether a car is approaching; but neither of these acts is evidence of due care, and we cannot discover in the testimony reported any evidence that the deceased exercised care or attention of any kind or degree. On the contrary, the undisputed evidence shows that, in spite of warnings from those in his immediate vicinity, he suddenly, without precaution, precipitated himself into a position of great and obvious danger. He no doubt had a right to expect that any cars which might be upon the other track would not run at a dangerous rate of speed, and would be lawfully managed; but this proper expectation could not excuse him from the exercise of all proper care, and does not relieve the plaintiff from the obligation of proving, by positive affirmative evidence that the deceased was in fact in the exercise of due diligence. As there was no such evidence, a verdict for the defendant was rightly ordered.

Judgment on the verdict.

ILLINOIS SUPREME COURT.

Frank FRORER *et al.*, *Appts.*,
v.
PEOPLE of the State of Illinois.

(.....Ill.....)

1. **Judicial notice will be taken that employees in mines and manufactories include but a part of those who are employed by others and who depend upon their daily labor for subsistence.**
2. **A statute making it unlawful for a person or corporation engaged in mining or manufacturing to engage or be interested in keeping or controlling any truck store, shop, or scheme for furnishing supplies, tools, clothing, provisions or groceries to employees, but which does not apply to those employing laborers in other branches of business, violates the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law.**
3. **A statute which makes it a misdemeanor for persons in one branch of industry to do what is unlawful for those in another branch of industry in like relation and under like conditions, is unconstitutional.**

(March 20, 1892.)

NOTE.—Statutes of the character of the one under examination in this case are of comparatively recent origin in this country and are by no means numerous at the present time. As a consequence there are few decisions on the question of their validity. What there are we think are all referred to in this opinion and with the exception of *Hancock v. Yaden*, 6 L. R. A. 576, 121 Ind. 365, they concur in holding the statutes unconstitutional. *Hancock v. Yaden* is very nearly opposed to the other authorities. The statute there prohibited employees from making contracts in advance to accept pay in anything else than money, and the court in the opinion devotes considerable space to this provision of the statute. But the statute says also that mining or manufacturing concerns

A PPEAL by defendants from a judgment of the Circuit Court for Christian County imposing a fine upon them for violating the terms of the statute prohibiting certain classes of persons from being interested in truck stores, etc. *Reversed.*

The facts are stated in the opinion.

Messrs. George S. House and Drennan & Hogan, for appellants:

This law interferes with the right of both the mine operator and coal miner to contract regarding a matter where all others are left free. This may not be done. It is an invasion of the guaranteed fundamental rights of both the employer and the employé.

In the subject-matter of this legislation the public can have no concern.

It is a character of legislation condemned by all courts as degrading in this, that it proceeds upon the theory that the class of employees named are unjust, and the class of employees named incapable,—wanting in natural capacity. This will not do in this government.

Labor is property. The right to make contracts about the free use and enjoyment of one's own property is a right of property, and secured by the constitutional guaranty that no person shall be deprived of property without due process of law.

shall pay their employees at least once in two weeks in money, and the court says that constitutes no unjust discrimination since it operates upon all alike within the classes named and leaves all free to enter them or not at their pleasure. There is, however, no discussion of how a class may be formed and it appears to assume that the Legislature may constitute a business which goes under one name a class leaving out all which may be called by other names, although their general features may be the same. That view would certainly not receive universal acceptance.

For note on statutory restrictions on contracts between master and servant, see *Com. v. Perry* (Mass.) 14 L. R. A. 325.

Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 591; *Cooley*, Const. Lim. p. 393; *Millett v. People*, 5 West. Rep. 155, 117 Ill. 294.

See also *Budd v. State*, 3 Humph. 488, where one of the sections of the Act incorporating the Union Bank which provided that if any of the officers, agents, or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional, because it did not apply generally to officers, agents, or servants of banks committing like offenses. And *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511, where an act authorizing the court to dismiss Indian reservation cases where prosecuted for the use of another, was held unconstitutional.

See also *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 84.

The Supreme Court of the state of Pennsylvania, in the case of *Godcharles v. Wigeman*, 4 Cent. Rep. 837, 118 Pa. 481, in passing upon the validity of what was denominated as the "Stone Order Act" in that state says: The Act is an infringement alike of the right of the employer and the employé; more than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.

It is entirely without and beyond the power of the Legislature to limit or forbid the right of contract between parties under no mental, corporal, or other disability when the subject of contract is lawful, not public in its character, and the exercise of it is purely private, and personal to the parties themselves.

State v. Goodwill, 6 L. R. A. 621, 38 W. Va. 179; *State v. Fire Creek C. & C. Co.* 6 L. R. A. 859, 33 W. Va. 188. See also *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1145; *Minnesota v. Barber*, 186 U. S. 813, 24 L. ed. 455; *Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 84; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 889; *Ex parte Kubach*, 9 L. R. A. 492, 85 Cal. 274; *Raggio v. State*, 86 Tenn. 272; *State v. Divine*, 98 N. C. 778; *Mugler v. Kansas*, 128 U. S. 623, 31 L. ed. 205; *Yick Wo v. Hopkins*, 118 U. S. 856, 30 L. ed. 220.

Meers, Ricks & Creighton and William Mooney for the People.

Scholfield, J., delivered the opinion of the court:

This is an action of debt under the Act approved May 28, 1891, in force July 1 of that year, entitled "An Act to Provide for the Payment of Wages in Lawful Money, and to Prohibit the Truck System, and to Prevent Deduction from Wages except for Lawful Money actually Advanced." The 1st, 2d, and 7th sections only are pertinent in the present case, and they read as follows: "Section 1. Be it enacted by the people of the state of Illinois, represented in General Assembly, that it shall be unlawful for any person, company, corporation, or association, now engaged, or hereafter to be engaged, in any mining or manufacturing business in this state, to engage in, or be interested directly or indirectly in, the keeping of a truck store, or the controlling of

any store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his, its, or their employés, while so engaged in mining or manufacturing. Sec. 2. Every person, company, corporation, or association found guilty of violating section one (1) of this Act, either by himself its or their agents, servants, or employés or partners, shall be guilty of a misdemeanor for each and every day such business is done in violation of said section, and on conviction shall be liable to a fine for each offense of not less than fifty (50) nor more than two hundred (200) dollars, to be recovered in the name of the people, for the use of the school funds; and any person having knowledge of the fact that said section has been violated may make complaint, and cause summons or warrant to be issued." "Sec. 7. 'Truck' means the payment of wages otherwise than in lawful money, or otherwise than to the full amount earned by the employé."

There are two counts in the declaration. It is alleged in the first count that "since the 1st day of July, 1891, and prior to the commencement of the suit, the defendants, as copartners, under the firm name of the Pana Coal Company, were engaged in the mining of coal at said Christian county, and in such business had in their employ divers persons; and that at said time and place the said defendants were interested in the keeping of a certain truck store, there situated, for the furnishing of supplies, tools, clothing, provisions, and groceries to their said employés, contrary to the form of the statute." In the second count it is alleged that "the said defendants, as copartners, were engaged in the mining of coal, and having in their employ divers persons, all at the time and place aforesaid, and were then and there interested in controlling a scheme for the furnishing of supplies, clothing, provisions, and groceries to their said employés, contrary to the form of the statute." The defendants pleaded not guilty, and the cause was, by agreement of the parties, tried by the court without the intervention of a jury.

Upon the trial, and after evidence was submitted, the defendants asked the court to mark as "held" the following among other propositions submitted in writing: "(4) As a matter of law, the court holds that the Act of the Legislature entitled 'An Act to Provide for the Payment of Wages in Lawful Money, and to Prohibit the Truck System, and to Prevent the Deduction from Wages, except for Lawful Money actually Advanced,' approved May 28, 1891, and each and every section thereof, is illegal and void." But the court declined to hold as thus requested, and found the defendants guilty, and assessed a fine of \$50 against them on each count, and gave judgment accordingly. The defendants excepted to the several rulings of the court, and the record of that judgment is brought before us by the appeal of the defendants.

The question whether there is error in the judgment depends upon whether sections 1 and 2, *supra*, are constitutional enactments, and therefore the law of the land; for, if they are not, there is no statute or principle of the common law upon which the judgments can be sustained. The first section assumes to make it unlawful for a person or a corporation, while

in the business of mining or manufacturing, to engage or be interested, directly or indirectly, in keeping or controlling any truck store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employés. Laws 1891, p. 212. This is not confined to sales upon credit, nor to sales of articles paid or to be paid for in work, nor are any exceptions made because of any peculiar circumstances or occasions, however urgently the necessities of individuals may require that there should be such exception; but it extends, under any and all circumstances, to every keeping or controlling of any store, shop, or scheme for furnishing supplies, tools, clothing, provisions, or groceries, by the operator of the mine or manufactory, to employés while engaged in mining or manufacturing. While the prohibition includes, by name, only the person, company, corporation, or association engaged in "mining or manufacturing," it includes equally within its effect their employés; for the employé is necessarily denied the right to contract with one who is forbidden by the law to possess, for the purpose of contracting with him, the articles about which he wishes to contract. It would therefore have added nothing to the legal meaning of this section if it had expressly prohibited the employés from contracting with their employer for the purchase of the property in which it is thus made unlawful for their employer to have any ownership. We must take judicial notice that employés in mines and manufactories include but a part of those who are employed by others, and who depend upon their daily labor for subsistence; for we know, from daily observation, that many thousands are employed in making excavations and embankments for roads, buildings, and other improvements, erecting and repairing buildings and various other structures, in the business of transportation, in that of the sale of goods, wares, and merchandise, in that of quarrying stone, and that of agriculture, and in that of domestic service, and in all of these branches of industry employers and employés are unaffected by this statute; and such employers may therefore, after as before its taking effect, engage or be interested in truck stores or shops or schemes for the furnishing of supplies, tools, clothing, provisions, and groceries to their employés.

And this leads to the inquiry whether the keeping of a truck store, or controlling of a store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his employés, by the person carrying on the business of making excavations and embankments for roads and other improvements, erecting and repairing buildings and other structures, the business of transportation, that of the sale of goods, wares, and merchandise, or that of agriculture, is, in substance and in principle, a different thing from that of the keeping of a truck store, or controlling of a store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his employés, by the person carrying on the business of mining or manufacturing. The purpose is, manifestly, the same in each case, namely, the sale by the employer to the employé of the articles designated; and it requires precisely the same elements to constitute a con-

tract—including mental capacity in the parties contracting, and freedom from fraud and overreaching—in the one case as it does in the others. The operator of a mine and the manufacturer have no other control over the employé than that which may result from employing him, or continuing him in employment, or refusing to do so; and every other employer of labor has precisely the same control over those who obtain or wish to obtain employment with him. There can be no reason why the miner or the operative in the manufactory will be more or differently influenced by his hopes and fears in these respects than will laborers in any other industries. Mining and manufacturing are indispensable branches of industry, and as honorable as any others. There is nothing in operating mines or manufactories to render the individual less capable to contract, or to give him greater wisdom and adroitness therein, than he would possess were he engaged in operating and controlling some other branch of industry. It may be conceded that there is more of dependence of the employé upon the employer in case of skilled labor, in a special department, because the demand for such labor is limited in each locality by the number and size of its industries, than there is in the case of the general laborer, who may find employment anywhere and everywhere; but mining and manufacturing do not include all the skilled labor in the country. In constructing roads, in building houses, in the business of commerce, including buying, selling, and transportation, and in other branches of industry, a vast number of skilled laborers are constantly employed, and their relations to their employers would seem to be under precisely the same conditions as are those affecting the relations between operators of mines and manufacturers and their employés. And, in any view, the extent and degree of dependence in particular classes of industry cannot affect the general principle, since, human nature being the same in all classes of industry, the effect of equal degrees of dependence must be the same in each class. It cannot truthfully be said that all operators in mines or manufactories are more dependent upon their employers than all laborers in any other branch of industry. We know, from observance, that there are instances of entire destitution, and consequently of the dependence presumed to result therefrom, in all branches of industry; and that in all branches of industry there are varying degrees of destitution, and consequently of the correspondent presumed dependence resulting therefrom. And so it must follow that any difference between the business protected by the first section, when carried on by the employer of laborers in mines or manufactories, and when carried on by the employers of laborers in other branches of lawful industry, cannot be one of principle, but must be purely one of degree, varying with the circumstances of particular cases; the injury from the prohibited business, if, in fact, it be such, being of precisely the same kind, whether one or many may be affected by it. In all that relates to mining and manufacturing, wherein they differ from other branches of industry, we recognize the supremacy of the

General Assembly to determine whether any, and, if any, what, statute shall be enacted for their welfare and that of operators therein, and necessarily affecting them alone; but keeping stores and groceries, or supplies of tools, clothing, and food, by whatever name, to sell to laborers in mines and manufactories, is entirely independent of mining and manufacturing, and has no tendency in any possible way to affect the mechanical process of mining and manufacturing. The prohibition of the statute operates, not directly upon the business of mining and manufacturing, but upon the individual, because of his participation in that business. It is not imposed for the purpose of rendering mining and manufacturing less perilous or laborious, nor to restrict or regulate the duties of employer and employé in respects peculiar to those industries, but for the sole purpose of imposing disabilities in contracting as to tools, clothing, and food,—matters about which all laborers must contract, and as to which all laborers in every other branch of industry are permitted to contract with their employers without any restriction.

Assuming, then, that the keeping of a truck store, or controlling of a store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his employés, by the person carrying on the business of mining or manufacturing, is not, in principle, a different thing from what it is when kept or controlled by persons employing laborers in different branches of labor, it is, if these sections are law, now lawful for any person or corporation, other than one engaged in mining and manufacturing, to engage or be interested directly in keeping a truck store, or controlling a store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his employés, while a person engaged in mining and manufacturing is, because of that fact alone, prohibited from doing so. The privilege or liberty to engage in or control the business of keeping and selling clothing, provisions, groceries, tools, etc., to employés, is one of profit,—of presumptive value; and thus, by the effect of these sections, what the employers in other industries may do for their pecuniary gain with impunity, and have the law to protect and enforce, the miner and manufacturer, under precisely the same circumstances and conditions, are prohibited from doing for their pecuniary gain. The same act, in substance and in principle, if done by the one is lawful, but if done by the other is not only unlawful, but a misdemeanor, punishable by fine.

If the General Assembly may thus deprive some persons of substantial privileges allowed to other persons under precisely the same conditions, it is manifest that it may, upon like principle, deprive still other persons of other privileges in contracting which, under precisely the same circumstances, are enjoyed by all but the prohibited class; and it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination is conclusive, for that would make the General Assembly omnipotent, since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen; and it

might find that the public welfare required that society should be divided into an indefinite number of classes, each possessing or being denied privileges in contracting and acquiring property, as favoritism or caprice might dictate. The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law (section 2, art. 2), and says Cooley: "The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." Cooley, Const. Lim. 1st ed. p. 898; *People v. Gillson*, 109 N. Y. 898, 12 Cent. Rep. 616; *People v. Otis*, 90 N. Y. 48. "Due process of law" does not mean a statute passed for the purpose of working the wrong. Cooley, Const. Lim. 1st ed. p. 858. These words are held to be synonymous with the words "law of the land." Id. pp. 352, 353. "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." *Millett v. People*, *infra*, and authorities there cited. It is not doubted that laws may be enacted properly, and without infringing this section of the Constitution, which, by reason of peculiar circumstances, may affect some persons or classes of persons only who were not before affected by such restrictions; but, in such instances, the circumstances must be so exceptional as to leave no others affected in precisely the same way upon whom a general law could have effect.

As we quoted from Cooley, Const. Lim., in *Millett v. People*, 117 Ill. 294, 5 West. Rep. 155, "distinctions in these respects should be based upon some reason which renders them important, like the want of capacity in infants and insane persons; but if the Legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or, in any other way, to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." Cooley, Const. Lim. 1st ed. p. 391. And upon this principle we held in *Millett v. People*, *supra*, that it is not competent under the Constitution for the General Assembly to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers

of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. In *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 691, and in *State v. Fire Creek, C. & C. Co.*, 33 W. Va. 188, 6 L. R. A. 359, the question before the supreme court was whether a statute of West Virginia, declaring "that it shall not be lawful for any person, firm, company, corporation, or association engaged in mining coal, ore, or other minerals, or mining and manufacturing them or either of them, or manufacturing iron and steel, or both, or any other kind of manufacturing. . . . to issue for the payment of labor any order or other paper whatsoever unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at a legal rate, made payable to employé or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation, or association giving, making, or issuing the same." The court held, after a lengthy and able discussion of the question, that the enactment was unconstitutional and void. The court, among other things, said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the Legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, or convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression." There was like ruling in regard to a similar enactment by the Supreme Court of Pennsylvania in *Godecharles v. Wigan*, 113 Pa. 431, 4 Cent. Rep. 887. In *Com. v. Perry* (Mass.) 14 L. R. A. 325, the defendant was indicted under a statute of Massachusetts providing that "no employer shall impose a fine upon, or withhold wages or any part of the wages of, an employé at weaving for imperfections that may arise during the process of weaving;" and the court held the statute unconstitutional, and in doing so said: "There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not

expressly forbidden. . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason—indeed, the statute before us recognizes it—why men should not be permitted to engage in it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right, which are expressly recognized by our Constitution." See also, to like effect, *People v. Marz*, 99 N. Y. 877, 52 Am. Rep. 84; *Ex Jacobs*, 98 N. Y. 493; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482.

But it is contended the enactment before us is sustained by the principles announced in *Munn v. People*, 69 Ill. 80. There is, in our opinion, no analogy between that case and the present. In the first place, there the subject-matter of the Act was local and exceptional in its nature, and the law in question operated alike upon all affected by like conditions; in the second place, the business of warehousing was held to be affected by a public use, and assimilated to the business of carriers, innkeepers, millers, and others of like kind, and therefore subject to regulations for the public welfare; and, in the third place, the statute there affected only the business of warehousing,—that wherein the necessity of transportation from the west to the east left the shipper no discretion, but compelled him, whether he would or not, to patronize the warehouse. It did not assume to regulate or restrict the warehouseman in contracting with his laborers, or his laborers in contracting with him. See *Munn v. Illinois*, 94 U. S. 127, 24 L. ed. 84.

Other instances of statutory regulations of private rights are in lien laws in favor of home-owners, mechanics, etc., limitation laws, the Statute of Frauds, and other statutes relating to evidence, laws in regard to pleadings, exemption laws, and insolvent laws; but these all relate, not to the power to contract in regard to matters of general right, but to the remedy for the enforcing of contracts, as to which the Legislature may make such regulations as the public welfare seems to demand, so long as, under pretense of regulating the remedy, it does not impair the right itself. Cooley, Const. Lim. 1st ed. 861. So, under what is denominated the "police power," laws may be constitutionally enacted imposing new burdens on persons and property, and restricting personal rights of enjoyment of property, where, in the opinion of the General Assembly, the public welfare demands it, under which may be instanced license laws, laws or ordinances fixing fire limits, quarantine laws, laws imposing liability upon masters on account of death or injury of servants, laws requiring dangerous machinery to be so guarded and used as to avoid injuries to others, laws to prevent monopolies, extortions and fraudulent impositions, and, in general, all laws whereby one person is prohibited from so using his lib-

erty or property as to injure or endanger the liberty or property of another. See *Id.* 527. Under this head may also properly be classed usury laws, and laws that may have been found on the statute books of England, and also, perhaps, on statute books of some of the states, imposing peculiar and exceptional restrictions on contracts with seamen. Usury laws proceed upon the theory that the lender and the borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender; and such laws may be found on the statute books of all the civilized nations of the world, both ancient and modern. See Tyler, *Usury*, p. 61; opinion of *Chancellor Kent* in *Dunham v. Gould*, 16 Johns. 377, 8 Am. Dec. 323. By the common law, the master had authority over all the mariners on board the ship, and, in case of disobedience, disrespectful or disorderly conduct, he might lawfully correct them in a reasonable manner; "his authority in this respect being analogous to that of a parent over his child, or of a master over his apprentice or scholar." *Abb. Shipp.* 7th Am. ed. p. 248, § 4. See also note at bottom of page. By the very nature and necessities of their employment, and the usages and customs governing it, seamen thus constituted a servile class, as distinctly marked, and as dependent and helpless, in many respects, as that of infants, and, of necessity, they required a measure of protection not required by the citizen who acknowledges no master. In none of the statutes alluded to is one person denied a privilege or liberty which is allowed to others under like conditions or circumstances, as he is here. The police power is limited to enactments having reference to the comfort, the safety, or the welfare of society, and, under guise of it, a person cannot be deprived of a constitutional right. It is impossible that under that power what is lawful, if done by A., if done by B. can be a misdemeanor, the circumstances and conditions being the same. Theoretically, there is no inferior class, other than that of those degraded by crime or other vicious indulgences of the passions, among our citizens. Those who are entitled to exercise the elective franchise are deemed equals before the law, and it is not admissible to arbitrarily brand, by statute, one class of them, without reference to and wholly irrespective of their actual good or bad behavior, as too

unscrupulous, and the other class as too imbecile or timid and weak, to exercise that freedom in contracting which is allowed to all others. So far as *Hancock v. Yaden*, 131 Ind. 365, 6 L. R. A. 576, may be in conflict with the views we have herein expressed, it is equally in conflict with *Millett v. People*, *supra*. There is nothing in the recent decision of the supreme court of West Virginia in *State v. Peil Splint Coal Co.*, in conflict with our decision in this case. It proves nothing that statutes may have been in force in England analogous to the sections involved in this suit, for there, as Blackstone says, "parliament is absolute and without control" (1 Com. pp. 161, 162, Cooley's ed.), while our legislative powers are restrained by a written constitution. We feel compelled to hold that the sections we have considered are repugnant to section 2, art. 2, of our Constitution, and therefore not law. The proposition in writing, submitted to the court, included sections not pertinent to this case, and it was therefore too broad, and the court properly refused to mark it as "Held." But the court erred in finding appellants guilty, and in giving judgment in behalf of appellee, and that judgment is reversed.

A petition for rehearing has been presented since the filing of the opinion, and we have given its arguments all the care and consideration within our power; and, having done so, we still remain of the opinion before announced. We have no discretion. Understanding our Constitution as we do, it is impossible, without disregarding its provisions, to sustain a statute which makes that a misdemeanor, when done by persons while engaged in one branch of industry, which if done by persons in another branch of industry, in like relations and under like conditions, will be lawful. We doubt not that grievous wrongs have resulted from overreaching by employers of employes engaged in mining and manufacturing, but, if so, on like principle, precisely, the same wrongs are liable to result in other branches of industry under like conditions; and the wrong, wherever done, must, in principle, always be the same. It is the province of legislation to deal with principles, leaving their application to particular facts to the courts. See Const. art. 8. We have, since considering this petition, restated, in somewhat different language, our views upon the question involved in this case, and the present opinion will therefore be filed and published in lieu of that heretofore filed. *Rehearing denied.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Maggie L. LOKER
v.
Nathaniel R. GERALD.
(....Mass.....)

The legal fiction that a wife's domicile

follows that of her husband gives jurisdiction of a suit for divorce on the ground of the wife's desertion, to a court of a state to which the husband has removed and in which he has resided for the time required by statute, although the marriage took place in another state in which the wife still resides and in which

NOTE.—*Domicil of wife for purpose of divorce suit.* While the doctrine of the principal case is sustained by numerous decisions, both English and 14 L. R. A.

American, the dissent from the ruling is so emphatic as to warrant a mention of the opposite view—especially as it clearly appears that upon a strictly

her desertion began and in which service is made upon her.

(June 24, 1892.)

REPORT from the Superior Court for Middlesex County for the opinion of the Su-

analogous state of facts the New York Court of Appeals, in the case of *O'Dea v. O'Dea*, 1 Cent. Rep. 785, 101 N. Y. 23, reached a directly opposite conclusion. The general proposition grounded upon well-recognized principles of the common law, that the domicile of the wife follows that of the husband, has long been fully accepted by the Massachusetts courts, and this, with the facts disclosed in evidence fully warranted the conclusion reached in the case under review.

The purposes of this note, however, are to show the dissent from this decision, and disclose the unfortunate conflict that prevails throughout the various states with reference to the question of the domicile of either party to the suit as affecting the right of the petitioned court to take jurisdiction.

The law making the domicile of the husband that of the wife is applicable only to their relations with third parties, and has no application in cases of actual separation and controversy between themselves as to the temporary or permanent severance of the marriage tie by judicial proceedings. *Vence v. Vence*, 15 How. Pr. 497; *Schonwald v. Schonwald*, 55 N. C. 387; *Cheever v. Wilson*, 76 U. S. 9 Wall. 109, 19 L. ed. 605.

In Louisiana it is said by Todd, J., delivering the opinion of the court: "It would do violence to the plainest principles of common sense and common justice to call this residence of the guilty husband, where the wife is forbidden to come, or of which she knows nothing, the domicile of the wife. The true meaning of this aphorism, touching the domicile of the wife being that of her husband, is that the domicile of the wife is the domicile that the husband has at his marriage, or provides after marriage for himself and his wife, and which, though he may change at pleasure, it must be one to which the wife is taken or invited, or at least of which she knows, and to which she may go and stay at her will." *Champon v. Champon*, 40 La. Ann. 23.

In Indiana it is held that the identity of domicile is a presumption which may be rebutted in a divorce case, that any act of the husband which entitles the wife to a divorce immediately discharges her from any obligation to dwell with him, that in such a case she must separate from him to preserve her legal rights, or the cohabitation will be a condonation of the act, and that when the duty of dwelling together ceases, the presumption must also cease. *Jenness v. Jenness*, 24 Ind. 355, 37 Am. Dec. 335. In other words, the law will recognize the wife as having a separate existence, separate interests, and separate rights in those cases where the object of the proceedings is to show that the marriage relation itself ought to be dissolved, otherwise the parties would stand on very unequal grounds, as the husband could change his own domicile at will, and thus, in many cases, deprive the wife of all opportunity of enforcing her rights. *Tolen v. Tolen*, 2 Blackf. 407, 21 Am. Dec. 748.

The New York Court of Appeals decides that the jurisdiction of the court of another state in which a judgment has been rendered is always open to inquiry in the courts of this state, and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are *coram non judice* and void. *Dobson v. Pearce*, 12 N. Y. 155, 62 Am. Dec. 152; *Kinnier v. Kinnier*, 45 N. Y. 585, 6 Am. Rep. 132.

Or if the judgment has been procured by fraud upon the legal rights of the party against whom it

preme Judicial Court of a suit brought to recover dower out of the estate of William Loker, deceased, in which a verdict had been directed in favor of the tenant. *Judgment on the verdict*.

The tenant pleaded the general issue and

is rendered, it may be questioned collaterally for that reason in the courts of this state. *Kerr v. Kerr*, 41 N. Y. 272; *Hunt v. Hunt*, 72 N. Y. 217, 33 Am. Rep. 129.

In a subsequent case it was held that a court of another state cannot adjudge the dissolution of the marital relations of a citizen of New York domiciled and actually residing there during the pendency of the judicial proceedings in such state without a voluntary appearance on his part therein and with no actual notice to him thereof, and this although the marriage was solemnized in such other state. *People v. Baker*, 76 N. Y. 73, 33 Am. Rep. 274; *Williams v. Williams*, 14 L. R. A. 220, 130 N. Y. 193.

The New Jersey court of errors and appeals agrees with the New York court, and holds that a decree in a divorce suit will have no extraterritorial effect when the defendant is domiciled in another state, and is not served with process, nor with notice of the proceedings. *Doughty v. Doughty*, 23 N. J. Eq. 581.

It is in no state or court denied that there may be such fraud upon a tribunal and upon the opposite party in judicial proceedings as will vitiate a judgment obtained thereby. Nor is it questioned that if the divorce granted in a foreign state is in all respects, as regards jurisdiction, as it is affected by the question of domicile, regular and valid, it appearing that all statutory requirements of the foreign state have been met, it is entitled to full faith and credit in every state of the Union. U. S. Const. § 1, art. 4.

A formidable array of federal decisions, expository of this constitutional provision, will be found to sustain the text. *Livingston v. Maryland Ins. Co.* 10 U. S. 3 Cranch, 274, 3 L. ed. 222; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 1, 2 L. ed. 15; *Raynham v. Canton*, 3 Pick. 298; *Consequa v. Williams*, 1 Pet. C. C. 225; *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249; *James v. Allen*, 1 U. S. 1 Dall. 183, 1 L. ed. 93; *Phelps v. Holker*, 1 U. S. 1 Dall. 261, 1 L. ed. 128; *Hitchcock v. Aicken*, 1 Caines, 460; *Kibbe v. Kibbe*, Kirby, 119; *Vandervoort v. Smith*, 3 Caines, 155; *Yeaton v. Fry*, 9 U. S. 5 Cranch, 336, 3 L. ed. 117; *McElmoyle v. Cohen*, 38 U. S. 12 Pet. 312, 10 L. ed. 177; *D'Arcy v. Ketchum*, 22 U. S. 11 How. 165, 13 L. ed. 648; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 403, 15 L. ed. 451; *Thompson v. Whitman*, 35 U. S. 18 Wall. 457, 21 L. ed. 397; *Mills v. Duryee*, 11 U. S. 7 Cranch, 451, 3 L. ed. 411; *Hampton v. McConnell*, 16 U. S. 3 Wheat. 234, 4 L. ed. 378; 1 Kent, Com. Lectures, 12, pp. 243, 244; *United States v. Amedy*, 24 U. S. 11 Wheat. 332, 6 L. ed. 502; *Buckner v. Finley*, 27 U. S. 2 Pet. 532, 7 L. ed. 521; *Owings v. Hull*, 34 U. S. 9 Pet. 627, 9 L. ed. 253; *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 12 L. ed. 337; *Bank of Alabama v. Dalton*, 50 U. S. 9 How. 522, 13 L. ed. 242; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Craig v. Brown*, 1 Pet. C. C. 354; *Gardner v. Lindo*, 1 Cranch, C. C. 78; *Turner v. Waddington*, 3 Wash. C. C. 123; *Catlin v. Underhill*, 4 McLean, 199.

In *Hunt v. Hunt*, *supra*, it is said that the wife, from necessity, may in certain cases have a domicile in another jurisdiction than that of her husband, as when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce; and so the reason of the rule weakens in power when in extreme cases the conduct of the husband has been such as to make

specified that the demandant was not the widow of decedent. At the trial it was admitted that demandant was entitled to dower unless she had been barred by a divorce obtained in Colorado, and a copy of an alleged record of divorce proceedings was introduced in evi-

dence. The demandant objected that the record was wholly insufficient and did not show a valid and effectual divorce.

Further facts appear in the opinion.

Mr. L. H. Wakefield for demandant.

Mr. P. H. Cooney for tenant.

It proper for the wife to seek relief from her obligation to have the same home and interest with him, and altogether ceases when a judicial decree has separated and adjudged them to live apart. . . . It is evident that this reason will also operate in favor of the husband, so that where he has ground for a suit by reason of the misconduct of the wife she may not so often change her domicile as to bar him in his pursuit of a remedy.

The following cases in this country sustain the proposition that either party to the matrimonial relation may acquire a separate domicile as against the other so far as jurisdiction in divorce proceedings are concerned. *Cook v. Cook*, 58 Wis. 156, 43 Am. Rep. 708; *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Dutcher v. Dutcher*, 39 Wis. 651; *Shanks v. Dupont*, 28 U. S. 3 Pet. 242, 7 L. ed. 646; *Craven v. Craven*, 27 Wis. 418; *Hanberry v. Hanberry*, 29 Ala. 719; *Hare v. Hare*, 10 Tex. 365; *Turner v. Turner*, 44 Ala. 437; *Republio v. Skidmore*, 2 Tex. 261; *Moffatt v. Moffatt*, 5 Cal. 280; *Shreck v. Shreck*, 32 Tex. 579, 5 Am. Rep. 251; *Smith v. Smith*, 4 Mackey, 256; *Hull v. Hull*, 2 Strobb. Eq. 174; *Jennness v. Jennness*, 24 Ind. 365, 37 Am. Dec. 335; *Fishill v. Fishill*, 2 Litt. 387; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Sawtell v. Sawtell*, 17 Conn. 234; *Fickle v. Fickle*, 5 Yerg. 208; *Ditson v. Ditson*, 4 R. I. 87; *Colvin v. Reed*, 55 Pa. 375; *Hinds v. Hinds*, 1 Iowa, 36; *Hollister v. Hollister*, 6 Pa. 449; *Goodwin v. Goodwin*, 45 Me. 377; *Smith v. Morehead*, 59 N. C. 390; *State v. Schlachter*, Phillips, L. 520; *Sewall v. Sewall*, 122 Mass. 156; *Mellen v. Mellen*, 10 Abb. N. C. 329; *Burien v. Shannon*, 115 Mass. 438; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Shaw v. Shaw*, 98 Mass. 158; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Yates v. Yates*, 13 N. J. Eq. 230; *Wright v. Wright*, 24 Mich. 130; *Frary v. Frary*, 10 N. H. 61; *Hopkins v. Hopkins*, 35 N. H. 474; *Payson v. Payson*, 34 N. H. 518.

If the husband abandons his wife, and the domicile they have established, to get rid of all these conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers, and places her in a situation to sue him for a divorce. *Barber v. Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226.

Although prima facie, the domicile of the wife is the same as that of the husband, the law recognizes an exception to the rule when the husband begins an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts. *Mellen v. Mellen*, 10 Abb. N. C. 329.

The rights of the parties and the jurisdiction of the court must stand or fall upon the actual existing state of facts, as disclosed by the evidence. This is the necessary result of the cases. 2 Bishop, Mar. & Div. §§ 124-127, 3 Am. Law Reg. 2:1, 222; *Rogers, Domicil*, 11 Cent. L. J. 421; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Elder v. Reed*, 62 Pa. 308, 1 Am. Rep. 414; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.

It must not be assumed that the validity of a di-
16 L. R. A.

vorces depends upon the actual service of the citation upon the defendant, as there are numerous authorities holding that such service is unnecessary, where it appears that the plaintiff was domiciled in the jurisdiction issuing the citation. *Ditson v. Ditson*, 4 R. I. 87; *Shafer v. Bushnell*, 24 Wis. 372; *People v. Hovey*, 5 Barb. 117; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Mansfield v. McIntyre*, 10 Ohio, 27; *Tolen v. Tolen*, 2 Blackf. 417, 21 Am. Dec. 743; *Hull v. Hull*, 2 Strobb. Eq. 174; *Cooper v. Cooper*, 7 Ohio, 238; *Gleason v. Gleason*, 4 Wis. 64; *Dickson v. Dickson*, 1 Yerg. 110; *Thompson v. State*, 28 Ala. 12; *Hood v. Hood*, 11 Allen, 193, 37 Am. Dec. 709; *Ponsford v. Johnson*, 2 Blackf. 51; *Beard v. Beard*, 21 Ind. 321; *Rhym v. Rhym*, 7 Bush, 316; *Wilcox v. Wilcox*, 10 Ind. 436; *Shreck v. Shreck*, 32 Tex. 578; *Baker v. People*, 2 Hill, 325; *People v. Dawell*, 25 Mich. 247; *Bradshaw v. Heath*, 13 Wend. 407; *McGiffert v. McGiffert*, 17 How. Pr. 18.

The common-law rule previously referred to, which locates the domicile of the wife with that of the husband, is a mere fiction which is never allowed to defeat justice. *Irby v. Wilson*, 21 N. C. 568. Neither can it be invoked to overthrow a right accorded to the wife by permitting the husband to assign to her another domicile after the cause of action has arisen, or after the suit has actually been commenced. *Colvin v. Reed*, 55 Pa. 375.

In the course of an extended note appended to the case of *Mellen v. Mellen*, *supra*, Mr. Abbott suggests that the question whether the husband's taking the new domicile without the wife entitles her to invoke the fiction that her domicile follows his is by no means settled.

The right of a state to declare the present or future status, so far as its own limits are concerned, of persons there lawfully domiciled, cannot be extended so as to enable it to determine absolutely what such status was at a previous time, and while they were subject to the laws of another state. The decrees of its courts in the latter respect must be subject to revision in the state where rights were then existing, or had been acquired. *Blackinton v. Blackinton*, 2 New Eng. Rep. 87, 141 Mass. 432; *Cummingtown v. Belchertown*, 4 L. R. A. 181, 149 Mass. 223.

Ordinarily where a party, upon a change of domicile, goes into another state or country, the personal status which he carries with him will be recognized by the courts of the latter country. This is certainly the general rule, but it is subject to certain well-recognized exceptions. If, for instance, such status has been acquired by a violation of an express provision of the positive law of the state in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the status would not and should not be recognized by the courts of the latter state. 2 Kent, Com. 458; *Whart. Confli. Laws*, 2d ed. §§ 165, 207; *Story, Confli. Laws*, §§ 98, 244; 4 *Phillimore, Int. Law*, ed. 1881, p. 529; *Brook v. Brook*, 9 H. L. Cas. 193; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 91; *Forbes v. Cochrane*, 2 Barn. & C. 448; *Mette v. Mette*, 18wab. 2; 416; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 606; *Van Voorhis v. Brintnall*, 88 N. Y. 18, 40 Am. Rep. 505. F. S. R.

Field, Ch. J., delivered the opinion of the court:

We think that it appears that the divorce was obtained in the state of Colorado in accordance with the statutes of that state, and that the service of process on the wife, who is the demandant in the present action, was also in accordance with these statutes. The report recites that, "it was not claimed by the demandant that the said William Loker went to Colorado for the purpose of procuring a divorce," and it must be taken that he was a bona fide resident of that state for more than a year before his suit for divorce was brought, which is the time required by the statute of Colorado, when the cause of divorce occurred in another state. A copy of the bill of complaint for divorce and of the summons was served on the wife in Massachusetts, where she lived; and the causes of divorce set forth by the bill were desertion for more than a year, and adultery; and the court, after hearing evidence, decreed a divorce from the bonds of matrimony for desertion. Great pains were taken to give the wife notice and an opportunity to be heard. The parties were married in Massachusetts, and lived there as husband and wife, but the husband removed to Colorado, and we infer that the wife did not, but remained in Massachusetts, and we infer that the desertion on account of which the divorce was granted began in Massachusetts. The real contention is that as the wife was never domiciled in Colorado, and was never served with process in that state, the court had no jurisdiction over her to dissolve the marriage. It must be noticed that, by our statutes, desertion, continued for three years, and adultery, are causes of divorce; and that the statutes authorize divorces for causes occurring in other states, even when the parties were not married in this commonwealth, and were not inhabitants of the commonwealth at the time of the marriage, provided the libellant has resided in the commonwealth for five years next preceding the filing of the libel, and did not remove into the commonwealth for the

purpose of obtaining a divorce. Pub. Stat. chap. 146, § 5. In practice here, divorces are often granted in cases in which the libelee has never resided within the commonwealth, upon service made by publication, and by a registered letter sent to the libelee, or notice served upon him or her, in another state, as the court may direct. Pub. Stat. chap. 146, §§ 9, 10. Pub. Stat. chap. 146, § 41, provides "that a divorce decreed in another state or country, according to the laws thereof, and by a court having jurisdiction of the cause, and of both the parties, shall be valid and effectual in this commonwealth," except in certain cases not material to the present inquiry. The various decisions of the courts of different states and countries on the question of the jurisdiction of a court to dissolve the bonds of matrimony, when only the libellant is domiciled within the state or county to which the court belongs, and the effect to be given to a decree of divorce in other states or counties, if the court takes jurisdiction, and enters a decree, are well known, and they are fully considered in 2 Bishop, Mar. & Div. chaps. 2-6.

It is sufficient for the present case to say that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that, therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties, within the meaning of the statute. The fact that our courts grant divorces under somewhat similar circumstances is a reason why, as a matter of comity, we should recognize the validity of this divorce. *Burten v. Shannon*, 115 Mass. 438. We are not now required to consider whether the rule of law would not be the same, independently of the legal fiction that the domicile of the wife follows that of the husband. The decision in *Cumington v. Belchertown*, 149 Mass. 223, 4 L. R. A. 131, was upon the effect of a decree annulling the marriage *ab initio*, and the court expressed no opinion upon the effect of a decree of divorce made under the circumstances there stated.

Judgment on the verdict.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Alexis DELAFOILE *et al.*, *Pliffs. in Err.*,
v.
STATE OF NEW JERSEY.

(.....N. J.)

*Marshals of an association organized under "An Act to Authorize the Formation of Asso-

*Head note by KNAPP, J.

NOTE.—Right of peace officer to enter dwellings to make arrests.

This question is treated at considerable length by the text-writers, but the relevant cases are not numerous. Many of the rules rest upon the authority of the early elementary writers.

Without a warrant.

A constable has the right, by virtue of his office and without a warrant, to enter any house the door of which is unfastened and in which there is a

noise amounting to a breach of the peace, and to arrest any person engaged in an affray or in committing an assault in his presence. *Com. v. Tobin*, 108 Mass. 428, 11 Am. Rep. 875.

If there be an affray in the house, where its doors are shut, whereby there is likely to be manslaughter or bloodshed committed, a constable may break open the doors to keep the peace and prevent the danger. 2 Hale, P. C. 96.

So, too, if there be disorderly drinking or noise in a house at an unreasonable time of night. *Ibid.*

was being committed. In forcing the stairs they did injury to the person of the landlord's wife, and were indicted and convicted for assault and battery. *Held*, that their act was not justified by any authority conferred on them as marshals by the statute before mentioned, and that they were properly convicted.

(June 20, 1892.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Quarter Sessions for Bergen County convicting defendants of assault and battery. *Affirmed*.

Statement by Knapp, J.:

The plaintiffs in error were indicted at the September Term, 1889, of the Bergen over and terminer, for assault and battery on one Hannah Collins, the wife of Thomas Collins, who kept an inn and tavern called "The Octagon," at Fort Lee, in the said county of Bergen. The defendants were members and marshals of an organization called the "Riverside Law and Order Society of the Township of Ridgely." The organization of that society was under an Act of the Legislature entitled "An Act to Authorize the Formation of Associations for the more Effectual Prevention and Detection of Crime," approved March 20, 1878. Supp. Revision, 815.

The cause was tried at the same term in the quarter sessions, resulting in a conviction of the defendants.

It was removed by writ of error into the supreme court, and there heard upon exceptions sealed at the trial. The supreme court affirmed the judgment of conviction, and it is to review that judgment that this writ of error is brought.

Mr. E. Stevenson for plaintiffs in error.
Mr. A. D. Campbell for the State.

Knapp, J., delivered the opinion of the court:

The record shows a conviction of the plaintiffs in error on an indictment found against them for assault and battery. The bill of exceptions returned with the record shows acts of forcible injury to the person, committed by them, such as justify the conviction, unless the official character in which they assumed to act shields them from the ordinary legal consequences of a forcible injury to the person of another. Their defense is that they were clothed with the authority of constables, and as such possessed the right to enter the dwelling of another when they had reasonable ground to believe that in such dwelling the criminal law was being secretly violated in the unlawful sale of intoxicating drink; that, as such officers, when in any part of such dwelling by the license of the owner, their further right was to force their way, against the will of such owner, into any other part of such building in search of the suspected wrong-doing. The

Of this latter proposition of *Lord Hale* it is said in *McLennon v. Richardson*, 15 Gray, 74, 76, 77 Am. Dec. 553: "No authority is given for this statement, nor, so far as we know, has it ever been recognized as the law in any adjudicated case;" its correctness is questioned and it is there said that "the authority of a constable to break open doors and arrest without a warrant is confined to cases where treason or felony has been committed or there is an affray or breach of the peace in his presence."

If one engaged in an affray fly into a house, and the officer follows him in fresh pursuit, he may without a warrant break open the doors to arrest him. *Crocker, Sheriffs*, 3d ed. §§ 48, 53.

Though a felony has been committed, yet a bare suspicion of guilt against a person will not justify an officer in forcing the door of his dwelling unless armed with a warrant. It will at least be at the peril of proving that the party so taken on suspicion was guilty. *Foster*, 321; 1 Russ. Crimes, 7th Am. ed. p. 629.

Where the doors of strangers are broken open upon supposition of the person sought being there, it must be at the peril of finding him there, unless as it seems, the officer acts under a warrant. 1 East, P. C. 324.

With a warrant.

A constable has a right to break open and enter the dwelling of a person for whom he has a warrant, if he believes such person to be therein. *Kelsy v. Wright*, 1 Root, 83; *State v. Shaw*, 1 Root, 134; *Barnard v. Bartlett*, 10 Cush. 501, 57 Am. Dec. 123; *Jacobs v. Measures*, 13 Gray, 74.

He may do so in the night-time as well as day-time. *State v. Smith*, 1 N. H. 846.

The sheriff has no right to enter and search a house not the dwelling of the defendant in the writ without the owner's consent, unless the so-

called be therein. *Hawkins v. Com.* 14 B. Mon. 395, 61 Am. Dec. 147. But see next paragraph.

A police officer with a warrant for a person whom he has reasonable cause to believe to be within another's dwelling has the right to enter and search the premises. *Com. v. Irwin*, 1 Allen, 567.

When the officer is once in the house he may break open all inner doors, drawers, boxes, and chests he may deem necessary in the execution of the warrant. *Crocker, Sheriffs*, 3d ed. § 54; *Murfree, Sheriffs*, 2d ed. § 1163.

In *Williams v. Spencer*, 5 Johns. 352, it was held that an action of trespass would not lie against a constable who, having a warrant for a person, entered through the open outer door of the house in which such person occupied an inner room and broke the door of the inner room to effect his arrest. The same conduct in executing a *captas ad resp.* was held justifiable in *Hubbard v. Mace*, 17 Johns. 127.

Officers of the house of commons who have a warrant of the speaker to take a person therein named after having been admitted to and having searched his house without finding him have no right to remain there to await his return; and by staying in his house for that purpose for several hours become trespassers *ab initio*. *Howard v. Gossett*, 1 Car. & M. 380.

In *Allen v. Colby*, 47 N. H. 544, it was held that officers searching for one attempting to avoid a military draft might rightfully take possession of his valise and clothing, if they could reasonably suppose that so doing would lead to his arrest.

To recapture escaping prisoner.

An escape by a prisoner lawfully arrested warrants the retaking of him, on fresh pursuit, and the breaking of doors for that purpose after demand and refusal of admittance. *Com. v. McGahy*, 11 Gray, 194.

question is, and the only one possessed of any substance, whether such officer is clothed with authority to the extent claimed for these defendants. That the defendants, in virtue of their offices, possessed the powers and authority of constables, is not denied. The Act under which they are appointed provides that "all the powers of constables in criminal cases shall be possessed and exercised by them, and that they shall have power and authority to arrest any person found within the limits of said county who shall have violated any law of this state within the county, or who shall have willfully interfered with the peace and good order of the county, and the said marshal shall arrest every such person without warrant and indorsement, and bring him or her, as soon as conveniently can be, before a magistrate," etc. This legislation, and their appointment under it, undoubtedly conferred upon them the common-law powers and authority of constables, and the usual powers exercised by officers of police. Has one so endowed with public authority the right by force, against the will of the owner, resisting him, to pass through any part of a dwelling, on the mere belief, however well grounded, that the criminal law is being violated, and that not in a way to constitute a breach of the peace? The parties were not armed with any warrant for the arrest of any person; therefore their justification is not under acts done in execution of process. But the powers of these officers are not limited to the

mere execution of process. The office was originally instituted for the better preservation of the peace, and a constable has the right, under his common-law powers, in divers cases, to arrest offenders without warrant. Thus he is justifiable without warrant in arresting persons directly charged with felony although it should afterwards appear that no felony had actually been committed; and where a felony had been committed, he is justified in making arrest without warrant, provided he acts in good faith upon such information as amounts to a reasonable and proper ground of suspicion. If he has reasonable cause to suspect that a felony has been actually committed, he is justified in arresting the parties suspected, although it afterwards appear that no felony has been committed. He may also arrest an offender without warrant for treason, felony, breach of the peace, and some misdemeanors, when committed in his view. 2 Bacon, Abr. title, *Constable*, C; Hale, P. C. 587; *Beckwith v. Philby*, 6 Barn. & C. 635. He is not only empowered to part an affray in his presence, but he is bound at his peril to do so if possible, and he may carry the persons engaged in it before a justice of the peace in order to their finding sureties to the peace, and to answer for their offenses. If the affray be in a house, the constable may break open the doors to preserve the peace; and if the affrayers fly to the house, and he freshly follow, he may break open the doors to take them without warrant. Hale, P. C. 92-135.

In *Cahill v. People*, 106 Ill. 621, 623, it is said: "We think there can be no doubt in reference to the law, and it may be regarded as well settled that an officer who has arrested a criminal, when he has escaped, may, if it becomes necessary, break down doors to rearrest him." To that effect is *Geuner v. Sparks*, 6 Mod. 173.

An officer is not justified in breaking open doors to retake a prisoner if the first arrest was illegal, as by the warrant having been filled up after being sealed. 1 East, P. C. 324.

Necessity of notification and demand before entering.

The early text-writers lay down the rule that in every case there must be a notification of his business by the officer and a demand and refusal of admission before he can force his way into houses to make arrests. *Foster*, 320; 2 Hawk. P. C. chap. 14, § 1; *Russ. Crimes*, 7th ed. p. 628.

Whether, in the cases of felony, the officer must first demand entrance has been doubted, but in misdemeanors it is considered requisite. *Wharton. Cr. Law*, 7th ed. § 2369; *Crocker, Sheriffs*, 2d ed. § 63.

The better opinion seems to be that, in cases of felony, no demand of admittance is necessary especially as in many cases the delay incident to it would enable the felon to escape. *Murren, Sheriff*, 2d ed. § 163.

In *Launock v. Brown*, 3 Barn. & Ald. 692, Abbott, Ch. J., said: "It is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand before you could justify breaking open the outer door of his house; because I am clearly of the opinion that, in the case of a misdemeanor, such previous demand is requisite." This doctrine is followed in *McLennon v. Richardson*, 15 Gray, 74, 77 Am. Dec. 368.

An officer holding a warrant against one charged

with a misdemeanor, whom he believes to be within the house of a stranger, after a demand and refusal of admittance, may enter by force, nor can he be treated as a trespasser by the owner although he did not inform the latter who the person was that he sought when the owner made no inquiry, if such owner knew that he was an officer with a warrant seeking to arrest a person believed to be in his house. *Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510.

In some cases a demand is treated as requisite without it appearing what the grade of the offense is for which an arrest is sought to be made. *Barnard v. Bartlett*, 10 Cush. 501, 57 Am. Dec. 123; *Jacobs v. Measures*, 13 Gray, 74; *Com. v. McGahay*, 11 Gray, 194.

The sheriff having criminal process for the arrest of a person may without demand for admission enter and search such person's dwelling, although it belongs to and is also occupied by another, whether the person sought be actually therein or not. *Hawkins v. Com.* 14 B. Mon. 395, 61 Am. Dec. 147.

It does not appear in this case whether the offense for which an arrest was sought to be made was a felony or misdemeanor, and the opinion makes no distinction. The court says, p. 397: "The fact that the house entered and searched is at the time the place of the dwelling of the defendant in the writ gives sufficient warrant to the sheriff, though it be not known to him certainly whether the defendant be or not then in the house or be found therein, and the law does not require that the officer should first signify his business and demand admission before entering and searching; for such disclosure of his purpose, and demand of entrance, would in many cases defeat the very object in view, by giving the offender notice of his danger and an opportunity of effecting his escape." J. G. G.

But he cannot, without a warrant, arrest a man for an affray or breach of the peace out of his view, unless it embrace a felony. This subject is fully discussed in Wharton, *Crim. Pl. & Pr.* §§ 5-8, and the cases are there collected. The boundaries of this official power seem to be clearly defined and distinct, and definite limits placed upon its exercise. No case or text-writer asserts of this office the power to go into or through a private house unbidden by the owner, save it be in the execution of criminal process, or where there is a well-founded belief of crime, and the officer goes in pursuit of the criminal, or where in such house there is evidence that a felony or breach of the peace is being committed. No one in this country, I think, before this case, ever asserted the right of a public officer to go through the private apartments of a family against the will of the owner to search for the existence of evidence of an infraction of a public law. Such a right, if it existed, would, in my judgment, create more public disorder than it could by any possibility repress.

It is said, however, that, admitting that such a right does not inhere in these officers under the doctrine of the common law nor general statutes controlling the subject, in this case there is such broad and extended power given that it embraces the right that these parties set up. Before it should be held that these officers or any others, acting in a ministerial capacity, or as conservators of the peace, are clothed with a power so comprehensive, the words of the law from which it is supposed to be derived should be such as to admit of no other possible construction. When such a law appears, it will be time enough to consider whether or not it infringes upon those fundamental rights of personal security and private property lying at the very foundation of organized government. The Act invoked in support of this claim of the plaintiffs in error does not, in my judgment, go any way towards the maintenance of their position. First, they are given the rights and powers of constables in criminal cases. These rights and powers are well defined, and, as has been shown, embrace within them no such claim. Next, they are given power to arrest persons who have violated any law of this state within the county, or who have willfully interfered with the peace and good order of the county, and then proceeds: "And the said marshal shall arrest every such person without warrant and indorsement, and bring him or her, as soon as conveniently can be, before some person exercising the duties of justice of the peace in criminal cases, to be dealt with according to law." In my judgment, this Act, when properly construed, will be found not to have extended the power of these marshals beyond those that are ordinarily exercised by other peace officers of the state. It is not to be presumed that the Legislature has done so, or intended to do so, and made exceptional provisions in favor of this peculiar class. Whom are they to arrest? Persons found within the limits of the county, who shall have violated any law of this state within

the county. What sort of a law is here intended as having been violated? It is a violation of law to commit a trespass upon one's land; the driving a wagon over the public highway of a less width than the statute demands is the violation of a law; to pursue any worldly business or pleasure or traveling on the first day of the week commonly called Sunday, is the violation of a law of this state. Is it this class of laws for the violation of which these officers are authorized to take up and arrest without warrant? Clearly not. It is the violation of some criminal law that is intended. And how are these officers to know that the law has been violated? Because, the law must have been violated in order that they may arrest. They have no power to take testimony; they do not sit as committing magistrates. How, then, can they know it? Only by its having taken place in their presence. In cases of this kind, the constable has power to arrest for an offense committed against the public law in his presence, provided it is in other language of the Act, "An act that interferes with the peace and good order of the county." That it is to be a criminal act, that interferes with the peace and good order of the county, is manifest from the further provision of the law that the offender is to be taken immediately before a justice of the peace having jurisdiction in criminal cases, there to be dealt with according to law.

The whole frame of this section of the Act plainly shows that the Legislature intended to express the possession of that degree of authority which, in common understanding, and under the doctrines of the common law, is possessed and exercised by these officers. It was not intended to confer upon them any such extraordinary powers. If the words are to be taken in their broad scope, they embrace every act that is violative of law, whether the redress for such act be of a civil or of a criminal nature. It would be absurd to yield to any such notion. It is said that the plaintiffs in error went in to make an arrest for a breach of the criminal law. But what breach of the criminal law was it for which they meant to arrest the guilty party? They did not know that the law was violated. At best, it was a mere suspicion. And, while they say they went in with the purpose of arresting any person that they might find violating the law, it would be an abuse of terms to say that their purpose in entering was to arrest a criminal. They knew of none such. Beyond mere suspicion, they were ignorant of any criminality. To cast aside all disguise of words, their purpose was to hunt through this house, looking for evidence to justify their suspicion, and this against the will of the owner, and against his resistance. This they had no right to do, and if they attempted it by force, and in doing so committed any violence against the person of the owner or of those acting in his interest, they were undoubtedly guilty of criminal assault. There is no pretense that previous to their act of violence there was any breach of the peace, or noise or turbulence, nor

was the person of any one threatened or endangered. Their power to arrest without warrant, where the public peace and good order of the county are interfered with, did not exist. The antitheses of public peace and order are violence and turbulence.

But it is said they went to abate a public nuisance. Whence did the power arise by which these officers could determine the fact of public nuisance, and upon such determination of their own proceed to abate it? Public nuisances are subjects of indictment, to abate which a public officer must have the judgment and order of the court. No man is given the power, upon his mere individual judgment, to undertake to so redress a public wrong. There is nothing in the case tending to show a right, as private citizens, to abate the alleged nuisance, under the well-settled doctrine on that subject. *Brown v. De Groff*, 50 N. J. L. 409, 12 Cent. Rep. 818. Unless we are willing to hold that the domicile of every citizen against whom these officers have a suspicion may be invaded by force, and their houses ransacked to find evidence justifying their suspicion, their action in this case must be disapproved.

The judgment below is affirmed.

NOTE BY JUSTICE MAGIE.

This opinion was found among the papers of the late *Mr. Justice Knapp*, to whom its preparation had been intrusted. It is known to his associates that he had intended to add some new matter to it. But it has been thought best to publish the opinion as it is, and to place in its note the matter which it is understood was intended to be added.

The closest parallel to the claim of plaintiffs in error, that a public officer may lawfully break open a house, or, being lawfully therein, may break into rooms, to discover evidence of the commission of a crime, will be found in those cases which arose in England shortly before the separation of this country, respecting the publication of seditious libels in the North Briton Monitor and other periodicals. In those cases the secretary of state issued general warrants, directing the arrest of the authors and publishers of such libels, (without naming them,) and the search and seizure of their papers. Messengers, to whom the warrants were directed, arrested and confined a large number of persons, and broke into rooms and desks, examined and seized their private papers, and delivered them to a clerk of the secretary of state. Many of those who were thus treated brought actions of trespass against the messengers, and recovered substantial damages. Upon motions in arrest of judgment or for a new trial or otherwise, questions involving the validity of such warrants, and the authority of messengers, were considered in the king's bench and in the common pleas. *Money v. Leach*, 1 W. Bl. 555; *Huckle v. Money*, 2 Wils. K. B. 205; *Beardmore v. Carrington*, 2 Wils. K. B. 244; *Entick v. Carrington*, 19 How. St. Tr. 1070, 2 Wils.

K. B. 275; *Wilkes v. Wood*, 19 How. St. Tr. 1154. In *Money v. Leach* the king's bench, without determining the question of the authority of the secretary of state to issue any warrant, decided that his warrant, not naming or particularly describing the person to be seized, was wholly void, and sustained a verdict in favor of Leach, who had been arrested on such a warrant. In *Huckle v. Money* a similar warrant came in question, under which Huckle, a journeyman printer, had been arrested. A verdict for exemplary damages was sustained in the common pleas, Lord Chief Justice Platt saying of the action of the jury: "I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition." In *Entick v. Carrington* the warrant in question expressly directed the apprehension of Entick, and also the seizure of his papers. In his action against the messengers, Entick confined his claim for damages to the trespass committed by breaking into his desks and boxes, and examining and seizing his papers. In the report of the case in the state trials, Lord Chief Justice Camden thus deals with the claim that a search in a suspected person's papers could be justified as a means of detecting offenders by discovering evidence: "Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. . . . In the criminal law, such a proceeding was never heard of. . . . It is very certain that the law obligeth no man to accuse himself because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it would seem that search for evidence is disallowed upon the same principle. There, too, the innocent would be confounded with the guilty." The report of the same case in 2 Wils. K. B. contains the decision of the common pleas upon a special verdict, and, after two solemn arguments, it was determined by the whole court that there was no jurisdiction in the secretary of state to grant a warrant "to break open doors, locks, boxes, and to seize a man, and all his books, etc., in the first instance, upon an information of his being guilty of publishing a libel." From these cases it is clear that the common law did not admit of the invasion of private property, even under color of a warrant, for the purpose of procuring evidence of crime. *A fortiori* such an invasion without warrant was not justifiable. It does not necessarily follow that the Legislature may not, with proper restrictions, authorize such invasion of private property to procure evidence of crimes difficult otherwise to detect. This question *Justice Knapp* in his opinion has distinctly reserved from decision.

ILLINOIS SUPREME COURT.

SHELBYVILLE WATER CO., *Appl.*

PEOPLE of the State of Illinois, *ex rel.*
Ambrose M. CRADDICK, County Col-
lector.

(.....III.....)

1. The water mains and electric wires of a water and light company are personal property for purposes of taxation.
2. Failure to enter opposite the name of a personal tax delinquent the cause of failure to collect the same and make oath as to the truth of such cause and that the taxes remain unpaid, as required by Rev. Stat. 1891, chap. 120, § 170, may be corrected by amendment of the record at the hearing of a proceeding to collect the taxes out of real estate, under section 191 of that Act, which provides for supplying omissions of tax officers.
3. Where the statutes make real estate liable for taxes levied on personal property when they cannot be made out of the personalty, and direct the collector to select real estate for that purpose when it becomes necessary, it will be presumed when the books show charges of unpaid personal taxes against land that they were necessary because the taxes could not be made out of personalty although it is not so stated on the return.

(March 26, 1892.)

APPEAL by defendant from a judgment of the County Court for Shelby County holding its real estate liable for the payment of taxes which had been assessed as personal-property taxes. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. William Lloy and William C. Kelley for appellant.

Messrs. W. B. Townsend and Moulton, Chaffee & Headen for appellee.

Magruder, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of the county court of Shelby county, rendered at the May Term, 1891, against delinquent lands, including certain lots and acre property belonging to the appellant company. The company appeared and filed objections, which were overruled, and exception was taken. Judgment was rendered against the lots of appellant in the original town of Shelbyville for a certain sum as personal property taxes, penalties, and costs, and against ten acres of appellant in said county for a certain other sum as personal property taxes, penalties, and costs. The two assessments of personal property taxes were made on the water mains and pipes and hydrants, and also upon the electric wires and lamps and poles, of the appellant, a part of which are in school-district No. 2, and a part in school-district No. 1, the latter com-

prising the city of Shelbyville. The appellant has erected, upon its land adjoining said city, a building and works, containing the necessary machinery for supplying the city with water, and for producing and furnishing electric light. The water-mains and electric wires are connected with the machinery. The mains are imbedded in the earth, and extend from the works for some distance on the company's land, and thence through the streets of the city, by permission of its authorities, under ordinances passed for that purpose. Fifty hydrants, standing each about three feet above the ground, are fixed to and form a part of the mains. The water is drawn by the machinery from a river, and forced by the engines into the mains and pipes. The wires also extend through the city from the dynamo and power engine in the building. Attached to them are thirty electric lamps. The wires, and the pole on which they are strung, beyond the land of appellant, are also upon the streets of the city by permission of the authorities expressed in city ordinances.

The first objection is that these mains and wires are a part of the realty, and were therefore improperly assessed as personalty. By express provision of our Revenue Act, gas mains and pipes laid in roads, streets, or alleys are declared to be personal property, and are required to be listed and assessed as such. Rev. Stat. chap. 120, § 16; 2 Starr & C. Stat. p. 2084. No such provision, however, exists in regard to water-mains or electric poles and wires. There are authorities which hold that the mains of a gas company are appurtenant to its lots, and are taxable as realty, unless it is otherwise provided by statute. *Capital City Gas-Light Co. v. Charter Oak Ins. Co.* 51 Iowa, 81; *Providence Gas Co. v. Thurber*, 2 R. I. 15. Under the doctrine of such authorities, it would seem that water-mains and electric wires should be assessed as part of the realty, where there is no statutory provision directing otherwise; and in Iowa such water-mains have been held to be real estate, and treated as appurtenances to the water-works. *Appeal of the Des Moines Water Co.* 48 Iowa, 324.

There are other authorities, however, which hold that gas-mains in the streets of a city are personalty. In *People v. Brooklyn Bd. of Assessors*, 89 N. Y. 81, it was said: "These mains, running under the streets of the city, not being erected upon or affixed to the relator's land, cannot be regarded as real estate, under the statute, for the purpose of taxation. The mains are not 'real estate,' as that term is defined in the statute regulating the assessment of taxes, and I do not think they can be held as fixtures, under the common doctrine upon that subject." In *Memphis Gas-Light Co. v. State*, 6 Coldw. 810, 98 Am. Dec. 452, the Supreme Court of Tennessee says: "It is insisted that the

NOTE.—For a case holding that the mains, pipes and hydrants of a water company are to be assessed as part of its real estate, and a note showing 16 L. R. A.

the course of the decisions on the subject, see *Oskaloosa Water Co. v. Oskaloosa Board of Equalization* (Iowa) 15 L. R. A. 226.

pipes used for conveying the gas manufactured to the consumers, and laid down, not upon the land of the company, but through and under the public streets of the city, are not a part of the manufacturing establishment. Pipes laid through the streets of the city in the manner above mentioned, by permission of the corporate authorities, do not become the property of the city or a part of the realty. They are personal property, and the property of the company." So far as the application of this doctrine is concerned, there is no difference between the mains and the wires. In this conflict of authority we are inclined to hold that these mains and wires are personalty, as this view is in harmony with the spirit, if not the letter, of our own statutes, and with the tone of our own decisions. In *Johnson v. Roberts*, 102 Ill. 655, it was claimed that certain machinery in a building had been improperly assessed as personal property, because the engines and boilers were permanently attached to and were a part of the realty; and we there held that, although the engines and boilers would be regarded as permanent fixtures and part of the realty at common law, and as between grantor and grantee, yet that the Legislature has the power to declare personal property to be realty, and realty to be personal property, for the purposes of taxation; that it had changed the rule so far as the facts of that case were concerned; that the engines and boilers, though attached to the realty, were to be treated as personalty under the twenty-fifth section of the Revenue Act, which mentions "every steam-engine, including boilers and the value thereof," as the sixth item in the schedule of personal property. 2 Starr & C. Stat. p. 2086. The evidence in the case at bar shows that the machinery in appellant's building, used for forcing water into the mains and furnishing electric light to the city, "consists of two Worthington pumping engines, two tubular boilers, one New York safety high-speed power engine, and one electric dynamo and fixtures." The mains and wires, being directly connected with these engines and boilers, which are personal property for the purposes of taxation under the doctrine of the *Johnson Case*, can as well be held to be a part of the machinery as of the realty to which the machinery is attached. If they are a part of the engines and boilers with which they are connected, they may, like such engines and boilers, be regarded as personal property for the purposes of taxation. In *Com. v. Lowell Gas-Light Co.*, 12 Allen, 75, it was held that the gas mains and pipes, laid down in the streets for the purpose of distributing gas to the consumers, constituted a part of the machinery in operation at the gas-works. So, also, in *Memphis Gas-Light Co. v. State*, *supra*, it was held that the pipes were a part of the apparatus for the delivery of gas to the consumers; that the delivery was as much within the purpose of the creation of the gas company as the manufacture; that the apparatus for delivery was merely an extension and continuation of the apparatus for manufacture; and that both belonged to

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the manufacturing establishment. In the present case the water-mains and electric wires are a part of the apparatus for the delivery of water and light to the inhabitants of the city, and, as such, constitute a part of the machinery, including the engines and boilers, which is located in appellant's building. We think that the mains and wires were properly assessed as personal property.

The next objection filed in the court below is that the said personal property taxes should not have been charged against the real estate, for the alleged reason that the town collector did not note in writing, opposite the name of appellant, "the cause of failure to collect the same," and did not make oath, and sign and enter upon the collector's book an affidavit, that the cause of delinquency noted was true and correct, and that such sums remained due and unpaid, and that he had used due diligence to collect the same. Rev. Stat. 1891, chap. 120, § 170; 2 Starr & C. Stat. par. 172, p. 2078. Upon the trial the court ordered the clerk to correct and supply the record; and thereupon the town collector was called, and entered upon his delinquent report or list, opposite appellant's name and opposite each amount of the total personal taxes, and under the head of "Remarks," the following words, "Refused payment, and no available property on which to levy." The town collector also made the oath, and attached to said list the affidavit provided for in said section 170. The action of the court in this regard was objected to and exception taken. We think the court was authorized to allow the record to be amended in the respect above indicated, under the provisions of section 191 of the Revenue Act. Rev. Stat. 1891, chap. 120, § 191; 2 Starr & C. Stat. par. 193, p. 2087. That section provides for amendments in judicial proceedings for the collection of taxes; and that no charge for any of said taxes shall be illegal on account of any irregularity in the tax-lists; and that no informality not affecting the substantial justice of the tax shall vitiate or affect it; and that any irregularity in the tax-lists, or any omission of any officer connected with the levying of such taxes, may, in the discretion of the court, be corrected, supplied, and made to conform to law, etc.

A strict construction of section 170 would lead to the conclusion that the only cases of failure to collect the tax upon personal property which are contemplated by that section are "removal" or "insolvency" or some "error in the tax-book." Primarily, this section would seem to have special reference to the settlement of the town collector with the county collector. It is illogical to require that the insolvency of a party charged with a personal property tax shall be a prerequisite to a charge of such tax upon his land. If he owns land, he is not insolvent. Section 255 of the Revenue Act provides that "real property shall be liable for taxes levied on personal property, but the tax on personal property shall not be charged against real property, except in cases of removals, or where said tax cannot

be made out of the personal property." 2 Starr & C. Stat. par. 257, p. 2112. Sections 170 and 255 should be construed together. The latter is broad enough to include other causes for a failure to collect the tax upon personal property besides insolvency. In the present case the proof shows that the town collector made a demand upon appellant about February 1, 1891, for the payment of the taxes upon its personal property; that appellant made no objection to the taxes, nor denied its liability therefor, but asked for as much time as possible, and was given until March 20, 1891, promising that payment would be made at that time; that a second demand was made about March 20, and payment was refused. If it was not then too late to make a levy, it is doubtful whether it would have been advisable to levy upon the water-mains under the streets and the electric wires over the streets, in view of the interest which the public had in both the water and the light thereby supplied. The books of the town and county collectors showed the amount of these personal taxes, and that they were unpaid, and showed the particular parcels of land against which they were to be charged. Section 188 of the Revenue Act provides that, "when it becomes necessary to charge

the tax on personal property against real property, the county collector shall select for that purpose some particular tract or lots of real property owned by the person owing such personal property tax," etc. 2 Starr & C. Stat. par. 185, p. 2082. The officer will be presumed to have done his duty. *Job v. Tabbetts*, 10 Ill. 832. Inasmuch as the books of the collectors, when introduced in evidence by the company itself, showed the charge of unpaid personal property taxes against particular parcels of land, it will be presumed that such charge had become necessary, because the tax could not be made out of personal property. Therefore the amendment allowed by the court merely stated what the law presumed without an amendment. Some other objections are made, but we do not deem them of sufficient importance to justify any further discussion. A careful consideration of them has led us to the conclusion that they have reference to such mere irregularities in the proceedings as do not affect the substantial justice of the tax, and consequently are cured by the provisions of said section 191.

The judgment of the County Court is affirmed.

MINNESOTA SUPREME COURT.

E. H. EIDAM, *Respt.*,
v.

Andrew J. FINNEGAN *et al.*, *Appls.*

(.....Minn.....)

*1. A stipulation by an attorney that the action shall abide the event of another action

*Head notes by GILFILLAN, *Jr.*

pending binds his adult clients, unless it be improvidently, fraudulently, or collusively made.

2. But such stipulation does not bind an infant party unless approved and ratified by the court upon a showing that it is for the interest, or, at least, not prejudicial to the interest, of the infant. It must appear that the matters in controversy in the two actions, so far as affected the infant, are precisely the same, and that

NOTE.—Control of guardian *ad litem* or next friend over the action.

A guardian *ad litem* will not be permitted to do any act, or make any admission, or enter into any agreement or stipulation which tends in any degree to prejudice or compromise the infant's rights. *Revely v. Skinner*, 38 Mo. 98.

The guardian *ad litem* of an infant plaintiff has no authority to bind the infant by a settlement of the action unless made with the express sanction of the court. *Edrall v. Vandemark*, 39 Barb. 569. The court said, p. 569: "The authority conferred upon him is to prosecute, not to settle, to obtain for the infant an adjudication as to his rights—not to barter away those rights in such manner as the guardian may choose." To the same effect is *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

The next friend of a lunatic has no power to compromise a suit brought by him as such, without the approval of the court. *Clark v. Crout*, 34 S. C. 417.

While it may well be considered to be within the official duty of the next friend of an infant plaintiff to negotiate a fair adjustment of the action without subjecting the plaintiff to the expense and risk of a trial, still, a settlement of the action of an infant by a next friend, unless sanctioned by the court or affirmed by entry of judgment in regular course, is invalid, and cannot be shown in bar of the action, nor can admissions made by the next friend in the negotiation for such settlement be

proved on the question of damages. *Tripp v. Gifford* (Mass.) Nov. 30, 1891.

A guardian *ad litem* cannot bind his ward by a submission of the matters in litigation to arbitration and approval of the award of the arbitrators. *Fort v. Battle*, 18 Smedes & M. 128; *Hannum v. Wallace*, 9 Humph. 129.

A next friend has no right to submit the case of an infant plaintiff to arbitration. *Tucker v. Dabbe*, 12 Heisk. 18.

But the defendant cannot object to the award because of the plaintiff's infancy. *Ibid.*

A *prochein ami* has no right to compromise, or to receive the money due upon a judgment recovered by him in the name of an infant. *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425.

The money must be paid only to a qualified guardian, or, if there be no such guardian, it should remain in court until such guardian qualifies or the minor becomes of age. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32.

One acting as a next friend for an infant in litigation has no authority to bind the infant by a contract for attorney's fees. *Houck v. Bridwell*, 28 Mo. App. 644.

A guardian *ad litem* cannot make a contract with an attorney for compensation that will deprive the court of the power to fix such compensation at a reasonable amount. *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 73.

he is represented in the two actions by the same guardian *ad litem*.

3. Judgment reversed as to the minor defendants, and affirmed as to the others.

(January 18, 1892.)

APPEAL by defendants from a judgment of the District Court for Hennepin County in favor of plaintiff in an action brought to determine adverse claims to certain real estate. *Modified.*

The facts are stated in the opinion.

Mr. Edward Savage, for appellants:

The court had no power to render a judgment against infant defendants upon the stipulation.

It is a primary rule that no guardian or attorney can stipulate away in court the rights of infants. No judgment can be given against infant defendants without legal proof of the facts constituting a cause of action.

Mills v. Dennis, 8 Johns. Ch. 387, 388, 1 L. ed. 651; *Peak v. Pricer*, 21 Ill. 164, 165; *Edsall v. Vandemark*, 39 Barb. 589, 599; *Howell v. Mills*, 58 N. Y. 822, 835; *Varner v. Rice*, 44 Ark. 236, 244; *Pillow v. Sentelle*, 89 Ark. 61, 65; *Newins v. Baird*, 19 Hun, 806, 807; *Hough v. Doyle and Hough v. Canby*, 8 Blackf. 800, 801; *Richards v. Richards*, 17 Ind. 636, 638; *Thayer v. Lane*, Walker, Ch. 200, 204; *Cooper v. Mayhew*, 40 Mich. 528; *Long v. Mulford*, 17 Ohio St. 484, 98 Am. Dec. 638, 646; *Bank of United States v. Ritchie*, 33 U. S. 8 Pet. 128, 145, 8 L. ed. 890-897; *Leyard v. Sheffield*, 2 Atk. 377; *Revely v. Skinner*, 38 Mo.

98, 100; *Litchfield v. Burwell*, 5 How. Pr. 341; *McClure v. Farthing*, 51 Mo. 109; *Ulery v. Blackwell*, 3 Dana, 300; 9 Am. & Eng. Encyclop. Law, pp. 156, 157.

An agreement to let the result of one action determine the result of another is neither itself a "proceeding in an action" (*i. e.* an ordinary matter of practice in conducting the case), nor is it made in such a proceeding, nor does it purport or attempt "to bind clients in any of the proceedings in an action." It is an agreement or bargain outside of the action altogether, and hence is not binding on any of the defendants.

1 Am. & Eng. Encyclop. Law, p. 956; 2 U. S. Dig. (1st series) pp. 346, 349.

Mr. John H. Steele, for respondent:

Section 9, chapter 88, Gen. Stat. 1878, gives the attorney authority "to bind his client in any of the proceedings in an action or special proceeding by his agreement, duly made or entered upon the minutes of this court.

To determine, then, whether an agreement by the attorney in the name of his client is binding on the latter, it is only necessary to inquire if it be a proceeding in the action. If it be, then it is binding, however disadvantageous it may be to his client.

Bray v. Doheny, 39 Minn. 355; *Brigham v. Winona County Suprs.* 6 Minn. 136.

Admissions of attorneys of record bind clients in all matters relating to the trial or progress of the cause.

Rogers v. Greenwood, 14 Minn. 833, citing 1 Greenl. Ev. §§ 27, 186, 205, 206.

A judgment against all the defendants, entered under a stipulation between the attorney for the plaintiff and certain adult defendants, that it should be in accordance with the decision in another case, should be set aside upon the application of the infant defendants. *McClure v. Farthing*, 51 Mo. 109.

In the last case the court said: "It is unnecessary to say that when there are several actions pending between the same parties, involving precisely the same facts, the guardian may not agree to submit the whole upon a single examination of witnesses, or, which is in effect the same thing, that the decision of one shall decide the whole. Such an agreement may be consistent with his duty, but that is not this case."

The guardian *ad litem* has no power to waive the production of legal proof nor to consent to judgment without it, nor can he consent to the use of that as evidence which the law does not recognize as such. *Litchfield v. Burwell*, 5 How. Pr. 341; *Crotty v. Eagle*, 35 W. Va. 143.

In Missouri a guardian *ad litem* in partition suits has, by virtue of statute, authority to bind his ward by stipulation in the nature of a waiver of proof. *Le Bourgeois v. McNamara*, 32 Mo. 139.

A guardian *ad litem* for an infant defendant in a partition suit has no right to enter into an arrangement by which the property is bid off for less than its value, whatever advantages to the infant are thereby contemplated. *Howell v. Mills*, 58 N. Y. 822, 827, 835.

A guardian *ad litem* has no power to execute a release to a proposed witness for the purpose of making him competent by discharging his interest. *Walker v. Ferrin*, 4 Vt. 523.

After issue joined a guardian *ad litem* for an infant defendant can control the due and orderly management of the action. He can accept short 16 L. R. A.

notice of trial, but can admit nothing to sustain the action. *Newins v. Baird*, 19 Hun, 806.

Since, under Cal. Civ. Code, § 795, the general guardian has authority to appear for minors in an action for partition, he may consent to the appointment of the single referee authorized by section 797. *Richardson v. Loupe*, 80 Cal. 490.

A consent by the next friend or guardian *ad litem* that a case be heard in a particular division of the Supreme Court of Illinois did not prejudice the substantial rights of the infant, although in the absence of consent the supreme court sitting in one division cannot take cognizance of a case from another division. *Kingsbury v. Buckner*, 124 U. S. 650, 33 L. ed. 1047.

Consent to take up a case for trial that has been fixed for a different day is not such a consent as will vitiate a judgment, although a minor represented by a special tutor be a party thereto. Succession of *Byrne*, 38 La. Ann. 513.

The rule that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. *Kingsbury v. Buckner*, 124 U. S. 650, 33 L. ed. 1047.

A statutory provision requiring ten days' notice for the suing out of a commission to take depositions might have been waived by a guardian *ad litem* or next friend without the imputation upon him of fraud or collusion; nor are fraud and collusion to be imputed to him because he did not, after his appointment, file cross-interrogatories, when cross-interrogatories were filed by another party and were of the most searching character. *Ibid.*

J. G. G.

Without the aid of any such statute as ours, where the plaintiffs in a number of suits are all represented by the same attorney, the attorney has the power without being specially authorized to stipulate that one of those suits abide the event of another.

North Missouri R. Co. v. Stephens, 36 Mo. 150; *Ohlquest v. Farwell*, 71 Iowa, 231.

Gillilan, Ch. J., delivered the opinion of the court:

In this action, brought under the statute to determine adverse claims to real estate three of the defendants are minors. A guardian *ad litem* for them was seasonably appointed, and the defendants, appearing by the same attorney, answered jointly. After the issues were made, the attorneys for the "respective parties made a stipulation in writing that the action abide the event of another action, which had been tried in the district court, and was then pending on appeal in this court. Final judgment having been rendered in the action referred to, the court, on motion of the plaintiff, directed judgment to be entered for plaintiff pursuant to the stipulation, and from the judgment so entered all the defendants, adults as well as minors, appeal to this court. In the stipulation the plaintiff's name was spelled "Eidam" instead of "Eidam." That would not be a misnomer in any case, but it would not matter if it were, for the court, before acting on the stipulation, could ascertain if it was intended to be one in this case. There can be no doubt it meant that judgment should be entered in this case according to the decision in the action referred to. According to the decisions of this court, such a stipulation made by the attorneys would bind the adult clients, subject to the power of the court to set it aside or disregard it, if improvidently, fraudulently, or collusively made. *Bingham v. Winona County Suprs.* 6 Minn. 136; *Rogers v. Greenwood*, 14 Minn. 333; *Bray v. Doheny*, 39 Minn. 355. There is no suggestion that this stipulation was obnoxious to such an objection. Nothing is called in question but the authority to make it on behalf of the minor defendants. It was therefore valid as to the adult defendants.

While it is true, as a general rule, that an attorney may bind his client by such a stipulation as this, it does not follow that the attorney employed by a guardian *ad litem* to represent the minor defendants may do so. The authority of the attorney cannot be greater than that of the guardian who employs him. It is necessary, therefore, to consider what is the authority of the guardian. The statute regulates the appointment of guardians *ad litem*, but does not define their powers. When appointed for an infant defendant, it is to defend the interests of the infant in the action. Some of the decisions limit his power so as practically to deprive him of all discretion or exercise of judgment in conducting the defense. Thus it has been held that the answer made by the guardian should be a full defense, specifically denying the material allegations, without regard to the truth of the denials as to any-

thing which may be prejudicial to the minor (*Varner v. Rice*, 44 Ark. 286; *Pillow v. Sentella*, 39 Ark. 61; *Brenner v. Bigelow*, 8 Kan. 496;) that he cannot waive any rights of the minor (*Cartwright v. Wise*, 14 Ill. 417; *Litchfield v. Buricell*, 5 How. Pr. 341; *Howell v. Mills*, 53 N. Y. 322;) nor make admissions either in the answer or for the purpose of the trial. *Ashford v. Patton*, 70 Ala. 479; *Quigley v. Roberts*, 44 Ill. 503; *Tucker v. Bean*, 65 Me. 352; *Newins v. Baird*, 19 Hun, 306.

The decisions we have cited, though they are extreme and go further than we would be willing to go, are in line with all the authorities, and accentuate the proposition that the relation between the guardian *ad litem* or the attorney whom he employs and the infant defendant is not the same as that between an attorney and an adult client. We would not be willing to assent to the proposition that a guardian *ad litem* or the attorney may not, in good faith, exercise discretion or judgment in the conduct of the cause. As our system of pleading does not provide any form of answer or verification by a guardian *ad litem* different from that for any other defendant, we do not think an answer by the guardian can be condemned merely because it does not deny material allegations in the complaint. Nor can we admit that concessions or admissions such as an ordinarily made in the progress of a cause, and which are entirely consistent with good faith, and which it is frequently for the interest of a party to make, may not be made by the guardian. To hold otherwise would impeach any trial in which the guardian or attorney omitted to make objections to evidence or proceedings in the trial which he might have made. So in *Re Hawley*, 100 N. Y. 206, 1 Cent. Rep. 287, and in *Re Tilden*, 98 N. Y. 434, it was held that a decree allowing the accounting of an executor could not be vacated on the application of a minor interested in it, and represented by a guardian *ad litem*, on the ground that items in the account ought not to have been allowed, nor upon any other ground than such as would have been available to an adult. And in *Reed v. Reed*, 46 Hun, 212, it was held that a judgment in partition could not be assailed, though in the same action, on the ground that the guardian *ad litem* might have objected, but did not, that the plaintiff had not such interest as entitled him to bring the action. The adult parties to an action have rights in it as well as the parties who are minors. The former are not to be made, without their consent, the guardians to protect the rights of the latter. It is for the court to see that the rights of the minors are protected. This duty it performs by appointing a proper person as guardian in a manner provided by law, and by the exercise, whenever necessary, of its right of supervision and control over the acts and conduct of the guardian thus appointed. In the exercise of this control the court may set aside or disregard acts or concessions of the guardian which have not already passed its scrutiny, and which, though fair on their

face, are shown to the court to have been improvidently or fraudulently done or made. And it may and ought to set aside or disregard such acts or concessions as apparently waive or surrender any material right of the minors, such, for instance, as the right to a trial, unless they be shown to be beneficial, or, at any rate, not prejudicial to the rights and interests of the minor. The power of supervision and control over the guardian includes the right to accept and act upon what he has done, or, if proper protection to the interests of the minor requires it, to reject and disregard what he has done. It is a matter for the court in which the action is pending, and no other. It may commit error in the matter; for instance, it may assume to be binding on the court an act, admission, or stipulation of the guardian which it ought to set aside or disregard. In this case the stipulation in effect waives a trial, and it could not be taken as binding and acted upon until the court approved and ratified it, upon a showing that it was not prejudicial to the interest of the minor defendants. Such a stipulation might well be not only not prejudicial, but actually beneficial, to them. For instance, suppose several actions by different plaintiffs against the same defendants, involving precisely the same matters of controversy. An agreement

that the others shall abide the event in one of them will save the useless cost and trouble of repeated trials. If there were in all of them the same guardian *ad litem* for the minor defendants, such a stipulation would put upon him the duty of adequately defending in the action specified the rights of the minor involved in each of the others, and we think the court might approve of that. It would be otherwise where there are different guardians in the action in which the stipulation is made and that specified in it, for that would be, in effect, to cast on another guardian the duty and burden belonging to the stipulating guardian. So far as the record in this action shows, the facts requisite to justify the court in ratifying the stipulation and ordering judgment upon it did not appear. From the moving papers it does not appear with sufficient certainty that the matters in controversy in the two actions were, so far as concerned the minors, precisely the same, and there was no attempt to make it appear that the guardian in this was also the guardian in the other action.

For this reason it was error to order judgment against the minor defendants, Edward A. Finnegan, P. James Finnegan, and J. Henry Finnegan. *As to them the judgment is reversed, and affirmed as to the other defendants.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

William MINOT, Jr., *Appt.*,

v.

Augustus RUSS.

Charles HEAD *et al.*, *Appts.*,

v.

Henry HORNBLOWER *et al.*

(.....Mass.)

1. The drawer of a check who gets it certified in his own behalf or for his own benefit and then delivers it to the payee is not discharged, but continues liable where the bank fails before payment of the check.

2. If the payee or holder of a check gets it certified in his own behalf or for his own benefit instead of getting it paid, the drawer is discharged, especially where the certification amounts to an extension of the time of payment.

(June 20, 1892.)

APPEAL by plaintiff from a judgment of the Superior court for Suffolk County sustaining a demurrer to the complaint in an action brought to recover from the drawer the amount of a certified check which remained unpaid because of the failure of the bank. *Reversed.*

NOTE.—Effect of certification of check on liability of drawer.

The principal case very clearly states the law upon this question and brings out prominently the distinction which harmonizes the cases but which was overlooked for some time by the text-writers with the result of obscuring and throwing uncertainty into the question.

As long ago as 1851 it was held that if the holder of a check has it certified by the bank the fund represented by it is then in the condition of an ordinary deposit. *Willets v. Phoenix Bank*, 2 Duer, 132. See also *Girard Bank v. Bank of Penn Twp.* 39 Pa. 99, 30 Am. Dec. 507.

And in 1873, *Peckham, J.*, in delivering the opinion of the court in *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, said he knew of no direct authority upon the question but upon principle it must be held that when the holder presents the check and has it certified, the bank holds the money, not at the risk of the drawer but of the holder of the check.

16 L. R. A.

This doctrine is recognized and cited in argument by the United States Supreme Court in *Washington First Nat. Bank of Washington v. Whitman*, 94 U. S. 343, 24 L. ed. 230. See also *National Commercial Bank v. Miller*, 77 Ala. 174.

And in *Thomson v. Bank of British North America*, 52 N. Y. 6, *Rapallo, J.*, said in argument that ordinarily where the payee or holder of a check instead of demanding payment procures the check to be certified it is as between drawer and holder regarded as paid.

By having the check certified the holder makes the risk of the bank's failure his own. *French v. Irwin*, 4 Bart. 401, 27 Am. Rep. 769.

At the same time that the above decisions were being rendered there was a line of authority being established to the effect that if the drawer of the check has it certified before he issues it, the certification does not relieve him from liability. *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 236, 39 Am. Dec. 436.

This was followed by *Rounds v. Smith*, 42 Ill.

APPEAL by plaintiffs from a judgment of the Superior Court for Suffolk County in favor of defendants in an action brought to recover from the drawers the amount of a check which plaintiffs had taken and had certified and which remained unpaid because of the failure of the bank. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank Brewster for Minot, appellant.

Mr. William C. Loring for Head *et al.*, appellants.

Mr. F. R. Jones for Russ, appellee.

Messrs. M. & C. A. Williams for Hornblower *et al.*, appellees.

Field, Ch. J., delivered the opinion of the court:

The first case is an appeal from a judgment rendered by the superior court for the defendant on his demurrer to the declaration. The defendant on October 29, 1891, drew a check on the Maverick National Bank payable to the order of the plaintiff, and, being informed by the plaintiff that the check must be certified by the bank before it would be received, the defendant on the same day presented the check to the bank for certification, and the bank certified it by writing on the face of the check the following: "Maverick National Bank. Pay only through clearing house. J. W. Work, Cashier. A. C. J., Paying Teller."

After it was certified the check was, on Saturday, October 31, 1891, delivered by the defendant to the plaintiff for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours of said day," and that on that day payment was duly demanded of the bank, and notice of nonpayment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the superior court on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their check on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The check was received too

late to be deposited by the plaintiffs for collection in season to be carried to the clearing house on that day, but during banking hours on that day the plaintiffs presented the check to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following:

"Maverick National Bank. Certified. Pay only through clearing house. C. C. Domett, A. Cashier. —, Paying Teller."

At that time the defendants had on deposit sufficient funds to pay the check, and the bank, on certification, charged to the defendants' account the amount of the check, and credited it to a ledger account called "Certified Checks," in accordance with their uniform custom. After certification, the plaintiffs on the same day deposited the check in the Hamilton National Bank for collection. It is agreed that if the check had been presented for payment on Saturday in banking hours it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the controller of the currency placed a National Bank examiner in charge, and the bank was put into the hands of a receiver. The clearing house on November 2d refused to receive checks on the Maverick National Bank, and the check was on that day duly presented for payment, and due notice of nonpayment was given to the defendants. Each of the checks was in the ordinary form of checks on a bank, and they were payable on demand, and no presentment for acceptance or certification was necessary to charge the drawer. In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense, also, it is a distinct commercial instrument, but according to the general understanding of merchants and according to our statutes these instruments were checks, and not bills of exchange. "A check is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money. No previous notice is necessary. No acceptance is required or expected. It has no days of grace. It is payable on presentment, and not before." *Bullard v. Randall*, 1 Gray, 603, 61 Am. Dec. 488. The duty of the bank was to pay these checks

25, in which there seems to have been a slight ground for distinction raised because it did not appear that the check had when certified been charged to the account of the drawer.

But this distinction was held to be immaterial in *Brown v. Leckie*, 43 Ill. 497, and it was there held that such fact would make no difference.

In *Larsen v. Breene*, 12 Colo. 484, it was held that a certified check is not a payment of the debt when it was certified at the instance of the drawer.

And in *Born v. First Nat. Bank of Indianapolis*, 7 L. R. A. 442, 123 Ind. 78, it was held that such acceptance is not *ipso facto* payment.

In *Andrews v. German Nat. Bank*, 9 Heisk. 223, 24 Am. Rep. 300, it is said to be a question for the jury whether or not such check is taken as absolute payment.

The distinction between the two classes of cases appears to have been first taken in *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 193, in which the court held that if a bank receives a check for

collection and accepts a certification of it by the bank upon which it is drawn in lieu of payment it thereby assumes the risk of payment and becomes liable to the owner for the amount of the check with interest from the date of the certification.

The distinction is broadly made by the Illinois Appellate Court in *Continental Nat. Bank of Chicago v. Cornhauser*, 37 Ill. App. 475. And the Supreme Court of Illinois in *Metropolitan Nat. Bank of Chicago v. Jones* (Ill.) 18 L. R. A. 492, decides that the certification of a check on the payee's application releases the drawer and expressly distinguishes the prior Illinois decisions on the ground that in them the certification had been made at the drawer's own request.

As bearing upon the general question it was held in *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933, 26 Am. Rep. 123, that certification of a check at the request of an indorser before delivery to the holder does not release the indorser's liability.

H. P. F.

when they were presented for payment if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the checks, although it could certify them if it saw fit, at the request of either the drawers or of the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But then the payee or holder of a check presents it for certification the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because instead of payment the holder desires certification that the bank certifies the check instead of paying it. In one case the bank certifies the check, for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present cases the checks were seasonably presented to the bank for payment, and on the facts stated the defendants would be liable unless the certification discharged them from liability. It is argued that the certification of a check, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the check then becomes, in effect, a certificate of deposit; and it is also argued that the certification is, in effect, only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank, and refused, and notice of non-payment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank check is not in all respects like the making of a certificate of deposit or the acceptance of a bill of exchange, but that it is a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf or for his own benefit, induces the

bank to certify the check. The weight of authority is that if the drawer, in his own behalf or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder in his own behalf, or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. *Born v. First Nat. Bank of Indianapolis*, 123 Ind. 78, 7 L. R. A. 442; *Brown v. Leckie*, 48 Ill. 497; *Rounds v. Smith*, 42 Ill. 245; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 800; *First Nat. Bank of Jersey City v. Leach*, 53 N. Y. 850; *Boyd v. Nasmith*, 17 Ont. 40; *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 193; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 848, 845, 24 L. ed. 229-231; *Metropolitan Nat. Bank v. Jones* (Ill. Sup.) 12 L. R. A. 492; *Continental Nat. Bank of Chicago v. Cornhauser*, 37 Ill. App. 475; *National Commercial Bank v. Miller*, 77 Ala. 168; *Larsen v. Breene*, 12 Colo. 480; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933, 26 Am. Rep. 126; *Morse, Banks*, §§ 414, 415.

We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified checks necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified, and then present them to the bank for certification instead of payment, so far as the drawer is concerned, the certification should be considered as payment. It may also be said that in the second case the certification amounted to an extension of the time of payment at the request of the payees without the consent of the drawers. Before the certification the drawers could have requested the payees to present the check for payment on Saturday, or could themselves have drawn out the money and paid the check. After certification the amount of the check no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing house, which could not happen before the following Monday.

The result is that *in the first case the judgment is reversed*, and the demurrer overruled; and *in the second case the judgment is affirmed*. So ordered.

WISCONSIN SUPREME COURT.

J. W. SIZER, *Appt.*,

v.

Patrick QUINLAN, *Respt.*

(.....Wis.....)

The right to fence a right of way is not given by a reservation in a deed of "a reasonable right of way across the land."

NOTE.—Brill v. Brill, cited in brief and opinion *supra*, seems to be the only case which furnishes any direct authority on the point involved in the principal case. Even that authority is in the *dicta* only. 16 L. R. A.

(May 24, 1892.)

APPEAL by complainant from a judgment of the Circuit Court for Fond du Lac County dismissing the complaint in an action brought to enjoin defendant from cutting down and destroying complainant's fence. *Affirmed*. The facts are stated in the opinion.

tained in the opinion. The decision was that a reservation in a deed of "a free ingress and egress across the above-described premises where the road now is" imposed no obligation on the grantees to

Statement by Pinney, J.:

The plaintiff, Sizer, is the owner of a tract of land on section 2, containing about 17 acres, and also of 40 acres of land on section 1, about 90 rods east of the former tract. The defendant owns a tract of land lying immediately between the plaintiff's two tracts, and both parties derived title from the same common grantor, who, in conveying to the defendant Quinlan, reserved "a reasonable right of way across the land" so conveyed, between the tracts retained by him and now owned by the plaintiff. These tracts the said common grantor subsequently conveyed to the plaintiff's grantor, together with the said right of way. The plaintiff fenced in this right of way to the width of one rod and a half with a wire fence, for the better and more advantageous enjoyment of it, and the defendant, denying his right to fence it in, cut and broke down the fence in part, and sawed off a large number of the posts situate on the premises over which the way passed, and threatened to cut, tear down, and destroy the remainder of the fence, against the will of the plaintiff. Whereupon the plaintiff brought this action to enjoin and restrain the defendant from entering upon the plaintiff's premises, and from interfering with said premises, or with the plaintiff, in any manner, so as to prevent him from a full and free use and enjoyment of the premises as aforesaid, and of the fences situate thereon. The defendant admits the existence of the alleged right of way over his said lands, and alleges that he has not denied and does not deny plaintiff's right to pass over it, but he denies that the plaintiff has any right to fence in or inclose such right of way on the sides thereof. The circuit court at the hearing was of the opinion that the right of way was an easement merely, and that the plaintiff had no right to fence it in, and gave judgment dismissing the complaint, from which the plaintiff appealed.

Messrs. Duffy & McCrory for appellant.

Messrs. Colman, Sutherland & Hiner, for respondent:

The reservation does not describe any particular strip or belt of land or locate or define the right of way. Nothing is reserved but a reasonable right of way.

Respondent therefore owns the fee, and appellant merely an easement.

Washburn, *Easem.* 2d ed., top. pp. 3, 216; Goddard, *Easem.* p. 73; *Cook County v. Chicago B. & Q. R. Co.* 85 Ill. 460, 464; *Hazleton v. Putnam*, 3 Pinn. 107, 54 Am. Dec. 158.

Respondent as owner of the servient tenement may use the same in any way not inconsistent with the enjoyment of the easement.

Goddard, *Easem.* p. 280.

A mere right of way cannot be fenced by the owner thereof.

Brill v. Brill, 11 Cent. Rep. 805, 108 N. Y. 511.

The numerous adjudications asserting the right of the owner of the servient estate to maintain gates at either end of a defined and established right of way are in harmony with the contention of the respondent.

Whaley v. Jarrett, 69 Wis. 618; *Short v. Devine*, 5 New Eng. Rep. 592, 146 Mass. 119; *Goddard, Easem.* p. 381.

Pinney, J., delivered the opinion of the court:

The right of way reserved by the defendant's grantor, and afterwards conveyed by him to the plaintiff with the lands to which it was appurtenant, created a mere easement. The language of the deed reserving it is "a reasonable right of way," and the common grantor of both parties conveyed it subsequently with the lands to which it was appurtenant as "the right of way across P. Quinlan's land." The plaintiff thus became the owner of the dominant estate for the benefit of which the easement existed, and the defendant's was the servient estate, burdened with the easement in question. It is argued that because the right granted is "a reasonable right of way," and it is necessary to as full and perfect enjoyment of it as is desirable, that, therefore, the plaintiff, for his greater convenience and safety in its use, has a right to fence it in; but we do not think the language in question warrants any such conclusion. The lateral boundaries and width of the way are not specified. The word "reasonable" obviously has reference to the width and limits of the way to be enjoyed but still it is a mere right of way, a mere easement, and no more, and, though a burden, is not an estate or interest in lands, and does not confer on the plaintiff any exclusive or permanent right of occupancy, but merely a transitory use. The defendant, as the owner of the servient estate, is circumstanced in respect to this easement substantially as the owner of an estate along or over which a highway passes is at common law in respect to fencing the highway. He may fence along the highway or not, as his convenience may dictate, but he is not bound to fence it, or to permit any one else to do so. If the plaintiff is allowed to fence in his right of way, it will work, it is manifest, an exclusion of the defendant from the land over which it passes, the full legal title to which still remains in him, which was not contemplated by the language used in the deed reserving the right of way or by the deed conveying it to the plaintiff, and would permit the plaintiff to exercise rights and avail himself of methods of use and enjoyment of the defendant's estate of a more permanent character than a mere right of way over his lands, and not essentially pertaining to or resulting from a mere easement over them. The owner of the soil of a way, whether public or private, may make any and all uses of it to which the land can be applied, and take all profits which can

maintain fences along the right of way so reserved. But in the opinion Danforth, J., says, that the grantee was not "in any manner required to abstain from occupying his lands in common without

division fences, and with free and unobstructed passage from one side to the other," and that he had the "right to have his lands fenced or unfenced at his pleasure." (The italics are ours.) J. G. G.

be derived from it consistently with the enjoyment of the easement. Washb. Easem. § p. 264 *et seq.* All rights which are consistent with the reasonable exercise of the easement remain with the grantor, because they are not granted. In this case the lands were conveyed by the common grantor to the defendant, and the mere easement was reserved and conveyed to the plaintiff. He is entitled only to a reasonable and usual enjoyment and use of the easement. *Bakeman v. Tulbot*, 81 N. Y. 866, 871, 88 Am. Dec. 275; *Parker v. Frick*, 45 Md. 387, 24 Am. Rep. 506.

In *Brill v. Brill*, 108 N. Y. 511, 517, 11 Cent. Rep. 305, similar views are expressed, and it is there laid down that "the owner of the soil has all the rights and benefits of ownership consistent with such easement. Among others must be the right to have his lands fenced or unfenced at his pleasure. In

the absence of fences, his horses and cattle must not obstruct the way, and the owner of the way is bound to the exercise of due and reasonable care by his own methods to prevent his cattle or other animals from trespassing. An inclosed road might be a convenience, but its creation is not imposed upon the owner of the soil by the terms of the reservation; it is not an actual or direct necessity to the full enjoyment of the privilege reserved, and it cannot be implied as incident thereto." Testimony was given to show that the defendant consented to the erection of the fence, but this was no more than a parol license, which was revocable, and was in fact revoked, by the acts and conduct of the defendant. The judgment of the circuit court is correct, and must be affirmed.

The judgment of the Circuit Court is affirmed.

NORTH CAROLINA SUPREME COURT.

John KELLY *et al.*

v.

LYNCHBURG & DURHAM R. CO. *et al.*, *Appts.*

(.....N. C.....)

1. An agreement that arbitrators may fix their own compensation is subject to the implied condition that the allowance made to themselves shall not be unreasonable and that its reasonableness may be determined by the court.

2. The court when asked to confirm a report of arbitrators may upon suggestion by exception or by motion determine whether an allowance which the arbitrators have made to themselves by consent of the parties is or is not reasonable and a formal action is not necessary.

(*Shepherd, J., dissents.*)

(April 26, 1892.)

APPEAL by defendants from an order of the Superior Court for Durham County confirming the report of the arbitrators which had been appointed in the case, allowing their charges for their services as such and overruling defendants' exceptions thereto. *Reversed.*

By agreement it was ordered that the matters involved in the action should be referred to an umpire and two arbitrators with power to hear the evidence make their award and report the same to the court. By the terms

of the submission it was agreed that the arbitrators might "fix their own compensation."

Further facts appear in the opinions.

Mr. W. A. Guthrie for appellants.

Messrs. Fuller & Fuller for appellees.

Avery, J., delivered the opinion of the court:

If the parties had not incorporated into the agreement to submit to arbitration a provision that the arbitrators might fix their own compensation, the duty of determining what would be a just allowance for the service rendered by them, and each of them, would have devolved upon the court, and the judge might have heard evidence in case of dispute, in order to arrive at a fair estimate of the value of the work done, and the expense incurred in performing it. *Stevens v. Brown*, 82 N. C. 463; *Griffin v. Hadley*, 53 N. C. 82. Where they assume the right to determine their compensation, without the assent of the parties, that portion of the report will not be sustained, and, if separate from other matters disposed of, may be set aside, while the award in other respects may be enforced as a rule of court. *Stevens v. Brown, supra*; *Knight v. Holden*, 104 N. C. 107. The truth of the principle embodied in the old maxim, *nemo debet esse iudex in propria sua causa*, is self-evident. *White v. Connolly*, 105 N. C. 70; *Freeman v. Person*, 106 N. C. 251. While it is admitted that the parties to an action may, by express agreement, clothe arbitrators with

NOTE.—The above case strikingly illustrates the supervisory power of courts over private agreements. The well-recognized instances of affirmative relief from contracts for fraud, duress, or undue influence, and the other instances of refusal specifically to enforce contracts which are inequitable, as well as those which are illegal or against public policy, sufficiently illustrate the fact that private agreements, even between parties competent to contract, will be subject to some review by courts. The protecting power of a court to shield

a person from his own inequitable contract must, indeed, be brought within some recognized principle of law or equity, but the wisdom of the courts gradually extends the application of such principles towards a nearer approximation of the legal rules to the rules of enlightened morality and justice. This seems to be done in the above case in applying the maxim, *nemo debet esse iudex in propria sua causa*, to bring into the contract an implied condition that the arbitrators' allowance to themselves must be reasonable. **B. A. R.**

power to fix the amount of their compensation, the law attaches by implication the condition that the allowance shall not be unreasonable, and, upon a proper suggestion that it is extortionate or excessive, it becomes the duty of the trial judge, before giving judgment to enforce the award, as a rule of court, to hear evidence, if necessary, and pass upon the question thus raised. The motion for judgment upon an award which is, by the terms of the submission, to be enforced as a rule of court, may be resisted upon any ground that impeaches its validity generally, or, where it is separable, the validity of a portion of the findings. *Metcalf v. Guthrie*, 94 N. C. 447; *Cowan v. McNeely*, 82 N. C. 5. It has been the practice in our courts to attack awards for errors of law apparent from the record by filing exceptions. *Long v. Fitzgerald*, 97 N. C. 89; *Duncan v. Duncan*, 28 N. C. 466.

It appears upon an inspection of the charges of two of the arbitrators, (the claim of the third having been compromised pending the dispute,) that they claim each about \$50 *per diem* for every day on which they were actually sitting together, with all expenses for board and transportation; and, moreover, one account contains a charge for one day at the same rate, which was spent previous to the hearing in conference with attorneys of the plaintiff, who had chosen him. The aggregate of one of the contested accounts is \$1,220.50; of the other, \$982.21. Upon the coming in of the award at the March Term, 1891, Judge Boykin, who then presided, ordered that notice issue to Lutz and Graham to file "verified itemized accounts of the time engaged and expenses incurred by each of them respectively, in the trial of this cause, together with the value of their services." To this order no exception was entered, and in response to it the accounts were filed, to which the defendants have formally excepted. It is too late to object to the order made at the March Term, 1891. The judge who passed upon the exceptions to the accounts filed by the two arbitrators rested his ruling upon the ground that he had "no power to consider the evidence, in the absence of sustained proof or allegation or of some affidavit of a party setting forth and specifically charging fraud, collusion, conspiracy, or unfairness." The court below adopted the language used by Morse, on Arbitration and Award, p. 596, and quoted from an opinion of the Supreme Court of Maine. But it must be remembered that the question under discussion there was not what was the proper method of attacking an allowance of fees, made by two or three arbitrators, each for himself according to his own estimate of the value of his own services, but how the joint work of all the arbitrators, as to which there might be collusion or conspiracy, could be impeached for fraud. His honor adopted the English rule, which has been followed by only a portion of the American courts, (Morse, Arbitration & Award, p. 620;) but admitting, for the sake of argument, that the action of the arbitrators as to all issues upon which they passed as a body could in England have been im-

peached only by a bill in equity, and that under our Code practice we are bound to preserve the principle by requiring that the equity shall be alleged in some proper way, it does not follow that the account for services which the parties may have consented that each arbitrator shall make out for himself shall be attacked only in the same manner. In the absence of such agreement, the *quantum* of fees would have been determined at the discretion of the court, while, if the parties had not agreed upon the trial by arbitrators of the matters in controversy between them, the issues of fact raised by the pleadings would have been settled by the jury. An excessive charge of a single arbitrator might, it seems to us, have been corrected under the former practice, without resorting to a court of equity, whatever might have been the rule as to collusive fraud. The permission to each arbitrator to make out his bill of charges is subject to the power of the judge to resume his functions in case the license should appear to him to have been abused. It is a substitution of the arbitrator in his place, with the condition annexed that the allowance may be set aside if unreasonable. If the award is set aside for fraud, the right of trial by jury as to the issues is reinstated. If the allowance to an arbitrator is impeached as unreasonable, the effect is to restore to the court the right to fix a reasonable compensation.

We do not concur with the court below in the view that there must be *allegata* and *probata* or proof sustained in any specified formal manner before the court can interpose to supervise an allowance of fees by the arbitrators to themselves. The amount of the fees would be determined, in the absence of any agreement, by the court on motion, and the judge would, in case of dispute as to the character and extent of the services, hear testimony. We see no reason why the judge, upon suggestion by exception, or by motion that the allowance is unfair, should not set aside an unjust allowance in the way prescribed by law for making a just one. This is in harmony with the Code and the general trend of our new practice, in dispensing with useless formality, where it obstructs the administration of justice. We think that the court was at liberty to hear any evidence offered as to the services performed, and, upon that and other material evidence, had the power to pass upon the question whether the charges made were unreasonable.

It would seem, however, that in America the jurisdiction of the courts of equity, in setting aside awards, has not been admitted to extend to all cases where there has been fraud in the arbitration; but it is needless to discuss that question, if we consider the compensation as a matter apart from the issues raised by the pleadings. We think that there was error in the ruling of the court below.

Error.

Shepherd, J., dissenting

I think that his honor very properly refused

to allow the award to be impeached in such a summary and informal manner. The compensation of arbitrators may be submitted to them as well as the other matters in dispute, and their award in this respect is equally binding, and must be impeached in the same way. The award in this case does not, upon its face, disclose the specific items of costs and charges as fixed by the arbitrators, and therefore the court could not see that they were so unreasonable as to warrant relief on the ground of fraud or oppression. In such cases the award must be impeached by an action in the nature of a bill in equity, charging fraud, misconduct, or other grounds of relief; and, when the award is to be made a rule of court, there should be, at least, an affidavit setting forth the grounds upon which its enforcement is resisted. The fact that the arbitrators are interested in fixing their own compensation makes no difference, as it is well settled that an award will not be disturbed where parties have knowingly submitted their differences to persons interested in the matters involved. *Pearson v. Barringer*, 109 N. C. 398, and the authorities cited. See also *Fox v. Hazelton*, 10 Pick. 275. The ruling of the court below is well sustained by the case of *Blossom v. Van Amringe*, 68 N. C. 65, in which Chief Justice Pearson says: "It certainly cannot be expected that the court shall wade through all of the voluminous proceedings, accounts, time devoted to the investigation," etc., in order to determine whether the amount of compensation fixed on is too high for the reason that the parties have agreed to leave that question to the arbitrators and they are bound by it except there be an allegation of

unfairness so well sustained as to induce the court to interfere in order to prevent fraud and oppression by an abuse of power confided to the arbitrators." See also *Adams*, Eq. 192. To set aside an award upon a motion, without affidavit or upon a mere exception, is, I think, something new in the practice. As to the fixing of compensation, it reduces the determination of the arbitrators to but little more dignity than an ordinary bill of costs, and I cannot see how this is authorized by the Code of Civil Procedure. His honor seems to have been of the opinion that the new procedure was designed simply for the purpose of enforcing existing principles of law and equity, and not to change them in any respect. Such also seems to have been the view of this court from the adoption of the Code to the present time. *Parsley v. Nicholson*, 65 N. C. 207; *Oates v. Gray*, 66 N. C. 442; *Katzenstein v. Raleigh & G. R. Co.* 84 N. C. 688; and numerous other cases.

The impeachment of an award, like the correction of a deed, is governed by certain principles, and is by no means a simple matter of practice. I can conceive of no greater source of confusion than the idea that the Code of Civil Procedure warrants any departure from well-settled principles, and that in some vague and indefinite way it is to be made a refuge for all of the "hard cases," at the sacrifice of that certainty and uniformity which constitute the beauty and strength of every enlightened system of jurisprudence. I think that the ruling of the court below should be affirmed, and that the impeaching matter should, at least, be supported by affidavit.

ILLINOIS SUPREME COURT.

MUTUAL ACCIDENT ASSOCIATION of the Northwest, *Appt.*,

v.

Benjamin F. JACOBS *et al.*

(.....Ill.....)

A deposit is not special by reason of a certificate of deposit showing that it is

made to secure the banker against a liability as surety of the depositor where the latter knows that the money is mingled with funds of the bank, but such deposit passes to the banker's assignee in case of his insolvency.

(May 12, 1892.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirm-

NOTE.—When a deposit in bank is special so that the title remains in the depositor.

In an early Arkansas case the court defines special and general deposits as follows: "Where money not in a sealed packet or closed box, bag, or chest is deposited with a bank or banking corporation the law presumes it to be a general deposit until the contrary appears, because such deposit is esteemed the most advantageous to the depositary and most consistent with the general objects, usages, and course of business of such companies or corporations. But if the deposit be made of anything sealed or locked up or otherwise covered or secured in a package, cask, box, bag, or chest or anything of the like kind of or belonging to the depositor, the law regards it as a pure or special deposit and the depositary as having the custody thereof only for safe keeping and the accommodation of the depositor." *Dawson v. Real Estate Bank*, 5 Ark. 237.

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So it is said that the deposit is general unless the depositor makes it special or deposits it expressly in some particular capacity. *Brahm v. Adkins*, 77 Ill. 283.

Money deposited with a bank for which an interest-bearing certificate of deposit is taken is not a special deposit so that it remains the money of the depositor for the purpose of taxation as money, although it may be taxable as a credit. *Ruffin v. Orange County Comrs.* 69 N. C. 498.

A deposit is not special when made in the ordinary way and mingled with the general funds of the bank merely because it is made by a clerk of the court from funds under the control of the court in a bank designated by the court as the depositary of such moneys. *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157.

So deposits by a receiver of a railroad company of moneys received and necessary to be used in the railroad business in a bank designated by the court

ing a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to recover money which had been deposited with their assignor, Samuel A. Kean. *Affirmed.*

Statement by Craig, J.:

This was a petition in the county court of Cook county brought by the Mutual Accident Association of the Northwest, in which it was alleged that on the 4th day of October, A. D. 1890, petitioner deposited with Samuel A. Kean the sum of \$6,000 as a special deposit, to be held by Kean to indemnify himself and one Jesse H. Cummings from any liability that might be incurred by them, or either of them, by reason of their having signed an appeal bond (as sureties) in a case wherein one Emma A. Tuggle recovered a judgment against petitioner in the circuit court of McDonough county, from which judgment petitioner appealed to the appellate court; that at the time the \$6,000 was so left with Samuel A. Kean as aforesaid, to wit, on the 4th day of October, A. D. 1890, he, Samuel A. Kean, was engaged in the banking business at the city of Chicago, in the county of Cook, aforesaid under the name and style of S. A. Kean & Co., having his main banking office or place of business at No. 100 Washington street, in said city, and also having a branch banking office at Nos. 143 & 145 Adams street, in said city, which said branch was then operated and carried on by the said Samuel A. Kean under the care and management of one Wesley L. Knox, as agent and manager for him; that your petitioner deposited the sum of six thousand dollars (\$6,000) with Kean at his branch banking office or place of business, and then and there received of and from said Kean, by and through his agent and manager, the following certificate of deposit:

"Chicago, Oct. 4, 1890. This is to certify that the Mutual Accident Association of the Northwest has deposited with Samuel A. Kean, of the county of Cook, state of Illinois, the sum of six thousand dollars, to be held by the said Kean upon the following conditions: Whereas, one Emma A. Tuggle, of the county of McDonough, recovered a judgment against the said accident company for the sum of five thousand dollars and costs, from which the said accident company have

taken an appeal to the appellate court; and whereas, the said Samuel A. Kean and Jesse H. Cummings have signed the appeal bond in the said case: Now, therefore, this six thousand dollars deposited with Samuel A. Kean is to be held by the said Kean to indemnify himself and the said Jesse H. Cummings from any loss or liability incurred by them, or either of them, by reason of having signed said appeal bond; and, after the said Jesse H. Cummings, and Samuel A. Kean are fully discharged from all liability under said bond, then the said six thousand dollars is to be returned to the said Mutual Accident Association, but not otherwise. [Signed] S. A. Kean & Co., Branch. Wesley L. Knox, Manager."

It is further alleged in the petition that the \$6,000 deposited is no part of the assets belonging to S. A. Kean, or to his estate, but that the same was and still is the property of the petitioner, and placed in the hands of Kean as a special deposit on trust, with the distinct understanding between petitioner and Kean that said \$6,000 was to be returned to petitioner by Kean as soon as said Kean & Cummings should be discharged from all liability under the bond, as appears from terms of said certificate. Petitioner prays that the said sum of \$6,000 may be declared to be the property of petitioner, and a trust fund in the hands of Benjamin F. Jacobs, assignee of Kean, and that an order may be entered by the court directing him, the assignee, to pay, deliver, and return the same to petitioner, as soon as the said Samuel A. Kean and Jesse H. Cummings are discharged from all liability under the appeal bond. The assignees of S. A. Kean put in an answer to the petition, in which they admit the giving of the receipt as set out in the petition. Further answering, respondents deny that the said \$6,000 was not and never became the property of the said Samuel A. Kean, and that it has been since said deposit, and still is, the property of the said petitioner, but aver the truth to be that said deposit became at once, upon its receipt by him, the property of the said Samuel A. Kean. They further deny that the \$6,000, or any part thereof, was in the possession of the assignee and state that, immediately upon its deposit by the petitioner, the said sum of \$6,000 became the property

as a depository of such moneys, when made generally to the credit of the receiver are not special so as to make the officers of the bank after its insolvency subject to a rule for contempt on failure to repay such money. *Southern Development Co. v. Houston & T. C. R. Co.* 27 Fed. Rep. 344.

The addition of the word "clerk" to a general deposit does not make it special. *Molain v. Wallace*, 8 West. Rep. 359, 103 Ind. 552.

Neither do the words "Judge of Probate, license money." *Alston v. State*, 18 L. R. A. 659, 92 Ala. 124.

Money delivered to the cashier of a bank for the purpose of paying a note executed to the bank but not then held by it does not constitute a general deposit, but is held by the bank in a fiduciary capacity, and an assignee of the bank in insolvency cannot hold it as assets of the bank. *Peak v. Elliott*, 30 Kan. 158, 46 Am. Rep. 90; *Elliott v. Barnes*, 31 Kan. 170.

To a similar effect is a decision that checks given 16 L. R. A.

a bank to pay notes not yet due in the mistaken supposition that the bank holds them, which checks the bank charges up to the depositor, create a trust fund for him to which he is entitled on the failure of the bank without having paid the notes. *People v. City Bank of Rochester*, 96 N. Y. 32.

On the contrary, it was held in a bankruptcy case by the United States district court that money delivered to a banker by one who had no deposit at the time to pay a note and mortgage which were to be sent to the banker for that purpose without anything being said as to the nature of the deposit but which in fact the banker credited to the depositor, did not constitute a special deposit; and that on the banker's failure after receiving the note and mortgage, but before remitting the money in payment the depositor must be regarded as a mere creditor of the banker. *Re Hosie*, 7 Nat. Bankr. Reg. 601. See also *Re Law's* Est. 14 L. R. A. 108, and *note*. B. A. K.

of said Kean, and was by him commingled with other moneys and property of the said Kean in said banking business, and used and paid out by the said Kean in the regular course of business.

Messrs. Albert H. Veeder and Mason B. Loomis for appellant.

Messrs. Jesse A. Baldwin and Moran, Kraus, Mayer & Stein for appellees.

Craig, J., delivered the opinion of the court:

The \$6,000 was not passed over to S. A. Kean in currency or other money, but, as appears from the evidence, the officers of the accident association drew a check payable to the order of S. A. Kean & Co. for \$6,000 on the Union National Bank, and delivered the check to Kean & Co. The money was drawn on the check, and used by Kean & Co. in its banking business. It is also plain from the evidence that the accident association knew that the check was paid, and that the money passed into the bank, and was used by the bank in the same manner as other funds which were received by the bank in the usual course of business. Under such circumstances, can it be held that the bank received the money as a special deposit; that the money became a trust fund, and was of such a character that the court was authorized to take it out of the hands of the general creditors, and turn it over to the petitioner? If the evidence established the fact that the \$6,000 had been placed in the hands of Kean & Co. as a special deposit, we think the petitioners were entitled to be protected. But was this a special deposit? As we understand the question, there is a wide difference between a special and a general deposit, as these terms are understood, not only by bankers, but by the public, who are transacting business daily with banks. Where money of any description is deposited in a bank, and the identical gold or silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special; while, on the other hand, a general deposit is "a deposit which is to be returned to the depositor in kind." *Anderson*, Law Dict. 344; 1 *Morse*, Banks and Banking, § 190; 2 *Am. & Eng. Encyclop. Law*, p. 92; *Keene v. Collier*, 1 *Met. (Ky.)* 417. Where gold or silver coin or a package of bills currency are received in a bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business. Its duty is to safely keep and return the identical money. But where there is a general deposit, the understanding being that a like sum of lawful money shall be returned, the bank is permitted to use the money in its general business, and the relation of debtor and creditor is created by the transaction. There is nothing in the certificate of deposit which was issued by Kean & Co. which indicates that a package amounting to \$6,000 had been deposited there to remain for a time and be returned. That was not the transaction; but, as is clearly shown from the evidence, the petitioner gave

Kean & Co. a check on another bank, which went through the clearing house, and was paid; and Kean & Co., with the knowledge of the petitioner, mingled the money with the general funds of Kean & Co. in its bank. This \$6,000 was commingled with the general funds of the bank in the same manner as money deposited by other depositors. The money thus became the funds of the bank, and, as such, upon the failure of Kean & Co., could not be followed by the petitioner. If the \$6,000 had been placed in a separate package, and thus deposited in the bank, and had never been mingled with the general funds of the bank, the position of the petitioner might be sustained; but such was not the case. *Otis v. Gross*, 96 Ill. 613, 36 *Am. Rep.* 157, is a case where the same principle was involved as here. There moneys had been deposited under an order of court, but had not been kept separate from the general funds of the bank and it was held that the deposit was not a special one or a mere bailment, but the money deposited became that of the bank. *School Trustees v. Kirwin*, 25 Ill. 73, is a case where the same principle is involved. And in *Union Nat. Bank of Chicago v. Goetz* (Ill. Sup.) 27 *N. E. Rep.* 909, after referring to the *Kirwin Case* and various other authorities, it is said: "Many other cases might be cited, but enough has been shown to clearly indicate the line of decisions holding the doctrine that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee, or by those representing him, and this court is fully committed to this rule." *Weatherell v. O'Brien* (Ill. Sup.) 29 *N. E. Rep.* 904, is also a case in point. There a deposit had been made with a banker, the intention of the depositor being that the deposit should be invested in a loan on real estate to be procured by the banker, and it was insisted that the money was deposited for a special purpose, and hence a trust for that purpose arose. In the decision of the case it is said: "[Where] the money which is delivered to a bank, even though it be for some specified purpose, as, for instance, investment in a mortgage security, has been mingled with the funds of the bank, as was done here, there is no reason why the depositor should be preferred above any other creditor. Where a trustee changes the form of the trust property, the right of the beneficial owner to reach it, and compel its transfer, may still exist, if the property can be identified as a distinct fund, and is not so mixed up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a bona fide purchaser for value without notice, or has lost its identity, the beneficial owner must, as under other circumstances he may, resort to the personal liability of the wrong-doing trustee,—citing 2 *Pom. Eq. Jur.* § 1068. Where a trustee has converted a trust fund into money, and mingled it with his other moneys so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for

the benefit of creditors. *Illinois Trust & Sav. Bank of Chicago v. Smith*, 21 Blatchf. 275, 15 Fed. Rep. 858, and cases there cited. Its identification is a prerequisite to the exercise of the right to follow it. 2 Story, Eq. Jur. § 1259. While it may not be necessary to point to the particular pieces of money, or the particular bank bills, that were deposited with the trustee, if the trust property be money, yet there must be a pres-

ervation of the distinctness of the trust fund." Here the money passed into the bank as a general deposit. It was mingled with other funds deposited in the bank, so that there is no means of separating it from other moneys received by the bank in its usual course of business, and the petitioner occupies the position of a general creditor.

The judgment of the Appellate Court will be affirmed.

OREGON SUPREME COURT.

Charles H. FISHER, *Resp't.*,
v.

OREGON SHORT LINE & UTAH
NORTHERN R. CO., *Appt.*

(.....Or.....)

1. The opinions of railroad experts is not admissible on the question whether or not it is dangerous to run a train at a designated rate of speed as that is a question which the jury are competent to decide.
2. Erroneously permitting an expert to give his opinion on a question which the jury should decide without such aid will not cause a reversal, if the opinion was correct and expressed the conclusion which the jury must necessarily have drawn from the facts in evidence.
3. The conductor of a train ordered to run as an extra to carry snow shovelers to a certain station beyond which the road is blockaded does not assume the risk of a snowslide between the stations on the trip he is ordered to run.
4. A snowslide being usually mingled with gravel and rock is a dangerous obstruction to a railroad distinct in nature from a snowdrift, and a section foreman having knowledge of such an obstruction to the track must give notice thereof to the managers of the road and to the conductor of an approaching train if he has opportunity.
5. A section foreman stands in place of his master in respect of the duty to give notice of a dangerous obstruction on the track, and is not in that respect as to his negligence in failing to do so a fellow servant of a conductor who is injured by reason of such obstruction.

(June 21, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Union County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

NOTE.—The duty of a master to warn his servant of extraordinary risks is illustrated well by the above case. For notes on the general duty of the master in this respect, see *Sherman v. Menomonee River Lumber Co. (Wis.)* 1 L. R. A. 174; *Brasil Block Coal Co. v. Gaffney (Ind.)* 4 L. R. A. 850; *Brennan v. Gordon (N. Y.)* 8 L. R. A. 818.

For notes on the question whether or not another employé of the same master is a fellow servant or 16 L. R. A.

Messrs. W. W. Cotton and Jera Snow, for appellant:

In *Bryant v. Burlington, C. R. & N. R. Co.*, 66 Iowa, 305, cited with approval in *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Or. 454, and *Houston & T. R. Co. v. Fowler*, 56 Tex. 452, the knowledge on the part of a person injured of the bad state of the track resulting from the weather was simply to be inferred from the fact that a storm or snowfall was shown to have taken place. Yet in both of these cases the court held, as a matter of law, that the person injured must have known that the track was in bad order on account of such snow and storm.

The court erred in allowing the witnesses, Fisher and Hooker, to give their opinion to the effect that the rate of speed at which Fisher's train was traveling at the time of the accident was not dangerous.

The testimony of experts is inadmissible upon a matter concerning which, with the same knowledge of facts, the opinion of any one else would have as much weight. It is only admissible when the facts to be determined are obscure, and can only be made clear by and through the opinions of persons skilled in relation to the subject-matter of inquiry.

Rogers, Expert Testimony, p. 18.

The opinions of mechanics and workmen are not admissible as to matters not of technical skill, and which may be decided by the jury.

Lawson, Expert & Opinion Evidence, §4.

The opinions of witnesses should not be received as to whether certain acts do or do not amount to negligence.

Lawson, Expert & Opinion Evidence, pp. 497-520.

Necessity is the only reason which justifies courts in receiving expert and opinion evidence, and it is only when the jury can receive no light from the facts alone, that opinions, either of experts or others, will be received.

Graham v. Pennsylvania Co. 189 Pa. 149; *State v. Anderson*, 10 Or. 455; *Guetig v. State*, 66 Ind. 95, 32 Am. Rep. 99; *Muldoney v. Illinois Cent. R. Co.* 36 Iowa, 462; *Hill v. Portland & R. R. Co.* 55 Me. 438; *State v. Watson*,

a representative of the master, see *Muhlman v. Union Pac. R. Co. (Colo.)* 2 L. R. A. 192; *Lindvall v. Woods (Minn.)* 4 L. R. A. 703; *Murray v. St. Louis Cable & W. R. Co. (Mo.)* 5 L. R. A. 735; *Howard v. Delaware & H. Canal Co. (Vt.)* 6 L. R. A. 75; *Hunn v. Michigan Cent. R. Co. (Mich.)* 7 L. R. A. 600; *Brennan v. Gordon (N. Y.)* 8 L. R. A. 818; *Ell v. Northern Pac. R. Co. (N. Dak.)* 12 L. R. A. 97.

65 Me. 74; *Linn v. Sigbee*, 67 Ill. 75; *Eureka Co. v. Bass*, 81 Ala. 200; *New England Glass Co. v. Lovell*, 7 Cush. 819; *National Gas Light & F. Co. v. Miethke*, 85 Ill. App. 632; *Veerhausen v. Chicago & N. W. R. Co.* 53 Wis. 689; *Hopkins v. Indianapolis & St. L. R. Co.* 78 Ill. 32; *Burton v. Somerset Potters' Works*, 121 Mass. 446; *Grahman v. Chicago, St. P. & K. C. R. Co.* 78 Iowa, 665; *Seese v. Northern Pac. R. Co.* 89 Fed. Rep. 487; *Hamilton v. Des Moines Valley R. Co.* 86 Iowa, 36; *Lawson v. Chicago, St. P. M. & O. R. Co.* 64 Wis. 447, 54 Am. Rep. 634; *Chicago & E. I. R. Co. v. Modest*, 124 Ind. 124; *Pennsylvania Co. v. Lindley*, 2 Ind. App. 111.

Opinions are never received if all the facts can be ascertained and made intelligible to the jury or if it is such as men in general are capable of apprehending and understanding. The ordinary affairs of life cannot be made the subject of expert testimony.

7 Am. & Eng. Encyclop. Law, p. 493; Rogers, Expert Testimony, § 6; *Muldorney v. Illinois Cent. R. Co.* 86 Iowa, 462.

It has been held by a large number of courts, as a matter of law, that it is the duty of the railway engineer to keep a prudent lookout upon the track to warn trespassers of approaching danger and to use ordinary care and diligence to prevent any accident.

Carlton v. Wilmington & W. R. Co. 104 N. C. 365; *Virginia Midland R. Co. v. White*, 84 Va. 498, and cases cited; *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 654; *Frazer v. South & North Ala. R. Co.* 81 Ala. 185; *Louisville & N. R. Co. v. Schuster*, 85 Am. & Eng. R. R. Cas. 407; *East Tennessee, V. & G. R. Co. v. White*, 5 Lea, 540; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686.

When errors are committed in the receiving of testimony, the court must grant a new trial whenever it is unable to say, from a consideration of the entire record, that the verdict could not have been different.

National Gas Light & F. Co. v. Miethke, 85 Ill. App. 632; *Smith v. Westerfield*, 89 Cal. 375.

The court erred in instructing that "there has been some evidence offered tending to show that certain trackmen or section master had notice before this accident that the track at that place was obstructed by a slide; if you find from the evidence that those persons, or any of them, knew the condition of the track there, and knew that it was unsafe, or as reasonably prudent men ought to have known, that it was unsafe for the passage of the train, and that they could have warned the train of the danger and through their neglect they, or any of them, failed to warn the train and that neglect was the cause of the accident, the defendant is liable."

The instruction under consideration assumes, without qualification, that the trackmen referred to by the instruction and Fisher were not fellow servants. Trainmen and sectionmen may be, and frequently are, fellow servants.

Knahila v. Oregon S. L. & U. N. R. Co. (Or.) June 24, 1891; *Weger v. Pennsylvania R. Co.* 55 Pa. 461; *Slattery v. Toledo & W. R. Co.* 23 Ind. 81; *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 617, 58 Am. Rep. 881; *Whaalan v. Mad River & L. E. R. Co.* 8 Ohio St. 251; *Heins* 16 L. R. A.

v. Chicago & N. W. R. Co. 58 Wis. 525; *Gormley v. Ohio & M. R. Co.* 72 Ind. 32; *Cooper v. Milwaukee & P. D. C. R. Co.* 23 Wis. 699; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *Collins v. St. Paul & S. C. R. Co.* (Minn.) 8 Am. & Eng. R. R. Cas. 150; *Holden v. Fitchburg R. Co.* 189 Mass. 268, 37 Am. Rep. 343; *Blake v. Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226; *Dallas v. Gulf, C. & S. P. R. Co.* 61 Tex. 197; *Boldt v. New York Cent. R. Co.* 18 N. Y. 484; *Vick v. New York Cent. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36.

Such sectionmen are vice-principals only when engaged in the performance of some duty which the master must perform; and it is only for their negligence in the performance of such duties that the master is responsible.

Under the facts of this case such sectionmen can only be rendered vice-principals by assuming that the master owed Fisher, in every possible view of the case, an absolute duty to either remove the obstructions from its track or else inform him of the exact location of every particular obstruction and of its probable dangerous character.

Fisher knew the road was blockaded and that no regular trains were being run thereover on account of the snowslides and drifts, and that he was going out as a conductor of a train sent for the purpose of raising such blockade. What duty then exists which the master must personally perform or which, if delegated to any of its servants, would render such servants in the performance of such duty vice-principals?

Defendant did not owe the duty of removing the obstructions before Fisher's train reached them because that was the work that Fisher was going out to do. Neither was it the duty of the defendant to inform Fisher of the fact that the road was blockaded by snow and slides and that regular trains could not pass over, because that was a fact which Fisher already knew, although he might not have known the location of each particular slide.

Carlson v. Oregon S. L. & U. N. R. Co. 21 Or. 454; *McKinney, Fellow Servants*, § 26; *Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 43 Am. Rep. 240; *Bryant v. Burlington, C. R. & N. R. Co.* 66 Iowa, 305; *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226; *Brick v. Rochester & N. Y. & P. R. Co.* 98 N. Y. 211.

The servant assumes all risks of injury naturally and probably following from the character of the place where he is at work or resulting from the manner in which the master conducts his work.

Stone v. Oregon City Mfg. Co. 4 Or. 52; *Tuttle v. Detroit, G. H. & M. R. Co.* 123 U. S. 189, 30 L. ed. 1114; *Koontz v. Chicago, R. I. & P. R. Co.* 65 Iowa, 224, 54 Am. Rep. 5; *Couch v. Charlotte, O. & A. R. Co.* 23 S. C. 557; *De Forest v. Jewett*, 88 N. Y. 264; *Dowell v. Burlington, C. R. & N. R. Co.* 62 Iowa, 629; *Heritt v. Flint & P. M. R. Co.* 11 West. Rep. 148, 67 Mich. 61; *Hawk v. Pennsylvania R. Co.* 31 Am. & Eng. R. R. Cas. 268; *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326; *Rush v. Missouri Pac. R. Co.* 86 Kan. 129; *Naylor v. New York & H. R. R. Co.* 53 Fed. Rep. 801; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340; *Anderson v. Winston*, 31 Fed. Rep. 528; *Kuhns*

v. Wisconsin, I. & N. R. Co. 70 Iowa, 561; *Flannagan v. Chicago & N. W. R. Co.* 50 Wis. 463; *Watson v. Houston & T. O. R. Co.* 58 Tex. 434; *Fraker v. St. Paul, M. & M. R. Co.* 32 Minn. 54; *Kelly v. Baltimore & O. R. Co.* (Pa.) 10 Cent. Rep. 55; *Gaffney v. New York & N. E. R. Co.* 4 New Eng. Rep. 33, 15 R. I. 456; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 184, 36 Am. Rep. 459; *Clark v. St. Paul & S. C. R. Co.* 28 Minn. 128; *Wilson v. Louisville & N. R. Co.* 85 Ala. 269; *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23, 29 Am. Rep. 208; *Gibson v. Erie R. Co.* 63 N. Y. 449, 20 Am. Rep. 552; *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 520; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Illick v. Flint & P. M. R. Co.* 12 West. Rep. 440, 67 Mich. 632; *Queen v. New York Cent. R. Co.* 1 Lans. 108; *Pittsburg & O. R. Co. v. Sentmeyer*, 92 Pa. 276; *Brossman v. Lehigh Valley R. Co.* 4 Cent. Rep. 913, 113 Pa. 490; *Clark v. Richmond & D. R. Co.* (Va.) 18 Am. & Eng. R. R. Cas. 78; *Wabash R. Co. v. Elliott*, 98 Ill. 481; *Davidson v. Southern Pac. Co.* 44 Fed. Rep. 476; *Brooks v. Northern Pac. R. Co.* 47 Fed. Rep. 687.

The business of Fisher was a hazardous one, arising from the known danger of snow. Under such circumstances the utmost obligation resting upon the master would be to provide such reasonable rules and regulations for the conduct of such business as that, if such rules were carried out, the hazards thereof would be lessened; and that having provided such rules and regulations, the master would not be liable for the failure of any servant to conform thereto.

Hartwig v. N. P. Lumber Co. 19 Or. 522; *Slater v. Jewett*, 84 N. Y. 61; *Fraker v. St. Paul, M. & M. R. Co.* 32 Minn. 54.

The fact that the place was rendered unsafe by reason of the failure of the trackmen to give signals does not and should not render the master liable.

Pennycuina R. Co. v. Wachter, 60 Md. 895; *Collins v. St. Paul & S. O. R. Co.* (Minn.) 8 Am. & Eng. R. R. Cas. 150.

Messrs. J. H. Slater & Sons and R. & E. B. Williams & Carey, for respondent:

By Hill's Code, § 706, evidence may be given on the trial of the opinion of a witness on a question of science, art, or trade, when he is skilled therein.

Mechanics, artisans, and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible.

Lawson, Expert & Opinion Evidence, p. 70. Appellant's argument fails to distinguish between two kinds of opinion evidence. The opinions of non-experts are sometimes admissible from necessity, either because the subject-matter is so blended with fact and opinion that to exclude the opinion is to exclude the fact, or because as in questions of sanity, hand-writing, etc., the witness has been so situated as to have gained a knowledge that can only be expressed by the statement of his conclusion. Expert evidence is admissible on an entirely distinct ground.

The test of the admissibility of expert testimony is not whether the subject-matter is com-

mon or uncommon, or whether many or few have knowledge of it, but whether the witnesses offered have any peculiar knowledge or experience not common to the world, which renders their opinions, founded thereon, an aid to the triers.

Taylor v. Monroe, 43 Conn. 44

Any person, though not an expert, may testify as to the speed of a moving train.

Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 103; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 525; *Pence v. Chicago, R. I. & P. R. Co.* 79 Iowa, 389; *Evansville & T. H. R. Co. v. Crist*, 2 L. R. A. 450, 116 Ind. 446; *Walsh v. Missouri Pac. R. Co.* 102 Mo. 582.

But no particular rate can be assumed, without proof, to be dangerous.

Detroit & M. R. Co. v. Van Steinburg, *supra*.

How can proof of this kind be offered but by experts, by the testimony of those whose experience and observation have given them a knowledge that others, however intelligent, can but rudely approximate.

What is or is not dangerous sometimes is not, but often is, a question that can be properly answered only by experts.

Cross v. Lake Shore & M. S. R. Co. 14 West. Rep. 181, 69 Mich. 363; *Chicago, B. & Q. R. Co. v. Gregory*, 53 Ill. 272; *Huizaga v. Cutler & S. Lumber Co.* 51 Mich. 272; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Bridger v. Asherville & S. R. Co.* 25 S. C. 24; *Clinton v. Howard*, 42 Conn. 306; *Porter v. Pequonnoe Mfg. Co.* 17 Conn. 258; *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 181; *Baltimore & L. Turnp. Co. v. Cassell*, 66 Md. 419; *Laughlin v. Street R. Co. of Grand Rapids*, 62 Mich. 221.

For instances of the admission of opinions, see,—

Sydeleman v. Beckwith, 43 Conn. 11; *Sailor v. Hazlitt*, 18 Ill. App. 243; *Chicago & A. R. Co. v. Bock*, 17 Ill. App. 20; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Eckert v. St. Louis, I. M. & S. R. Co.* 18 Mo. App. 354; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506; *Hayward v. Knapp*, 23 Minn. 438; *Bierce v. Stocking*, 11 Gray, 174; *Kershaw v. Wright*, 115 Mass. 361; *McIntosh v. Livingston*, 41 Iowa, 223; *Chamberlain v. Dunlop*, 28 N. Y. S. R. 875; *Case v. Simonds*, 7 N. Y. Supp. 253; *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536; *Eureka Co. v. Bass*, 81 Ala. 200; *Stead v. Worcester*, 150 Mass. 241; *Lewis v. Seifert*, 9 Cent. Rep. 751, 116 Pa. 628; *Ward v. Charleston City R. Co.* 19 S. C. 521; *Maher v. Atlantic & P. R. Co.* 64 Mo. 276; *Bellefontaine & I. R. Co. v. Bailey*, 11 Ohio St. 833; *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85.

Even non-experts may, after detailing all the facts, state their opinion deducible therefrom.

Lawson, Expert & Opinion Evidence, p. 589; *Clinton v. Howard*, 42 Conn. 807.

In view of the testimony the admission of the evidence complained of did not affect the verdict. In much stronger cases the error of admitting opinions has been considered harmless.

Mead v. Altgeld (Ill.) Jan. 22, 1891; *Gulf, O. & S. F. R. Co. v. Smith*, 74 Tex. 276; *Aikin v. Leonara* 1 Or. 224; *Goodale v. Portage Lake Bridge Co.* 55 Mich. 413.

Acts which the master, as such, is bound to

perform for the safety and protection of his employes, cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent or servant, or a subordinate or inferior agent or servant to whom the doing of the act, or the performance of the duty, has been committed.

Fuller v. Jewett, 80 N. Y. 53.

Lord, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in suffering its railroad track to be obstructed by a slide of snow, earth, and gravel, at a point named on its road, whereby the train of which plaintiff was conductor, and upon which he was riding, was thrown from the track, and he was injured. The defense set up is contributory negligence, and, as relevant to the matter under review, the defendant alleged that its track had been obstructed for one or two days prior to the accident; that the plaintiff and other men with him went out on a work train for the express purpose of removing slides of snow and earth which had accumulated on the track, so that trains might pass over it; that the plaintiff had full knowledge of the obstructed condition of the track; that, at the time of his injury, the plaintiff was in charge of the train, which was being run by the engineers at a dangerous rate of speed, and without keeping a good lookout ahead of said train, in consequence of which the train struck a slide of snow and earth, and was thrown from the track.

Under this defense, the defendant sought to establish and claimed—*First*, that the plaintiff assumed as part of his contract of employment the risk of the train striking such an obstruction on the railroad track as that out of which his injury arose; and, *second*, that the plaintiff's injury was the result of his own negligence in allowing the engineer to run the train at an excessive or dangerous rate of speed, without keeping any lookout for obstructions on the track.

The evidence shows that prior to the day of the accident a good deal of snow had fallen, which the wind, in some places, blew into drifts. Orders had been given that regular trains would not be run. The plaintiff was employed as a conductor of a freight train. On the day of his injury he received an order from the train master as follows: "To Engineers 88 and 86—Engines 88 and 86: Conductor Fisher will run extra from Kamela to La Grande." Soon after this order was received the two engines named were coupled to a caboose, and started from Kamela to La Grande. Hooker was the engineer of 88, the forward engine, and upon it the plaintiff rode. In the caboose was the road master, with several shovellers. When near a place called Stumptown, some fourteen miles from Kamela, the train ran into a slide of snow and gravel, and engine 88 was thrown from the track into the Grande

Ronde river. Both the plaintiff and Hooker, the engineer, went down with it into the river, and the plaintiff was so injured that subsequently his leg had to be amputated. At the point where the accident occurred the roadbed is cut into the side of a hill, and the road forms a curvature, so that the place where the slide obstructed the track could be seen some two or three hundred yards, but not so definitely as to determine whether it was a slide or a drift. The snowplow had been through on the track the day before, and the plaintiff and engineer had a right to suppose that the track was free from obstructions. There were several light drifts of snow blown on the track at places, but none of them were very deep, and were of light soft snow. The engine was not equipped with a regular snowplow, but it had a sheet-iron protection on the pilot to clear the drifts of snow from the track. The day was fair and bright. When the engine would run into these snowdrifts, the engineer would shut the cab windows, as it would cause the snow to fly in all directions, and cover the windows so as to obstruct the view for a moment; but as soon as the drift was passed the slide window would be opened, from which a lookout could be kept. The window was open when the engine passed the sectionmen at the crossing. It was closed in passing a snowdrift just before the engine struck the slide, but owing to the curvature of the road, if the window had been open at the time, it is doubtful if the result would have been different, as it was not possible for them to distinguish that it was a slide until the engine got close to it. Carleton testified that he and Chamberlain saw this slide, and reported it to the section foreman on the evening before; that when he saw it he could see that it was a slide, and not a drift; that the rest of the track was good, and that he did not find anything on the track except the slide. Chamberlain testified that he, too, saw it the evening before; that he could see where two or three slides had come from two or three hundred feet up the mountain, and could see that they had made a slide across the track, and not a drift of snow; and that he reported it that evening at Hilgard to the section foreman. There is a difference between a slide and a drift, and the testimony of these two witnesses, as well as others, seem to take it for granted that a slide is dangerous.

Slides come from the sides of mountains, and are usually mingled snow and gravel and rock, and necessarily a dangerous obstruction on a track. These two witnesses had been sent out by the section foreman, Lee, as track walkers, to examine the track; "to go over it, and see what condition it was in," and to report the condition of the track to him. This they did; yet this section foreman, with this knowledge of the condition of the track, utterly neglected to investigate the matter himself or to give warning of the condition of the track at the place of this slide. The foreman was at a telegraph station, but not even a message was sent to the road master or train dispatcher. Neither the plaintiff nor the engineer knew of the loca-

tion of the slide. The blockade was east of that point, and, when they received orders to "run extra" to La Grande, they had reason, on this account, to rely on a safe track, as well as to suppose that the road was open and in running order, from the fact that the snowplow had gone over the track to La Grande the day previous. Madden, the road master, whose duty included superintending section men and keeping obstructions from the track, testifies that he had no reason to believe that any slide would be encountered at that point. Nor is this all. When the train passed the foreman on the road, at a crossing only a short distance from the place where it struck the slide and fell over into the river, he neither gave those in charge of it any warning, nor put up any signals to warn them of the danger. The testimony indicates that, at the time the engine struck the slide, it was being run at the rate of fourteen or fifteen miles an hour. Hooker, the engineer, testified that the engine was running at the rate of fifteen miles an hour when it struck the slide. That he had been an engineer seventeen years. Then he was asked: "Is that the fastest rate of speed?" *Answer.* No, sir; it is not. *Q.* How fast can an engine be safely operated on a track in the condition that was in between Kamela and the place where the accident occurred? (Defendant objected, and objection overruled.) *A.* Twenty miles an hour. *Q.* What was the condition of the track up to that point, as you found it in making that run? *A.* Very good, so far as the track was concerned. I could not say anything about it; there was some snow on the track. *Q.* Did you meet with any obstructions or slides? *A.* No, sir; not to amount to anything. There were no slides of any kind; there were some little drifts of snow across the track." A like objection was raised to the testimony of the plaintiff when recalled, as follows: "*Q.* From your experience as a railroad man and your knowledge of the railroad track as it existed between Kamela and the place of accident, state whether or not the rate of fifteen miles an hour is a dangerous rate of speed. (Objection to answer overruled.) *A.* No; I would not consider it so. *Q.* How fast can trains, such as this was, and under the circumstances under which this train was running there at that place, run with safety in your opinion? (Same objection.) *A.* A train might run with perfect safety along that point of track anywhere from twenty to twenty-five miles an hour."

The objection to this testimony is that the opinions of Hooker and Fisher were not necessary to aid the jury in determining whether the rate of speed was safe; that the question presented by the case was not one requiring any expert knowledge. The general rule undoubtedly is that witnesses must ordinarily state facts and not give their opinions. Our Code provides that evidence may be given on the trial of the opinion of a witness on a question of science, art, or trade, when he is skilled therein. Hill's Code, § 706. When the matter under consideration is of that character that any one of ordinary intelligence, without any peculiar habits or

course of study, is able to form a correct opinion, it is manifest that the opinion of an expert is inadmissible. In such case, his opinion could not operate to aid the jury, but would only serve to anticipate and usurp their duty; nor will it render such opinions admissible as evidence because the witness may be able to reason more logically, or to form a better opinion, than the jury. Mr. Rogers says: "The testimony of experts is inadmissible upon a subject which, with the same knowledge of facts, the opinion of any one else would have as much weight. It is only admissible when the facts to be determined are obscure, and can only be made clear by and through the opinions of persons skilled in relation to the subject-matter of inquiry." Rogers, *Expert Testimony*, p. 14.

When the nature of a question is such that a man of ordinary intelligence and experience is incapable of drawing correct conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge on the subject, the opinion of an expert is desirable and competent evidence. *Chief Justice Shaw* said: "It is not because a man has a reputation of superior sagacity and judgment and power of reasoning that his testimony is admissible; if so, such men ought to be called in all cases, and advise the jury, and it would change the mode of trial; but it is because a man's professional pursuits require peculiar skill and knowledge in some department of science not common to men in general, which enables him to draw an inference, when men of common experience, after all the facts proved, would be left in the dark." *New England Glass Co. v. Lovell*, 7 Cush. 319. It was said by the court in *Taylor v. Monroe*, 43 Conn. 44, that "the test of the admissibility of expert testimony is not whether the subject-matter is common or uncommon, or whether many or few have knowledge of it, but whether the witnesses offered have any peculiar knowledge or experience not common to the world, which render their opinions, founded thereon, an aid to the jurors." The rule is laid down and illustrated by cases by Mr. Lawson, that "mechanics, artisans, and workmen are experts, as to matters of technical skill in their trades, and their opinions in such cases are admissible." And as corollaries or subrules, he further states "that nautical men are experts on the question of care in marine cases," and "railroad men are experts as to railroad management." Lawson, *Expert & Opinion Evidence*, p. 70. The competency of the evidence objected to is sought to be upheld upon the ground that no particular rate of speed can be assumed to be dangerous without proof; that the jurors were not experienced railroad men, and could do no more than guess whether it was safe or not to run the train, as was done under the circumstances; and that the required proof could only be offered by the testimony of those whose experience and observation have given them a particular knowledge upon the subject. There may be no doubt that the conductor and engineer based their statements or testimony upon their observation and

experience as railroad men. Under the circumstances, it was their opinion, in the light of their experience and knowledge as railroad men in the operation of trains, that the rate of speed at which the train was running was not excessive or dangerous; that its rate of speed, under existing conditions, might have been increased with safety. But it is where matters of technical skill or scientific knowledge are involved that the opinions of mechanics and artisans are admissible. While it is true that what is or is not dangerous is sometimes a question that can only be properly answered by experts, as some of the cases indicate, (*Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 14 West. Rep. 181; *Chicago, B. & Q. R. Co. v. Gregory*, 68 Ill. 272; *Hutzege v. Cutler & S. Lumber Co.* 51 Mich. 272; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Bridger v. Asheville & S. R. Co.* 25 S. C. 24,) yet none of them are cases like the present. The opinion asked here goes to the merits. It seems to us upon the facts as disclosed by the record the jury were competent to form an opinion, or draw the proper conclusion from the facts, without the opinion of the witnesses upon the subject. It is not material that the evidence would not justify the construction put upon it by the defendant, or that the witnesses understood it differently, as its competency depends upon a state of facts involving technical skill or knowledge, which the facts in question did not present for consideration. The defendant contended that the running of the train at the rate of 15 miles an hour without keeping any lookout, under the conditions presented by the evidence, was dangerous, and negligence in the plaintiff contributing to his injury, while the witnesses expressed the opinions that the rate of speed, under the circumstances, was not excessive or dangerous, and that it might have been increased without liability to accident; yet the opinion being such as touched the merits, and upon a subject-matter that involved no technical skill or knowledge, and which the jury were competent to decide, we think the opinions of these witnesses as evidence were inadmissible, and that it would have been more consonant with the rules of evidence to reject it. But the question arises whether, upon the facts, the jury could have formed any other opinion, or reached any different conclusion, from that expressed by these witnesses; for, if they could not, the error could affect no substantial right of the defendant, and was not reversible error. The contention of the defendant was that the evidence tended to establish the defense pleaded; that the plaintiff was employed upon a work train, and went out with it upon a track known to be obstructed for the purpose of removing such obstructions; that with such knowledge, and upon a road thus obstructed, he permitted the train to be run at an excessive rate of speed, without keeping any lookout, and when the snow was plastered over the windows so that neither he nor the engineer could see ahead; that under these circumstances, and in violation of the rules of the defendant as to the rate of speed to be

used in such case, and in violation of their duty, they recklessly ran the train into the slide, and caused the accident. If this were a proper construction of the facts, or if upon any such state of facts the opinion of these witnesses had been based, we should feel no hesitation in declaring such evidence not only inadmissible, but such error as would entitle the appellant to a new trial. The telegraphic order received by the plaintiff was not to "work," but to "run extra;" that is to say, that the orders which he and the engineers received show that they were led to believe that they had a clear track from Kamela to La Grande as an "extra," and not that they were to "work" between those points. If those in charge of the train had been instructed to clear the track of obstructions, or do other work, on the way to La Grande their orders would have been in an entirely different form, as the rules disclose which are made a part of the so-called bill of exceptions. A rotary snowplow had gone through over the track the day before to La Grande, and the road master and other officers supposed and thought the road was open to La Grande from Kamela, where Fisher and his train were, and where the road master was with a gang of shovelers in a caboose. It was between La Grande and Huntington that the road was blockaded, and the rotary plow, in clearing it, broke, so that the road master, Madden, was telegraphed for from La Grande to bring his shovelers to that place. Fisher, as conductor, and the engineers then received from the train dispatcher their running orders to La Grande, in the course of which journey the accident occurred as already detailed. But it is plain from the telegraphic correspondence between the road master and the train dispatcher that there was no blockade or obstruction thought of between Kamela and La Grande, and, in view of the other facts already stated, the plaintiff had no reason to suppose that he was on a working train for the purpose of aiding in removing obstructions from the track, or that the track was obstructed, or that he was performing other than his customary duty as freight conductor in the run from Kamela towards La Grande. Nor was the train run without any lookout, or the cab windows so covered with snow or kept closed so that they could not see out. It was only when passing through the drifts of snow that the windows were closed, and then only for an instant, as has been already sufficiently explained. The track was not out of order, or in any condition of obstruction, except at the slide, which had been reported by the track walkers to the section foreman. The track walkers did not report the drifts of snow between the slide and Hilgard, for they did not consider them of sufficient importance, but they did report the slide as coming from the mountain, showing that they did consider it as something that merited more than ordinary consideration, and the foreman must have so understood it. Nor in the run, until the engine struck the slide, did they meet with any obstruction upon the track; showing again that the track walkers had reported

truly the only obstruction on the track which required to be attended to before a train should be started without notifying its officers of its condition. Under these conditions and circumstances, there is no rule of the defendant company that the running of a train at the rate of fifteen miles an hour is excessive or reckless. On the contrary, it is permissible, and even a greater rate of speed. Madden, the road master, the only one of the defendant's witnesses upon the train, or who knew anything about it, expressly says that he did not consider it dangerous to run at the rate of speed at which the train was going, under the circumstances; that he had no reason to expect that the train would run into a slide, or that there was such an obstruction upon the track; that he did not usually interfere in any way, as he calculated that the men running the train had common sense, but that he would have interfered if he thought there was any need of it. So that, in view of the whole record, the opinion expressed, that the rate of speed at which the train was running when it struck the slide was not excessive or dangerous, is correct, and beyond dispute, upon the facts, and only such a conclusion as the jury must have drawn from the facts. So far as the verdict is concerned, then, it could not have been different if the expert evidence had not been admitted.

There is but one other point we deem it necessary to consider. It is in relation to an instruction given, which, it is claimed, assumes, without qualification, that trackmen and the plaintiff were not fellow servants. That trainmen and sectionmen may be, and frequently are, fellow servants is not disputed, and no authorities need to be cited. In *Wellman v. Oregon S. L. & U. N. R. Co.*, 21 Or. 530, which involved substantially the same pleadings and issues, *Wellman* being on the same train as fireman, and who was killed by the same accident, it was said by this court: "To avoid misconception, a single observation in relation to instruction number seven seems to be necessary. It is as to the effect to be given to the knowledge acquired by the trackmen or section master on the 15th of January,—the day before the accident. There is evidence tending to show that these persons saw the slide that caused the injury on that day, and communicated the fact to the section foreman the same evening. If such was the fact, he was bound to communicate the information to those in charge of the train which was to pass over the road, and the failure to do so would subject the defendant to liability, independent of anything that has already been said." This was based on the theory that sectionmen, when engaged in the performance of some duty which the master owes to the servant, or is bound to perform, are vice-principals. It is sought to avoid the effect of such conclusion in the present case by claiming that the evidence shows that the plaintiff was employed on a work train at the time of his injury, that went out for the express purpose of removing obstructions upon the track between Kamela and La Grande; that he took charge

of such train with full knowledge that the road was obstructed or blockaded, for the purpose of finding, and to aid in removing, such obstructions; and hence the defendant claims that it was not its duty to notify or inform the plaintiff that the track was obstructed, nor to remove any obstruction upon the track before the plaintiff's train should reach them, as this was the identical work that he was going out to do. Upon this assumption of the facts, the defendant claims that liability to injury from obstructions upon the track was incident to the plaintiff's contract of employment, and a risk he voluntarily assumed. In support of this contention, it cites and relies upon the case of *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Or. 454. This case has no application to the facts involved in the present case. There it was held that a servant engaged in repairing a railroad track, already known to him to be in a dilapidated condition, assumes as part of his contract of employment the risks incident thereto, among which is the dilapidated condition of the track; but the court expressly declared that the servant does not assume the increased risk arising from neglect of the railway company—unknown to him, or not ascertainable by ordinary diligence—to use proper care to learn the condition of the track, and to prevent accident to its servants. Bean, J., says: "The fact that the track was known to be in a dilapidated condition, and out of repair, did not relieve the master from the discharge of his duty in the premises. The deceased could still exact from it the exercise of such care and vigilance, and require it to take such precautionary measures to prevent accidents, as the exigencies of the case, having due regard to the safety of its servants, would suggest to prudent and cautious men, experienced in that particular branch of business." Within the principle declared in this case, it would hardly seem doubtful, if the facts be assumed to exist as claimed by the defendant,—that the plaintiff was going out in charge of a train to find and remove obstructions upon the track between Kamela and La Grande,—that the master, in the exercise of ordinary care, would not have been bound to notify the plaintiff of the existence and location of this slide obstructing its track. The section foreman, whose business it was to inspect the track and keep proper watch and oversight over it, had, in the performance of that duty of the master delegated to him, sent out two track walkers the night before the accident to ascertain the condition of the track, and they had reported to him that there was a slide obstructing the track. The section foreman knew, therefore, of the existence and location of the slide the evening before the train started, and had the means by telegraph to communicate that important fact to the train dispatcher or he could himself have notified the plaintiff or warned him in various ways, and thus avoided any liability to accident on account of such slide. As the foreman stands for the master in such case, it would seem to be a plain dictate of duty for the master, with due regard for the

safety of its servants, and in the exercise of that care and vigilance which the exigency of the situation required, to have notified the plaintiff of the existence and location of the slide, and thereby avoided liability to accident. If the exercise of ordinary care required the master to take some such precautionary measures to prevent such an accident to its servant, the plaintiff did not assume the risk of such slide. As Bean, J., said in *Carlson v. Oregon S. L. & U. N. R. Co.*, *supra*, in speaking of the risks of the servant: "But if it were increased by the neglect of the master to use proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accidents to its employes as the exigency of the situation might require, he did not assume such risks." But we are not compelled to rely upon this aspect of the case; it is only suggested to show its character, and the difficulty of giving it any solution consistent with the exercise of care in the premises. The case here, upon its facts, is wholly different. As they have already been detailed, it is unnecessary to repeat them, but it will be enough to summarize some of them, to show the inapplicability of the theory of the defense to them. The plaintiff was not on a work train sent out to clear obstructions from the track between Kamela and La Grande; nor did he take charge of the train with any notice or knowledge that his duties involved such work, or other than his customary duty in running the train between Kamela and La Grande. For various reasons, he had a right to suppose that the track was clear or free from obstructions, except light snow blown into drifts, and that the blockaded track was between Huntington and La Grande. The shovelers were being carried to La Grande. The road master in charge of them says he had no reason to expect that they would run into a slide, or that they were running at a dangerous rate of speed. Upon this state of facts, the risks incident to a track, known to be obstructed with slides of snow and earth, as constituting a part of the contract of one accepting service upon it, can have no application. In accepting this employment, and running the train between Kamela and La Grande, the plaintiff did not assume, as a part of his contract, the risks arising from a track obstructed with slides of snow and earth. Nor did the plaintiff know that the track was obstructed by

a slide, but the defendant, through its foreman, knew of its existence and location. But, to avoid the effect of this, it is said that the track walkers did not report it as "dangerous;" hence it is argued that the foreman had no knowledge that any dangerous obstructions to the passage of trains were to be found upon the track anywhere along this section. But they did report it as a slide, coming from the mountain, and the difference between a slide and a drift has been sufficiently adverted to as showing the danger of the former when it obstructs the track. They did not report the snowdrifts across the track, but they did the slide that had come down the mountain and obstructed the track, and as indicating that they understood the difference; and the duty of the foreman, when the slide was reported, to give notice of its existence and location, at least, the result verified. The train experienced no difficulty in coming through the snowdrifts, but went to destruction when it encountered the slide. It was clearly the duty of the foreman to have communicated the information he received of the existence of this slide obstructing the track to those in charge of the train, and the failure to do so was negligence for which the defendant is liable. We do not deem it necessary to pursue the record further. We have examined it fully and carefully, and we do not think, upon the entire record, that any substantial right of the defendant has been ignored or prejudiced; and, though there may have been a mere technical error in the admission of the expert evidence, yet it is not possible to see, upon this record, how the verdict could have been different if such evidence had not been admitted. The bill of exceptions, so called, in this case contains the entire evidence, oral and documentary, all the instructions *pro* and *con.* and in fact is a transcript of the whole proceedings as extended from the shorthand report of the trial. Necessarily, such a bill of exception is filed with much superfluous and irrelevant matter, imposing needless expense on the parties, and much increased labor upon us. As the judgment was large, we have felt bound to examine the evidence carefully, so as to ascertain the facts involved upon which error is predicated, and then apply the law. This we have done, with the above result, in the hope that hereafter the bill of exceptions will contain no matter not essential to express the exceptions.

The judgment is affirmed.

ARKANSAS SUPREME COURT.

GILKERSON-SLOSS COMMISSION CO.,

Appt.,
v.

Lena SALINGER.

(... Ark.....)

A married woman cannot become her

husband's partner in a mercantile business by virtue of a constitutional right to hold separate property and of statutory provisions authorizing her to transfer her separate personal property and carry on any trade or business.

(June 4, 1892.)

NOTE.—Partnership between husband and wife in business.

The power of a married woman to become a partner.
16 L. R. A.

ner of her husband in business was plainly denied her at common law and can exist only under enabling statutes. No authorities are needed for this

A PPEAL by plaintiff from a judgment of the Circuit Court for Monroe County in favor of defendant in an action brought to recover from defendant, a widow, a debt which had been contracted by herself and her husband while in partnership in a mercantile business. *Affirmed.*

The facts are stated in the opinion.

Messrs. Ewan & Thomas and W. S. McCain, for appellant:

The Legislature of Arkansas, in 1878, enacted that any married woman might "carry on any trade or business," and that she might "sue or be sued on account of said business." Digest, 4625.

In *Trieber v. Stover*, 80 Ark. 727, it was contended that this statute allowed her to sue and be sued only in equity, but the court held this contention to be too narrow.

Abbott v. Jackson, 48 Ark. 212, ruled that the right to contract the relation of partner was implied in the power to "carry on business."

In New York, under a statute not unlike our own, the court of appeals has recently settled this question in favor of the right of husband and wife to form a partnership.

See *Suau v. Caffé*, 9 L. R. A. 598, 123 N. Y. 808. See also *Re Kinkead*, 3 Biss. 405.

In *Krouskop v. Shontz*, 51 Wis. 204, the Supreme Court of Wisconsin held that the husband and wife were jointly liable for supplies furnished to the farm which they owned and operated jointly.

A partnership is little else than a contract of mutual agency.

1 Lindley, Partn. *124, 210.

In *May v. May*, 9 Neb. 16, 81 Am. Rep. 899, under a statute in the identical words of our own, it was held that a wife might sue her husband on a note made by him and assigned to her by the payee.

See also *Pillow v. Sentelle*, 49 Ark. 480.

After this court had held that the wife under our statutes might contract for a partnership it was invading the domain of legislation for the court below to make an exception as to her husband. In *Hickey v. Thompson*, 52 Ark. 287, this court was asked to say that "carrying on business" did not include farming. The court, however, declined to make an exception not made by the statute.

Messrs. W. F. Hill and W. J. Mayo, for appellees:

A partnership is a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits between them.

Anderson, Law Dict. article, *Partnership*.

There are two currents of authorities in this country in reference to the capacity of married women to make contracts—the one liberal and the other conservative.

Stillwell v. Adams, 29 Ark. 846.

Some few of the courts of the states have held that the ordinary enabling statutes authorize contracts between husband and wife.

9 Am. & Eng. Encyclop. Law, 794.

But it will be found that the great weight of authorities is the other way.

proposition, but it is involved, among other cases, in *Chatterton v. Young*, 2 Tenn. Ch. 768; *Brown v. Jewett*, 18 N. H. 230; *Mayer v. Soystrer*, 80 Md. 402.

So in the absence of statutory authority to become a partner of her husband, a married woman cannot be charged as such by holding herself out as a member of a partnership. *Montgomery v. Sprankle*, 81 Ind. 112.

In Florida it was held as late as 1887 that a married woman had no contractual capacity and therefore could not enter into a partnership with any one. *De Graum v. Jones*, 23 Fla. 83.

Under the Texas statute allowing a married woman to contract for the benefit of her separate property and for family necessities, she cannot become a partner in business with her husband, or any one else. *Miller v. Marx*, 65 Tex. 131; *Green v. Ferguson*, 63 Tex. 825; *Brown v. Chancellor*, 61 Tex. 437; *Cox v. Miller*, 64 Tex. 16; *Wallace v. Finberg*, 46 Tex. 35.

So in Ohio, at least prior to the Statute of 1884, a wife had, although able to contract for the benefit of her separate estate, had no power to become her husband's partner. *Payne v. Thompson*, 8 West. Rep. 153, 44 Ohio St. 128.

In South Carolina a married woman cannot enter into a partnership contract with her husband or become estopped from denying a partnership liability, although the statutes give her a right to contract and hold separate property as if unmarried. *Gwynn v. Gwynn*, 27 S. C. 525. But see *Alabama cases, infra*.

The right to a separate legal estate does not give a married woman power to become a partner. *Carrey v. Burrus*, 20 W. Va. 571.

Authority to carry on trade as a *feme sole* does not include the power of a married woman to become a partner. *Bradstreet v. Baer*, 41 Md. 19.

And the power to own separate property and 16 L. R. A.

contract in relation thereto does not give her such power. *Howard v. Stephens*, 52 Miss. 239.

A statute which merely authorizes a married woman to hold a separate estate and contract in reference to it as if she were unmarried does not authorize her to enter into a partnership with her husband. *Artman v. Ferguson*, 2 L. R. A. 843, 73 Mich. 146; *Speier v. Opfer*, 2 L. R. A. 845, 73 Mich. 85; *Bassett v. Shepardson*, 52 Mich. 3.

The power to enter into any contract with reference to her separate estate in the same manner as if she were sole and to carry on any trade or business does not give a married woman the right to become a partner of her husband. *Lord v. Parker*, 3 Allen, 127; *Plumer v. Lord*, 7 Allen, 481; *Bowker v. Bradford*, 1 New Eng. Rep. 459, 140 Mass. 521; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

The strongest of all the cases against a wife's power to become a partner of her husband is the recent case of *Seattle Board of Trade v. Hayden* (Wash.) May 11, 1892 (post, —), in which the court denies that power, although the statutes had expressly abolished all laws which impose or recognize civil disabilities upon a wife and give her the right to a separate estate and to contract and incur liabilities to the same extent and in the same manner as if she were unmarried.

On the other hand, there are other authorities which interpret the Married Women's Statutes more liberally.

In *Re Kinkead*, 3 Biss. 405, it was held that a married woman, under a statute giving her a right to separate property and to contract with reference to it, could enter into a partnership with her husband, but this decision was made in respect to the claim of an individual creditor of the husband to share in the partnership assets with creditors of a firm consisting of husband and wife.

In Alabama under statutes which give a married

Harris, Contracts of Married Women, § 582.

And this court, in the cases of *Countz v. Markling*, 30 Ark. 17, and *Pillow v. Wade*, 81 Ark. 678, has decided that contracts between husband and wife are void.

These decisions are based on the unity of husband and wife, as it existed at common law; and if this doctrine is still recognized by the court, how could it consistently sustain a contract of partnership between them?

Robinson v. Eagle, 29 Ark. 207; *Abbott v. Jackson*, 43 Ark. 212; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Artman v. Ferguson*, 2 L. R. A. 843, 78 Mich. 146, 16 Am. St. Rep. 572; *Lord v. Parker*, 3 Allen, 127; *Plumer v. Lord*, 5 Allen, 460; *Bowler v. Bradford*, 1 New Eng. Rep. 459, 140 Mass. 521; *Payne v. Thompson*, 3 West. Rep. 153, 44 Ohio St. 192; *Cox v. Miller*, 54 Tex. 16; *Mayer v. Soyster*, 30 Md. 402; *DeGraum v. Jones*, 23 Fla. 83; *Carey v. Burrus*, 20 W. Va. 571; *Speier v. Opfer*, 2 L. R. A. 845, 78 Mich. 85; Harris, Contracts of Married Women, § 618.

Hughes, J., delivered the opinion of the court:

The question is presented by a demurrer, which the court below sustained to the following complaint: "Monroe Circuit Court. *Gilkerson-Sloss Commission Company*, Plaintiff, v. *Lena Salinger*, Defendant. Amended Complaint at Law. The plaintiff, Gilkerson-Sloss Commission Company, a corporation incorporated under the laws of Missouri, doing business at St. Louis, states that Louis Salinger

died on the 26th day of November, 1890; that at the time of his death and for five years previous thereto the defendant, Lena Salinger, was the wife of said Louis Salinger; that for some time previous to January 20, 1888, the defendant and one William Hooker were partners in trade, under the firm name of William Hooker & Co., doing a general mercantile business at Brinkley, Ark., and on said 20th day of January, 1888, said William Hooker sold and transferred all his right and interest in the property and assets of said firm of William Hooker & Co. to said Louis Salinger, and thereby said Louis Salinger and the defendant, Lena Salinger, became jointly interested in the ownership of said partnership property, and said Louis and Lena then and there agreed to adopt the firm name and style of L. Salinger & Co., and to carry on and continue said mercantile business as partners with each other, and they did adopt said name and style of L. Salinger & Co., and did, pursuant to such partnership agreement, carry on such business from the said 20th day of January, 1888, until the day of said Louis Salinger's death, to wit, November 26, 1890, and while such partnership business of L. Salinger & Co. was being carried on, to wit, during the year 1890, the plaintiff sold and delivered to L. Salinger & Co. goods, wares, and merchandise to the amount of \$1,260.36, for part of which said L. Salinger & Co. executed to plaintiff two promissory notes. An itemized statement of plaintiff's account against said L. Salinger & Co., including the amount of said notes, together with the notes,

woman the right to her earnings and to a separate estate, and permitting her to contract with her husband and engage in trade on her separate account, she may become estopped from denying the existence of a partnership with her husband as to those who have dealt with and trusted her as such. *Schlapback v. Long*, 90 Ala. 525.

In *Le Grand v. Eufaula Nat. Bank*, 61 Ala. 123, it was held that a married woman engaging in business with the addition of "& Co." to her name was estopped to deny that she was a partner as against those who dealt with her on the faith of the partnership.

In Georgia it was held in 1890 that a married woman was liable on a joint lease with her husband of a house in which to carry on a hotel business. *Schofield v. Jones*, 85 Ga. 516.

This did not expressly decide that a partnership between husband and wife would be valid, but that the wife might be a co-lessee of her husband, and the case is not necessarily in conflict with those which deny the right of husband and wife to be partners in business.

The same may be said of the Wisconsin decision that a statute allowing contracts to be made and remedies in favor of and against a married woman "as if she were unmarried" makes her liable on a purchase of property to be used by them in carrying on her farm. *Krouskop v. Shontz*, 51 Wis. 204.

In New York it has been decided by the court of appeals (second division), that a married woman may become liable on a partnership debt as a partner of her husband under the statute giving her authority to carry on any trade or business "on her sole and separate account." *Suau v. Caffé*, 9 L. R. A. 593, 122 N. Y. 306.

The same decision had been made by the supreme court, special term, in *Graff v. Kinney*, 15 Abb. N. C. 397. Although the same question had been decided the other way by a special term decision in 16 L. R. A.

Fairlee v. Bloomingdale, 14 Abb. N. C. 341, and by the general term of the supreme court in *Kaufman v. Schoeffel*, 37 Hun, 140, by the city court of Brooklyn in *Noel v. Kinney*, 15 Abb. N. C. 408 (disposed of in the court of appeals on other grounds), by the New York Common Pleas in *Jacquin v. Jacquin*, 15 Abb. N. C. 403, note (this being an action for an accounting), by the New York superior court in *Chamboret v. Carney*, 3 Jones & S. 473, and by a surrogate in *Boyle's Estate*, Tucker, 4. Again, in *Lowenstein v. Salinger*, 43 N. Y. S. R. 414 (decided Dec. 31, 1891), and about one year after the decision in *Suau v. Caffé*, the general term once more held that a wife could not become her husband's partner under the New York statutes, and therefore denied such right under the statutes of Arkansas on a showing that the latter were almost identical with the New York statutes.

But in Mississippi the Arkansas statute, which gives a married woman the power to own a separate estate and to carry on trade or business, has been construed in harmony with the decision in *Suau v. Caffé*, *supra*, by the New York court of appeals. *Toof v. Brewer* (Misc.) Feb. 20, 1893. This, it will be seen, is in conflict with the decision of the Arkansas court in the main case.

If a married woman has actually been engaged in business as a partner of her husband she may take her share of the profits as against his creditors. *Huffman v. Copeland*, 86 Ind. 224.

So a husband may become estopped from denying that he is a partner of his wife. *Rabitts v. Orr*, 83 Ala. 185.

The weight of authority at present is undoubtedly against the power of a wife to enter into business partnership with her husband unless expressly authorized to do so, while the general tendency both of statutes and decisions is evidently toward the complete removal from married women of legal disabilities of every kind.

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is herewith filed, showing all credits to which they are entitled, and leaving a balance of \$571.69 due and unpaid to plaintiffs."

No part of said indebtedness has been paid except as credited on said statement. Can a married woman become the partner of her husband in a mercantile business? In many of the states it is held that she may, under statutes enlarging the powers of married women, and removing in part their disabilities at common law. It is so held in *Suau v. Coffe*, 122 N. Y. 808, 9 L. R. A. 593. But the weight of authority is that she cannot. At common law, the legal existence of the wife was merged in that of the husband, and they could not contract with each other. Section 7, art. 9, Const. 1874, provides that "the real and personal property of any *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and be devised, bequeathed, or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband." It has been held that under this section a married woman may convey her separate estate, and acknowledge the execution of a deed for registration as a *feme sole*. *Roberts v. Wilcoxson*, 86 Ark. 355. She cannot, however, make an executory contract to convey land which will bind her or her heirs. *Felkner v. Tighe*, 89 Ark. 357; *Christman v. Partee*, 88 Ark. 31. By section 4625 of Mansfield's Digest it is provided that "a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may alone sue or be sued in the courts of this state, on account of the said property, business or services." Under similar statutes it has been held by some courts that a married woman could not become the partner of any one in business. In *Abbott v. Jackson*, 43 Ark. 212, Judge Eakin said: "It is well settled, too, that a married woman, under such statutes as that of April 28, 1873, can form a partnership as a sole trader with a third person, other than her husband," etc. But it has not been heretofore determined expressly in this state that a married woman can or that she cannot enter into partnership with her husband. In *Counte v. Markling*, 30 Ark. 17, it was held that a judgment by confession rendered against the husband in favor of the wife is void, and will be quashed on certiorari. This was on the ground of the legal unity of husband and wife, and the inability of the wife to sue the husband at common law. In *Pillow v. Wade*, 81 Ark. 678, it is held that husband and wife are incapable of contracting with each other. Under a similar statute to ours it is held in *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607, that a wife cannot form a partnership with her husband. See also *Lord v. Parker*, 3 Allen, 127; *Plumer v. Lord*, 5 Allen, 460; *Speier v. Opfer*, 73 Mich. 35, 2 L. R. A. 345; Harris, Contracts of Married Women, § 618; 16 L. R. A.

Mayer v. Loyster, 30 Md. 402; *Carey v. Burrus*, 20 W. Va. 571; *De Graum v. Jones*, 23 Fla. 88.

In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action.

The judgment is affirmed.

Hemingway, J., dissenting:

I am constrained to record my dissent from the decision in this case, and from much that is said in the opinion by way of argument. I am of opinion that, under the Constitution and laws of Arkansas, a married woman is, as to her separate personal property, clothed with all the powers of a single woman; that she may make contracts in reference to it with her husband or with others, binding upon her in law, just as though she were single; that she may be sued upon said contracts in a court of law, where the action is otherwise properly cognizable in law; and that, since it is settled that she may engage in business as a partner with others than her husband, it follows from exactly the same reasons that she may embark her property or services in a partnership with him. My reasons in brief are that whatever law can be appealed to as authorizing her to form a partnership with any person is without limitation or restrictions as to the person with whom she may form it; and that, as it confers a power without restriction in that respect, it can be held to exclude the husband only by a system of judicial construction which seems to me to be legislation,—and that towards restraining the power vested under an Act which is highly remedial, and expressly calls for a liberal construction. Manaf. Dig. § 4639. At the common law, a married woman had no power to make a valid contract with her husband, or with anybody else. Her disability was general, and whatever power she now has must be found in the statutes. They authorize her to bargain, sell, assign, or transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account. This has been held as authorizing her to make contracts and enter into partnerships; and how it can be said that the right is given to be exercised as to one person, and is not as to any other, I do not comprehend. By its terms it extends as much to dealings with one person as with another, and if it exists at all, it exists generally as to all persons, unless the courts limit a power which came from the Legislature unlimited. If I were attempting to restrict the operation of the Act and limit the exercise of the power to any person or class of persons according to principles of public policy, I should have to consider whether it would not be better to include the husband, and exclude others, than to permit a partnership with all others and forbid it as to him. But as I view the Act, it contains no

restrictions, and I have no right to ingraft any to meet my ideas of policy. In the case of *Suau v. Caffé*, 122 N. Y. 808, 9 L. R. A. 598, a very clear and convincing discussion of the question may be found; and in the case of *Toof v. Brewer* (Miss.) 3 So. Rep. 571, the question is exhaustively and ably considered. That case depended upon the laws of Arkansas, and the Supreme Court of Mississippi, upon a review of our decisions and statutes and the general current of authorities, held that a woman could become a business partner of her husband in Arkansas. There are decisions that hold otherwise, but they rest upon the legal unity of husband and wife,—a condition that has had no existence, except in law

reports, since legislation gave to married women the right to acquire, own, and dispose of their property, and to take and enjoy the income from it, free from any interference or control by their husbands. As such decisions are based upon a condition that has been deliberately abrogated by statute, I think the courts should be controlled by the new law, and not by the old condition. I believe the two decisions cited state the law, and sustain the positions taken with unassailable reasoning, and I beg leave to refer to them for a fuller treatment of the subject. I am authorized to state that *Battle, J.*, concurs in this opinion.

WASHINGTON SUPREME COURT.

SEATTLE BOARD OF TRADE *et al.*,
Respts.,

Mary HAYDEN, *Appt.*

(..... Wash.)

A partnership between husband and wife is not authorized by statute providing that a wife may make contracts and incur liabilities as if unmarried, and giving her full power to manage and dispose of her own property, and also declaring that all laws which impose or recognize civil disabilities upon a wife that do not exist as to her husband are abolished.

(*Dunbar, J., dissents.*)

(May 11, 1902.)

APPEAL by defendant, Mary Hayden, from a judgment of the Superior Court for Whatcom County holding her liable for debts of the firm of J. P. Hayden & Co. *Reversed.* The facts sufficiently appear in the opinion. *Messrs. Slade, Hadley & Hadley* and *Bruce & Brown*, for appellant:

That a married woman could not make a contract of copartnership, or, indeed, of any other nature, at common law, needs no discussion.

Hoker v. Boggs, 63 Ill. 161; *Wilson v. Loomis*, 55 Ill. 352; *Pike v. Baker*, 58 Ill. 163.

The Legislature enacted the statute having reference to that rule of law, and have in words limited their grant of power to married women, only to the extent that "laws which impose or recognize civil disabilities upon the wife, which are not imposed or recognized as existing as to the husband, are hereby abolished."

Code, § 2398.

The Legislature found the husband burdened with the disability to contract with his wife; they left him under that burden.

See *Artman v. Ferguson*, 2 L. R. A. 243, 78 Mich. 146; *Jenne v. Marble*, 37 Mich. 326; *Lord v. Parker*, 3 Allen, 127; *Bowker v. Bradford*, 1 New Eng. Rep. 459, 140 Mass. 521;

NOTE.—For notes upon the questions involved in this case, see the preceding case of *Gilkerson-Sloss Commission Co. v. Salinger*, 16 L. R. A.

Payne v. Thompson, 3 West. Rep. 153, 44 Ohio St. 192; *Kaufman v. Schoeffel*, 37 Hun. 140; *Cox v. Miller*, 54 Tex. 16; *Mayer v. Soyler*, 30 Md. 402; *Kelly, Married Women*, § 16, p. 159.

Messrs. Dorr & Finch and *Strudwick, Peters & Van Wyck*, for respondent, Seattle Board of Trade:

The husband and wife may contract as partners and are liable to creditors as such.

Suau v. Caffé, 9 L. R. A. 598, 122 N. Y. 808; *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 74, 60 Am. Rep. 428; *Bitter v. Rathman*, 61 N. Y. 512.

If the contract is invalid only as between the defendants, the wife, who received the fruits of the transaction, cannot as against a creditor assert its invalidity. Although married, she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*.

Bodine v. Killeen, 58 N. Y. 93.

The Statute of New York (§ 2, chap. 90, Laws 1890) provides that "a married woman may . . . carry on any trade or business, . . . on her sole and separate account."

Since the enactment of this statute, it has been held that husbands and wives may legally contract with each other in reference to their separate estates.

Owen v. Cawley, 36 N. Y. 600; *Bodine v. Killeen*, *supra*.

That they may become agents for each other.

Knapp v. Smith, 37 N. Y. 277.

And that a husband may assign to his wife a chose in action.

Seymour v. Fellows, 77 N. Y. 178.

In *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140, it was held that a married woman could not on the ground of coverture deny the existence of the partnership where its name had been assumed publicly, and credit obtained on the faith of its alleged existence.

The following cases hold that the husband and wife may become partners:

Lyon v. Zimmer, 30 Fed. Rep. 401; *Norris v. McCanna*, 29 Fed. Rep. 757; *May v. May*, 9 Neb. 16, 31 Am. Rep. 399; *Knox v. Moser*, 69 Iowa, 841; *Lipscomb v. Lyon*, 19 Neb. 511; *Youmans v. Lowley*, 56 Mich. 197; *Clark v. Hezekiah*, 24 Fed. Rep. 663; *Toof v. Brewer*, (Miss.) Feb. 20, 1888; *Dunifer v. Jecko*, 2 West.

Rep. 452, 87 Mo. 283; *Wells v. Caywood*, 3 Colo. 489; *Hamilton v. Hamilton*, 89 Ill. 849.

Many more cases intimate or assume as much.

McKune v. McGarvey, 6 Cal. 497; *Guttman v. Scannell*, 7 Cal. 455; *Melcher v. Kuhland*, 22 Cal. 523; *Camden v. Mullen*, 29 Cal. 566; *Dayton v. Walsh*, 47 Wis. 118, 32 Am. Rep. 757; *Graff v. Kinney*, 87 Hun, 405; *Rankin v. West*, 25 Mich. 195; *Bellows v. Rosenthal*, 81 Ind. 116.

Looking to the sources of our laws of property rights between husband and wife, we find that by the civil and Spanish law the relation of husband and wife was regarded as a species of partnership.

Schmidt, *Civil Law of Spain & Mexico*, bk. 1, title 1, chap. 4; *Packard v. Arellanes*, 17 Cal. 537; *Labbe v. Abat*, 2 La. 565.

The community of the husband and wife is a species of partnership under the Mexican law.

Fuller v. Ferguson, 26 Cal. 567; Platt, *Property Rights of Married Women*, § 6.

Messrs. Fairchild & Rawson, for respondent, Risdon-Cahn Co.:

The state of Arkansas has a statute which is similar to our own. Under this statute, the identical question presented in this case was passed by the Supreme Court of Mississippi in *Toof v. Brewer*, Feb. 20, 1888, wherein in passing upon the question as to whether or not husband and wife could enter into a contract of copartnership the court cites Bishop, *Married Women*, § 435; Schouler, *Husband & Wife*, § 316, and the cases referred to by them, and states that with the exception of the cases from Massachusetts the authorities cited are foreign to the proposition they are relied on to support, and distinguish the Massachusetts cases upon the ground that the section of the statute of that state that permitted her to acquire property excluded the right to acquire it by gift from the husband.

See also *Re Kinkead*, 3 Biss. 405; *Kaufman v. Schoeffel*, 37 Hun, 140; *Graff v. Kinney*, 87 Hun, 405; *Fairlie v. Bloomingdale*, 38 Hun, 220; *Zimmermann v. Erhard*, 58 How. Pr. 11; *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 74, 60 Am. Rep. 423.

In the case of *May v. May*, 9 Neb. 16, the Supreme Court of Nebraska holds that under the statute of Nebraska, husband and wife may contract together, and that the wife can sue the husband upon a promissory note made and executed to her.

See also *Logan v. Hall*, 19 Iowa, 491; *Huber v. Huber*, 10 Ohio, 371; *Alexander v. Alexander*, 85 Va. 353; *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725; *Brickley v. Walker*, 68 Wis. 568; *Knoz v. Mower*, 69 Iowa, 341; *Lipcomb v. Lyon*, 19 Neb. 511.

In *Dunifer v. Jecko*, 2 West. Rep. 452, 87 Mo. 282, it is held that a married woman, under her power to contract and redeem her separate property, may engage with her husband in the publication of a newspaper.

In *Wells v. Caywood*, 3 Colo. 489, the effect of modern statutes upon the rights of married women is discussed with great clearness and at great length, and as the statute of Colorado is very like our own, the case is peculiarly instructive.

16 L. R. A.

Messrs. Allen & Powell, for respondent J. H. Allen:

Petition for rehearing on behalf of Seattle Board of Trade.

Chapter 183, Code 1881, establishes the law of this territory respecting the rights and capacities of married persons; in its provisions alone are to be sought the spirit and policy of the law and no resort is to be had to the common law or to the civil law or to any other law.

Rosencrantz v. Washington Territory, 2 Wash. Terr. 274.

The underlying principle of the status of a married woman at the common law is that her legal capacity is suspended during coverture. Under our statute her capacity is the same during coverture as when sole, and is equal in every respect to that of her husband. The reason of the common-law rule is therefore gone and with it must go the rule.

The evils resulting from this or that statute cannot be considered by a judicial body determining what is or what is not the law.

Brotton v. Langert, 1 Wash. 73.

Stiles, J., delivered the opinion of the court:

These were four cases, the trials of which were consolidated. In two of the cases the theory of complaints was that the appellant and her husband were actual partners in the mercantile business under the firm name of J. P. Hayden & Co. In the other two the theory was that the community composed of the husband and wife was carrying on business, and that the husband and wife were its agents. The evidence did not tend to support either theory as pleaded, but was directed wholly to an effort to show that J. P. Hayden was doing business under the name of J. P. Hayden & Co., and that appellant made herself liable as a partner by "holding out." The real object in making appellant a party, and taking judgment against her, was to subject certain real estate which she claims is her separate property to the payment of debts incurred by J. P. Hayden & Co. The main question involved is, Can a husband and wife become partners in trade in this state? It is claimed that they may, under the Act of November 21, 1881, commonly known as "Chapter 183 of the Code" of that year. Of that chapter the following sections are supposed to be especially pertinent to the matter in hand: "Sec. 2396. Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried." "Sec. 2398. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has." "Sec. 2400. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profit thereof, shall not

be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, incur, or devise by will such property, to the same extent, and in the same manner, that her husband can property belonging to him. Sec. 2401. Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried." "Sec. 2406. Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

Prior to the Act of 1881, but for the Acts commencing in 1869, the common law would have regulated the property rights of husband and wife. It did then, and still does, regulate them, excepting so far as the statute has directed otherwise; and, notwithstanding that this Act provides in section 2417 that the "rule of common law that statutes in derogation thereof are to be strictly construed has no application to this Act," it is not to be supposed that the Legislature intended or proposed to extend the scope of the Act beyond the language used further than the implications naturally flowing therefrom. At the common law, a wife could not be a partner in business with any one because partnership is based on a contract, as to which she was under a disability, and yet in equity she had always been permitted to enforce contracts made for her benefit, even with her husband, and her claim against him as her debtor had always been sustained. *Story*, Eq. Jur. §§ 1872, 1878; *Valensin v. Valensin*, 28 Fed. Rep. 599; *Clark v. Heskiah*, 24 Fed. Rep. 663; *Huber v. Huber*, 10 Ohio, 872.

She could have a separate estate,—meaning an equitable estate,—held by a third person in trust for her. This estate she could charge in equity, but not at law. Judgments upon her debts went not against her person, when allowed at law, but were allowed as equitable burdens upon her estate or personal property in possession at the time of the marriage and that acquired afterwards. Her choses in action, when reduced to possession, and her earnings became her husband's. In her freeholds and lands in fee the husband took a life estate. He became liable for her antenuptial debts, and, jointly with her, for her torts during coverture. Her responsibility at law for contracts was entirely suspended; and in equity, before the courts would hear anything against her, it must appear that she was possessed of a separate estate in the common-law sense.

Now, this Act of 1881 does certain things for a married woman: *First*, it gives her full dominion over her own property, whether acquired before or after marriage, to enjoy and dispose of it without the intervention of her husband, or responsibility for him or his debts; *second*, it removes from her all civil disabilities not imposed upon her husband; *third*, she can sue and be sued as if she were unmarried, either at law or in

equity; *fourth*, for her debts she alone is responsible; *fifth*, her property is chargeable with family expenses. In short, the purpose of the Act seems to be to set her free from all influence or dominion of her husband in so far as her property rights are concerned, and leave her to manage, control, and dispose of them as she pleases, whether to her gain or loss.

In this opinion we shall not discuss the question how large her power is, but confine ourselves to the single matter before us. Counsel for respondents contend that, as it is the evident purpose of these provisions to emancipate the wife from the control of the husband, and to enfranchise her with the power denied to her under the common law, to acquire, hold, enjoy, and dispose of property, and do business on her own account as freely as he can, or even more freely than he can, under the same Act, it must follow that she can enter into a contract of partnership in all the ways, and with all the liabilities, that her husband can and that, unless she is permitted and held to be able to enter into the same contracts with him that she can with others, he is deprived of the full measure of liberty which the law intends to confer upon her.

It may be said that she can, and in some cases will be held to, become a general partner with third persons under the terms of the Act, and the necessary implications thereof. It has been so held in *Newman v. Morris*, 52 Miss. 403; *Abbott v. Jackson*, 43 Ark. 212, and elsewhere, when one of the persons engaged with her as partners was her husband. But the question still remains, Does the statute intend that she can enter into ordinary contracts with her husband and particularly the contract of partnership?

On this point we think the position of the respondents is antagonistic to itself. In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that, unless she can become his partner, she will not be wholly free, if yielded to, will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordinary persuasion, or by his mere declaration, made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which it seems to us stands out the most clearly in the Act in question, *i. e.*, to secure her protection in the management and enjoyment of her estate, would be defeated.

In Massachusetts the Married Woman's Property Act, which existed until 1874, when the Legislature expressly forbade husband and wife to contract, provided: "Any woman may, while married, bargain, sell, and convey her real and personal property which may be her sole and separate property, or which may hereafter come to her by de-

scent, devise, bequest, gift of any person except her husband, and enter into any contract in reference to the same, in the same manner as if she were sole;" and "any married woman may carry on any trade or business, and perform any labor or services, on her own sole and separate account; and the earnings of any married woman from her trade, business, labors, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, etc., and her property acquired by her or her trade, etc., may be taken on any execution against her." This Act covers every material point of our own, and notably the wife is permitted to make "any contract" in reference to her property, which is all that any person can do. But in *Lord v. Parker*, 8 Allen, 127, it was held that she could not be a partner in a firm where her husband was a partner. Speaking of the statutes, the court said: "Their leading object is to enable married women to acquire, possess, and manage property without the intervention of a trustee, free from the interference or control, and without liability for the debts of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction; and we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her 'sole and separate' property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. If she could contract with her husband, it would seem to follow that she could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings *in invitum* under the Insolvent Laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law, involving such momentous results, and a change so radical, could have been contemplated by the Legislature, without a much more direct and clear manifestation of its will."

To the same effect is the construction of the similar statute by the supreme court of

the state of Maine. *Smith v. Gorman*, 41 Me. 405; *McKeen v. Frost*, 48 Me. 239.

In Michigan, How. Stat., § 6295, provides that the separate property and estate of a married woman "may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with the like effect as if she were unmarried." And section 6297 provides that "actions may be brought by and against her in relation to her sole property in the same manner as if she were unmarried." It is true that these provisions in the Michigan statute (and those of several other states) speak particularly only of her separate estate, but her separate estate is by section 6295 expressly defined to be the same as that which is equally her separate property in this state; but if she be thus enabled to contract with absolute freedom in reference to her separate estate, then according to the logic of respondents' argument, her freedom in that respect would be unlawfully curtailed by holding that she could not contract with reference thereto with her husband. Yet the Supreme Court of Michigan in *Artman v. Ferguson*, 73 Mich. 146, 2 L. R. A. 843, after alluding to decisions in other states where it is held that a married woman may be, where she has separate estate, a partner with persons other than her husband, uses this language: "It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control; and if she might enter into a business partnership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in *Bassett v. Sheperdon*, 53 Mich. 3, and we see no reason for departing from it. The important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal, and a mutual liability for the contracts and obligations of each other."

In Indiana, under the third section of the Act of March 25, 1879, it was provided that a married woman might enter into any contract, in reference to her separate personal estate, trade, business, labor, or services, and the management and improvement of her separate real property, the same as if she were sole; and her separate estate, real and personal, should be held liable and on execution sold. But in *Haas v. Shaw*, 91 Ind. 884, and in *Scarlett v. Snodgrass*, 92 Ind. 262, it was distinctly held that she could not bind herself by a contract of copartnership with her husband. These citations from eminent courts are sustained in *Schouler, Husb. & W.* § 817, and 2 Bishop, Mar. Wom. § 485.

Opposed to these adjudications, counsel

cites us to a line of authorities of which *May v. May*, 9 Neb. 16, is a sample. There a husband made and delivered his promissory note to a third party, who indorsed and delivered it to the maker's wife; and a second note he made directly to his wife. She brought an action at law against him on both notes, and the court held that the demurrer of the wife to the husband's answer setting up the marriage of the parties in the nature of a plea of abatement should have been sustained. The statutes of that state with regard to the separate property of married women are substantially the same as our own, and we see no reason for dissenting from the views therein expressed and the conclusions therein arrived at. The holding of the court was, in effect, simply to substitute an action at law for a suit in equity. In its decision, on page 226, the court said: "Even under the old system of practice and before the beneficent legislation defining the rights of married women herein quoted, this could have been done by resorting to the circuitry of proceeding in the name of a trustee and a court of equity. But now not only is the administration of law and equity vested in the one court, but all forms of procedure which heretofore distinguished legal and equitable suits are abolished, and the need of the intervention of a trustee is done away with by the statute which provides that 'every action must be prosecuted in the name of the real party in interest.'"

But notwithstanding these cases, and the doctrine established by them, no case is cited, and we have not been able to find one, in which either husband or wife has been permitted, either at law or in equity, to enforce a purely executory contract against the other; and in that lies the kernel of this controversy. Because such a contract must be enforceable by both parties, and at its beginning it is entirely executory. The terms of the partnership may be that it shall continue for a certain length of time; that certain capital shall be invested; that the services of the parties to the contract shall be devoted to the business of the partnership; that the profits and losses of the business shall be divided equally or in certain proportions; and many others, all of which are executory and some of which are absolutely indispensable to the prosecution of any partnership business to advantage.

It is also insisted, and citations are made to authorities to show, that the husband and wife, in states where the doctrine of community property prevails, are, in a sense, partners at all events. One of the citations is *Fuller v. Ferguson*, 26 Cal. 547, and another is Schmidt's Civil Law of Spain and Mexico; but turning to *Fuller v. Ferguson*, page 567, we find this language: "The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced in the manner prescribed. To this community or partnership belongs—*First*, all the property, of whatever nature, which the spouses acquire by their own labor and industry; *second*, the

fruits and income of the individual property of the husband and wife; *third*, whatever the husband gains by the exercise of a profession or office; *fourth*, the gains from the money of the spouses, although the capital is the separate property of one of them." It is scarcely necessary to say that, because the relation of husband and wife as to their common property is likened to a partnership, the reason for the similitude is totally wanting when their separate property is concerned.

But the respondents produce two decisions of New York and Mississippi, respectively, which expressly hold that a husband and wife may be partners,—*Suau v. Caffé*, 122 N. Y. 808, 9 L. R. A. 593; *Toof v. Brewer* (Miss.) 3 So. Rep. 571. The statutes of New York governing the former case were almost identical with those of Massachusetts, above quoted. Husband and wife filed a certificate, by which they assumed to form a limited partnership under the firm name of "George Caffé." The husband was the general and the wife the special partner, she contributing \$25,000. The firm became indebted, and both husband and wife were sued. The court, after reviewing New York cases only, said: "Upon principle and authority we think that when a husband and wife assume to carry on a business as partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture." This as is seen by the facts above stated, was an extreme case, in which the wife had by a solemn instrument, placed upon file among public records, shown her intention of assuming a partnership relation with her husband and contributing to the firm large sums of money. Whether or not the firm was insolvent is not disclosed. All that appears is that she was retained as a party to the action. But we find that of the seven judges of New York Court of Appeals but four joined in the opinion, while three dissent on the very point in question. Haight, J., in his dissenting opinion, reviews the course of decision in the state of New York as well as in other states, and comes to the conclusion—which is, we think, unassailable—that the majority opinion was wrong. The decision in this case is, to us, a curious one, inasmuch as we find the same court, only one year previous, in the case of *Hendrick v. Isaacs*, 117 N. Y. 411, 6 L. R. A. 559, holding by a unanimous court that under these same statutes a husband and wife could not contract with each other at all.

Toof v. Brewer was a controversy which was controlled by the statutes of Arkansas, which are again almost exact duplicates of those of Massachusetts. The court, after alluding to *Abbott v. Jackson*, 43 Ark. 212, in which it was held that a married woman could become a partner as a sole trader with a third person other than her husband, and would, as to her property, be bound by all the contracts of the firm as effectually and to the same extent as if she were a man, discusses cases in Massachusetts, New York, and other states, and comes to the conclusion that a married woman, under the law of Arkansas, could also become the business

partner of her husband. Just why it becomes necessary for the court in this case to decide this question is not clear from the report. It is said that the Brewers, husband and wife, were carrying on planting operations in Arkansas, and Toof *et al.* made to them advances of supplies. After this the Brewers moved to Tennessee, and there gave to Toof *et al.* four notes in payment of the indebtedness due them, in which notes Mrs. Brewer charged her separate estate for their payment. From this it would seem that the question of partnership was not necessarily involved in the case, but that the real question was whether, upon her note, which assumed to expressly charge her separate estate, a personal judgment at law should be entered against her.

The case of *Wells v. Caywood*, 8 Colo. 489, is also cited by respondents, and the general language used by the court in that case on page 491 is abundantly broad enough to support the citation, were it not that the point in issue had no analogy whatever to that of the case at bar. We conclude, upon the whole, that the better reason as well as authority is with the position that these married women's statutes generally agree on their material points, and that it was not intended thereby that a husband and wife could become partners.

But in our statute there are one or two provisions which we think make this position clearer than it is in perhaps any of the others. Section 2397 substantially makes each of them, as to all transactions between them, a trustee for the other. The burden of proof, as between them, is upon the party asserting the good faith. Persons who are free to contract with each other are not subject to such a rule. They stand at arms' length, and, unless there is actual fraud, the law gives no relief. Again, it would seem that, if husband and wife are at liberty to contract with each other with perfect freedom as strangers, the provisions of section 2416 would have been left out. By that section husband and wife, when they attempt to make any agreement as to the status or disposition of the community property, must do so by the execution of an instrument in writing and under seal, which must be acknowledged and certified as a deed to real estate. Why so much solemnity with regard to her interest in community property and such looseness and absolute want of protection with regard to her separate property, which it is conceded by all it was the first purpose of this Act to secure to her?

The case at bar is, perhaps, as strong an example as experience could produce of the evil effects of such a construction of this statute as is contended for by respondents. The wife held certain real estate, which she claims is her separate property. It is all she has. The husband engaged in a mercantile business in a building built by her upon her land, and painted over the door a sign, "J. P. Hayden & Co." He went to Seattle to buy goods for his stock, and his wife went with him. In a certain store where he was about to make some purchases he was asked who constituted the firm. His answer was,

"My wife is the only partner I have." She sat within a few feet of where this was said, and the witness who testified to the statement of Mr. Hayden thought she might have heard what he said. Again, a traveling agent for a firm in San Francisco, who sought to sell Hayden goods, when in the store at Fairhaven asked a question similar to the one asked in Seattle, and received a similar answer; and on this occasion Mrs. Hayden was sitting at a desk in the view of the two men, and again the testimony was that she might have heard what her husband said. The jury found as a special verdict that these were the only two men to whom any such statement was made, although others were testified to. Yet upon this testimony, and some other of as slight moment, and because, as it is said, the wife remained silent, and did not deny what her husband said in her hearing, she was held to be a general partner by "holding out," and judgment was rendered against her, not only for the claims of the two firms to whose representatives her husband had said that she was his partner, but also for the claims of eighteen or twenty other firms, none of whom, with the exception of one or two, pretended to have heard that she was in any wise interested in the business, or that she existed as the wife of J. P. Hayden. It is clear that to sustain such a judgment would be to render the estate of every married woman wholly unsafe, and all but destroy the most beneficial purpose designed to be subserved by the statute, as we understand it.

Judgment reversed, and cause dismissed.

Anders, Ch. J., and Hoyt, J., concur.

Scott, J., concurring (filed June 14, 1892):

I concur in holding that a husband and wife cannot enter into a partnership with each other to carry on a business. This is the law in most of the states, and all arguments advanced in favor of such a holding elsewhere, in so far as their laws relating to the removal of the disabilities of married women are like our own, derive much greater force in a state where community property laws prevail as here. Our statutes recognize but two kinds of property which can be held or owned by married persons,—separate property and community property. The statutes point out how this property may be acquired, and define what it is, according to the manner and time in which it is acquired. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance with the rents, issues, and profits thereof, is her separate property, and the same is true with regard to like property owned by the husband. Section 1399, Gen. Stat. (former § 2409), provides that all property not acquired as prescribed in any one of the ways mentioned which is acquired after marriage by either husband, or wife, or both, is community property. It has been held that their interests in this community property are indissoluble during the existence of the community to the extent that the interests of either therein cannot be reached

separately by any third party. The interest of each in the property is equal, and I do not think it would be contended that by any mutual arrangement between themselves they could agree that either could have a lesser interest than the other in said property without destroying its community character.

Section 1401, Gen. Stat., provides that "nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole, or any portion of community property, then owned by them or afterwards to be acquired, to take effect upon the death of either." This seems to me to clearly preclude the idea of their entering into any such agreement affecting their property interests to take effect prior to the dissolution of the community except as expressly provided otherwise. Section 1448, Gen. Stat., authorizes the direct conveyance by one to the other of his or her interest in all or any portion of their community real property which thereby becomes the separate property of the grantee, but it is apparent that such a deed to be effectual must convey the entire interest of the grantor in the property designated in the deed from the one spouse to the other. No lesser nor partial interest of the grantor could be conveyed in any event because this would have the effect of destroying its community character, and leave it neither separate nor community, which would effect a result the law does not contemplate. If a husband and wife can become partners in business they can form the same kind of a partnership that other persons can, and enter into an agreement whereby one could take a small interest in the business, and the profits thereof, and the other the larger one. The property acquired through the pursuance of this business would not come under either head of the two classes recognized; it could not be held to be separate property for it would not be acquired in any one of the ways specified, and it could not be community property, because, as said, in community property their interests must be equal, while according to the partnership contract their interests might be very unequal. This would create a third species of property owned by husband and wife which the law does not recognize. It seems to me to be clearly the intention of the law that only the two species of property can belong to the community, or to either of its members; that the law is a limitation in this respect, and will not permit the holding or ownership of any other kind of property than that which is designated as separate, and that which is designated as community, and the distinguishing features of its acquisition have been clearly pointed out and define its character; especially for these reasons I think that in this state where community property laws obtain that it would be contrary to the whole law on this subject to permit the husband and wife to enter into any contract or agreement whereby they might acquire property of a character other or different from that specified which the law ex-

pressly permits them to hold and enjoy. It is true we have some statutes which construed without reference to others would seem to allow the wife to enter into any contract, and which remove all restrictions in this respect. I think our statute law upon this subject goes to a greater extent than that of the states from which the cases have been cited.

Section 1408 of the General Statute, (§ 2896, Code 1881,) provides that every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried, and section 1410 (§ 2406, Code 1881,) provides that contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried, yet when considered in connection with our other laws relating to the property rights of married persons it is apparent that they are considerably restricted thereby, and it would be wholly incompatible and inconsistent with such other provisions to hold that a husband and wife could enter into any joint arrangement or agreement between themselves creating a different kind of ownership in property from the ones specified, to take effect before the death of either, and it would be strongly against public policy to allow them so to do, and thus likely to give rise to interminable and unfathomable complications.

Our laws cannot in accordance with recognized rules of construction be held to authorize the husband and wife to enter into a partnership with each other for the purpose of trade or business although it may be possible they might form some particular kind of an agreement for such a purpose which might not conflict with their rights of property as defined by the statutes. This is very doubtful, however, and when considered in all its bearings with the rights, duties, and liabilities of partners to each other and to creditors, it is evident that it is not the intent of the law to confer any such authority upon them. The effect that such an arrangement might have or must necessarily have upon their property rights as classified, is the strongest argument that can be advanced against the position of the respondents, as it would destroy the distinction between the classes of property they may own as declared by the statutes.

Section 1444, Gen. Stat., provides that a husband or wife may appoint the other attorney in fact with full power to sell, convey, and incur his or her separate estate both real and personal, and section 1446 makes similar provision with regard to their community property, and with section 1448, further assisted by the broad scope of sections 1408 and 1410 practically subjects the wife to the influence of the husband as to the disposition and control of her property, separate or community, it seems to me as fully as any partnership agreement between them could possibly effect, and I should be forced to the conclusion that they might become partners in trade with each other were it not for the

statutes prescribing and defining the kinds of property a husband and wife may own and acquire. It is a matter of experience that their property rights and relations become complicated at best under the practical workings of the law as expressed and interpreted, and as a matter of public policy it would be very undesirable to still further allow them to become involved in mercantile partnership relations with all its possible resulting consequences, conflicts and complications.

Dunbar, J., dissenting (Filed May 28, 1892):

I dissent. It seems to me that the decision in this case is another instance (too common in the history of the courts of the United States) of the judicial repeal of a statute. It is not only a fundamental principle of our government, well understood and universally recognized, that the legislative and judicial departments of the government must be kept distinct and separate, but the first warning note sounded by all writers on statutory interpretation is that, when the language of a statute is plain and unambiguous, the duty of interpretation by the court does not arise.

Section 2896 provides that "every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and sue and be sued, as if he or she were unmarried." There seems to be nothing ambiguous or doubtful in the language or provisions of this statute, and, applying any and every known rule of interpretation to it, we must conclude that there is no room for construction, and that the only duty of the court is to declare it the law, and to decree its enforcement. The real intention of the law-makers must be gathered from what they say, and, where the language is not technical, it must be given its ordinary and popular meaning. The statute provides that "every married person can enjoy and dispose of every species of property as if he or she were unmarried." Is there anything doubtful or ambiguous about that language? Could language be more plain, pointed, or incisive? Could the idea of unrestricted enjoyment of one's property be expressed more tersely, plainly, and emphatically? There are no provisos and no exceptions expressed. What right, then, has the court to step in, and, under the guise of construction, inject a limitation which the Legislature did not provide for, and which, in effect, renders nugatory the law passed by that body?

It is an easy but a dangerous thing for courts to wander off in hazy theories and speculations concerning what the Legislature meant, and to base their conclusions on the policy or impolicy of the law. This should only be done when the patent ambiguity of the law compels it. And here, in support of what I have said, I desire to quote from Endlich, on the Interpretation of Statutes, (sec. 4.) which is the embodiment of the authorities upon this subject: "Sec. 4. When, indeed, the language is not only plain, but admits of but one meaning, the

task of interpretation can hardly be said to arise, (and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.')

It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta sententia expositore non eget.* Such language best declares, without more, the intention of the law-giver, and is decisive of it. The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. (It is therefore only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the law-makers. Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be. 'It has therefore been distinctly stated, from early times down to the present day, that judges are not to mold the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what, in their view, is right and reasonable, or is prejudicial to society; are not to alter clear words, though the Legislature may not have contemplated the consequences of using them; are not to tamper with words for the purposes of giving them a construction which is "supposed to be more consonant with justice" than their ordinary meaning.')

Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary, or inconvenient the intention conveyed may be, it must receive its full effect. (Indeed, it is said that it is only when all other means of ascertaining the legislative intent fail, that courts may look to the effects of a law in order to influence their construction of it. But, whilst it may be conceded that where its provisions are ambiguous, and the legislative intent is doubtful, the effect of several possible constructions may be looked at in order to determine the choice, it is very certain that,) when once the intention is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words."

And yet the majority, by an argument based on the supposed hardships which would be imposed upon married women, have come to the conclusion that the Legislature did not mean what it plainly said; and, if the language of section 2896 could possibly be tortured into anything doubtful,

section 2406 plainly shows that the legislative intent was to remove all civil disabilities, so far as property rights are concerned, when it provides that "contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried." The Legislature evidently understood the full scope of the law it was enacting, and its far-reaching effects; and where, in its opinion, the limitation was necessary, it provided for it, as in the proviso to section 2398 that "nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office except as otherwise provided by law." Had it intended the law to operate as claimed by the majority it would evidently have incorporated a proviso in section 2406 substantially as follows: "Provided no married woman shall enter into a contract of partnership with her husband." But it is left for the court to enact this proviso by judicial construction,—something very near approaching, in my opinion, a judicial enactment.

As showing the danger of leaving the plain provisions of the statutory law, I note the fact that the majority recite at length the provisions of the common law, and draw deductions from its analogies, when the Act in question, to avoid the very thing which the court now insists on doing, provides especially in section 2417 that the "rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object." The Legislature evidently attempted to emancipate this law from the rule of construction now insisted upon by the court, and the plain rule of construction provided by the Legislature is waived aside by the remark that "it is not to be supposed that the Legislature intended or proposed to extend the scope of the Act beyond the language used, further than the implications naturally flowing therefrom." I think that it is to be presumed that the Legislature realized the fact that it was enacting a statute in derogation of the common law, and that it did not want the law hampered by the rule of construction mentioned. It seems to me that the language of section 2417 is also so plain that there is no room for construction. In fact it seems that, if the plain provisions of this law can be argued

out of existence, all the laws of the state are at the mercy of judicial construction.

I am unable to see in what way the enactments of section 2397 and section 2416 sustain the theory of the majority. It is perfectly competent for the law to provide who shall be subject to the burden of proof in any given transaction nor is it by any means a new provision of the law. It is especially a wise provision in this instance, and can in no way that I can perceive throw any light on the subject discussed. So far as section 2416 is concerned, there is the very best of reasons why transactions concerning community property should be attended with solemnity and certainty. Both parties have an interest in such property, and delicate relations exist which do not exist at all concerning the separate property of either of the spouses. The separate property is more independent; and the fact that the law imposes these solemn protections upon community property, and not upon separate property, would rather strengthen the idea that the use of separate property was entirely unrestricted. The fact is that for many years the law, in obedience to popular demand, growing out of feudal education, stood *in loco parentis* to woman. She was regarded as not being able to transact business, and had to act under a trustee or guardian. Advancing thought has demanded other legislation and woman's independence and capability have been recognized by the legislation of different states in different degrees. In this state, I think, the Legislature has seen fit to grant to married women an untrammelled control of their separate property. The law presumes that they are capable of protecting their own property, and it is not, in my opinion, the duty of the court now to assume to stand *in loco parentis*, or to sally forth in Quixotic zeal to relieve women from conjugal oppressors, or from burdens real or imaginary. It is argued by the majority that the case at bar is an instance of the evil effect of the construction contended for by respondents, because the wife was held to be a partner by "holding out," when the testimony did not justify such a conclusion. This argument, in my opinion, is entirely without force, and will apply equally to nearly every law on the statute books. Juries are continually rendering verdicts, and courts entering judgments, based on inadequate testimony. It is simply a question of fact to be tried as any other question of fact is to be tried.

Rehearing denied.

CONNECTICUT SUPREME COURT OF ERRORS.

APPEAL FROM PROBATE OF ANN SMITH, Guardian, etc., of Thomas Smith, et al.

(.....Conn.....)

1. A lack of honesty, integrity, and experience in business affairs is not suffi-

cient ground for rejecting an executor under a statute which allows the rejection of one who is "incapable to accept the trust."

2. An executor appointed by will cannot be rejected by the court except where the law has specially so provided.

NOTE.—*Requisite moral qualifications of executors.* In many of the states, statutes prescribe various qualifications, moral in their nature, for executors, relating chiefly to security in the administration

16 L. R. A.

(February 22, 1892.)

APPEAL by contestants from a decree of the Superior Court for New Haven County reversing a decree of a Court of Probate held at Waterbury which refused to approve the appointment of Bryan J. Smith as executor of the will of Bridget Smith, deceased, although he had been named in such will as executor, and in his place appointing James J. Cassin. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. George E. Terry and Lucien F. Burpee, for appellants, original appellees:

Legislation, both in England and in the United States, has been constantly adding to the number of causes of disqualification, and limiting the number of those who may accept such trusts. The old doctrine that the testator had some absolute and sacred right or privilege to appoint a trustee of his own liking to carry out the purposes of his will has proved unsatisfactory. It is the modern opinion that the execution of the will is rather to be considered than the giving of a lucrative office to any person, and the interests of legatees and creditors are to be promoted rather than the gratification of the testator's caprice in selecting his executor.

Schouler, Exrs. & Admsrs. § 33; 1 Woerner, Exrs. & Admsrs. § 233.

In this state, the Revision of 1865 provided:

“If no executor be named in the will, or if the

executor named shall have died, or shall refuse or be incapable to accept said trust, or to give bond, the court shall commit the administration,” etc.

Conn. Gen. Stat. § 549.

Manifestly this statute was intended to enlarge the discretionary power of the court of probate, as well as to add to the requirements upon those who apply to be made executors. The court of probate may find an applicant incapable. Must that incapability arise from physical and mental disqualifications only, or may it be caused as well by want of common honesty?

See *Wilcox's App.* 54 Conn. 320; *Wickwire's App.* 30 Conn. 86; *Drew's App.* 58 N. H. 320.

The tendency of legislation and decision has been distinctly toward the recognition of two classes of disabilities, namely, absolute disabilities and discretionary disabilities.

Crowell, Exrs. & Admsrs. §§ 103, 104.

Messrs. Wooster, Williams & Gager, for appellee, original appellant:

The incapacity contemplated by the statute is the same as recognized and adopted by the common law.

1 Wms. Exrs. p. 278.

All persons, generally speaking, are capable of becoming executors who are capable of making wills.

Schouler, Exrs. & Admsrs. §§ 33, 33, and *notes*.

All persons may be made executors unless specially disqualified.

of the estate. In the absence of statutory regulation, the choice of the testator must be respected regardless of the moral character of the nominee.

The person nominated in the will is entitled to qualify as executor, unless under mental or legal disability. *Holbrook v. Head* (Ky.) Jan. 23, 1883.

It is said by T. A. Johnson, J., in *McGregor v. McGregor*, 3 Abb. App. Dec. 93, 95: “I am of the opinion that any person appointed or named as executor in a will is to be deemed competent, unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named as executor in a will, upon his application, who is not declared incompetent to serve by statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power.”

From the earliest time it has been a rule that every person may be an executor, saving such as are expressly forbidden. 2 Wms. Exrs. 6th Am. ed. p. 194.

There are few, or none, who by our law are disabled, on account of their crimes, from being executors. *Id.* p. 204.

The word “integrity,” in a statute justifying the rejection of an executor who is wanting in integrity, means soundness of moral principle and character as shown by a person's dealings with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. *Re Baugher*, 33 Cal. 302.

Under this statute the paramour of a dissolute woman who professed to live “by his wits” is disqualified to act as her executor. *Plaisance's Estate*, Myr. Prob. 117.

By the New York statute one “convicted of an infamous crime” is disqualified to receive letters testamentary. Under this statute no degree of legal or moral guilt or delinquency is sufficient to exclude a person unless convicted of an infamous crime upon indictment or other criminal proceeding. 16 L. R. A.

Inga. Coope v. Lowerre, 1 Barb. Ch. 45, 5 L. ed. 299; *Coggshall v. Green*, 9 Hun, 471; *McMahon v. Harrison*, 10 Barb. 669.

In those of the United States where no statute exists upon this subject it is probably the law that conviction of an infamous crime would render a person incompetent to become either an executor or administrator, and if not so absolutely, yet in cases where a discretion is given to the court in the matter, such conviction would probably have much weight against the appointment. *Crowell, Exrs. & Admsrs.* § 84.

But in *Smethurst v. Tomlin*, 2 Swab. & T. 143, it was held that a person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a court of probate to establish the validity of the will by which he was appointed.

The conviction of an infamous crime which will under the New York statute disqualify one from acting as executor or administrator is a conviction in the courts of that state. *O'Brien v. Neubert*, 3 Dem. 55.

Verdicts against one for feloniously or fraudulently taking property and for criminal conversation do not disqualify. *Coope v. Lowerre, supra.*

Unless repeated offenses establish “improvidence,” which the statute makes a disqualification. *Ibid.*

A conviction of larceny in another state will not warrant the rejection of an executor as incompetent on account of “improvidence” within the New York statute. *O'Brien v. Neubert, supra.*

The fact that the applicant for letters is a professional gambler is presumptive evidence of such improvidence as to disqualify him for the office of executor or administrator. *McMahon v. Harrison*, 6 N. Y. 443.

That an executor has been adjudged an habitual drunkard does not affect the validity of a sale of land made by him under a power contained in the will. *Sill v. McKnight*, 7 Watts & S. 244. J. G. G.

Redf. Wills, pt. 2, chap. 2, § 6, par. 3. See also par. 8.

One's choice of an executor, by his last will, being so solemn an act, and by a person legally capable of making a choice among friends and kindred, should be heeded.

Schouler, Exrs. & Admsrs. § 83.

Any person may be an executor if mentally capable of executing its duties.

Stewart's App. 56 Me. 300.

It would be arbitrary, as well as unjust, for a court to adjudge that a person of sufficient capacity to make a will had not sufficient to select a trustee to manage his estate as executor.

Shields v. Shields, 60 Barb. 60.

The surrogate has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power.

McGregor v. McGregor, 8 Abb. App. Dec. 92; *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515, note, p. 518.

Torrance, J., delivered the opinion of the court:

Shortly after the will of one Bridget Smith had been admitted to probate, Bryan J. Smith, as son of the deceased, of full age and of average mental capacity, who was appointed executor by the will, appeared before the probate court, and offered to accept said trust, to qualify as such executor, and to give bond as required by law. The court of probate found that he was not a fit person to execute the trust, refused to approve of his appointment as executor under the will, and thereupon, all of the next of kin having refused to accept the trust, appointed one Cassin as administrator with the will annexed of said estate. From these two decrees an appeal was duly taken to the superior court. In the reasons of appeal filed in that court the above stated facts were, in substance, set forth.

To the reasons of appeal, the appellees in the superior court filed this answer: "(1) The said Bryan J. Smith, who was named as executor of the will of the said Bridget Smith, deceased, was incapable to accept said trust, because he was not a man of honesty and integrity and experience in business affairs. (2) The said court of probate appointed said James J. Cassin to be administrator with the will annexed, because all of the next of kin of the deceased, except the said Bryan J. Smith, neglected to appear and refused to accept said trust."

The appellants in the superior court demurred to this answer, on the ground that the matters therein alleged afforded no justification for the action of the court of probate, were irrelevant and immaterial, and did not show any want of mental capacity in said Smith to accept said appointment as executor. The superior court sustained the demurrer, and subsequently rendered judgment setting aside the action of the court of probate in the premises. The present appeal is brought to review this action of the superior court. The claim of the present appellants is that the superior court erred in holding that Smith was not incapable of accepting

the office of executor under the facts admitted by the demurrer, and whether the court did or did not err in so holding is the principal question in the case. In the brief of the present appellants it seems to be conceded that, prior to 1885, the court of probate would have had no power to refuse to approve of the appointment of an executor merely for the causes alleged against Smith. But it is claimed that the power of the court in matters of this kind was enlarged by the changes made in the revision of the Probate Laws in 1885. The statute bearing upon the question under consideration as it appears in the Revision of 1875, reads as follows: "Upon the refusal of an executor to accept the trust or to give a bond, the court shall commit the administration of the estate, with the will annexed, to the widow or next of kin of the deceased," etc. Revision 1875, p. 871, § 12. Prior to 1885 this statute, in substantially the same form, had remained upon the statute book for nearly two centuries. In the year 1885, in the revision of the probate laws, it was made to read as follows: "If no executor be named in the will, or if the executor named therein shall have died, or shall refuse or be incapable to accept the trust, or to give a bond, the court shall commit the administration of the estate with the will annexed to the husband," etc. Pub. Acts 1885, chap. 110, § 141. In this form it now appears as section 549 of the present General Statutes. It will thus be seen that, so far as the present case is concerned, the only change made in the law was made by inserting the words, "or . . . be incapable to accept the trust," and upon the construction of these words the decision of the case at bar must rest.

The present appellants contend that if a person is lacking in honesty or integrity or business experience, or at least, if he is lacking in all three, he is to be deemed "incapable to accept the trust," within the meaning of this statute. We think this claim is not well founded. It should be remembered that, independently of any statute upon the subject, the rule of the common law was that all persons might be appointed as executors who were mentally capable of executing the duties of the trust, or, as it is otherwise stated, who were capable of making a will, or were not specially disqualified. *Stewart's App.* 56 Me. 300; Schouler, Exrs. § 82; Redf. Wills, pt. 8, chap. 2, § 3. This general rule has been modified by statute in some of our states. It is also, we think, quite clear upon principle and authority that where a testator appoints an executor out of the class recognized, either by the common law or by statute, as capable of accepting and performing the duties of such a trust, the court invested with authority to admit the will to probate cannot reject the person so appointed, or refuse to approve of the appointment, except in cases where the law has specially so provided. In a case decided in New York, in 1864, under a statute of that state, Judge Johnson uses the following language: "I am of the opinion that any person appointed or named executor in a will is to be deemed to be

competent unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named executor in a will, upon his application, who is not declared incompetent by some statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power. To allow surrogates to invent new causes of disqualification, and add to those prescribed by statute, would be conferring novel and dangerous powers upon those officers of special and limited jurisdiction." *McGregor v. McGregor*, 8 Abb. App. Dec. 92. In the same case Judge Denio said: "The selection of executors is not committed to the surrogate's court. The testator is allowed to appoint such persons as he may select, provided they do not fall within the classes of incompetent persons mentioned in the statute." In a Kentucky case, decided in 1851, the court says: "The moral unfitness of the person appointed as executor of a will cannot be inquired into by the court to which he applies for permission to qualify. He derives his office from testamentary appointment, and, if he is a person not disqualified by law from being an executor, the court has no right to refuse to permit him to qualify, or to refuse to grant him letters testamentary." *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515. "One is not disqualified from acting as executor on account of crime. He may act in that capacity, although attainted or outlawed, under the English law. Nor does immorality or habitual drunkenness, by the American practice, disqualify one to act in that office." Redf. Wills, art. 8, chap. 2, § 8. So far as we are aware, these citations are in substantial agreement with our own law upon this subject. Thus Swift says: "Every person who is capable of making a will may be appointed an executor." 1 Swift, System of Laws, 423. In his Digest, Judge Swift says: "An executor is a person appointed by the testator to carry his will into effect. Any person may be appointed an executor, excepting an idiot or alien enemy." 1 Swift, Dig. 442. From a very early period our statutes on this subject have made the power of the court of probate to appoint, in the first instance, an administrator with the will annexed, to depend upon the refusal, express or implied, of the executor named in the will to accept the trust; and they have always contained provisions of a more or less stringent nature, whose object was to compel the executor to produce the will and to accept or refuse the trust. Down to 1885, as we have seen, the statute in terms permitted the court of probate in the first instance to appoint an administrator with the will annexed, only in case the executor named in the will refused to accept the trust or give bond. Under this statute it was doubtless within the power of the court of probate to refuse to approve of the appointment of one as executor who was by common law disqualified to act as such, but even this is, perhaps, left somewhat in doubt by the terms of the statute. Of course, a refusal to accept might, under certain cir-

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cumstances, be implied. *Ayres v. Wood*, 18 Conn. 291; *Solomon v. Wixon*, 27 Conn. 530.

It is obvious, however, that in cases where a will has been proved, contingencies, other than the mere refusal of the executor to accept the trust, might exist which would equally make the appointment of an administrator necessary. The will might not contain the name of any one as executor; the executor, if named, might have died before the will was probated; or, if named and living, might be incapable to accept the trust. This last contingency may arise from two causes. The person named in the will might be by law disqualified to be an executor. In such case, as we have intimated, the terms of the old statute left it doubtful, perhaps, whether the court of probate could commit the administration of the estate to another. If qualified by law to act as executor, his condition or circumstances at the time when it became his duty to accept or refuse the trust might be such that he could not legally manifest or declare his acceptance thereof, and yet, at the same time, it might well be impossible to imply a legal refusal from his neglect or failure to accept. Such cases may easily be supposed, and doubtless had occurred in actual practice, giving rise to doubt and uncertainty as to the course to be pursued under such circumstances. It was, we think, to cover these two classes of cases, and to put an end to all doubt as to the power of the probate court to commit the administration of the estate, under such circumstances, to a person other than the one named in the will, that the words "incapable to accept the trust" were inserted in the statute. The present appellants construe them as adding, to the list of matters which disqualify persons from being executors at common law, certain other matters of the nature of those alleged in the case at bar. The trouble with such a construction is that it leaves the court of probate to determine what such other disqualifying matters are, after the testator has made his choice. The statute has not defined them, nor indicated in any way what they are. The court, rather than the law, will thus largely determine who may be executors. Then, too, the test of moral fitness or want of business experience is a very variable test. The question will ever be largely one of degree, and different men will differ, both as to the test to be applied and as to the kind or degree of immoral character or reputation or want of business experience which will render a person "incapable to accept the trust." Then, again, the trial and decision of questions of this nature is a task of no little delicacy and difficulty. Upon this subject the court of Kentucky, in a case from which we have already quoted, says: "If the opinions of men in regard to the moral character of those who may be appointed executors, and in whom testators repose confidence, whatever those opinions may be, are to be received, and are to constitute the evidence by which, in law, we are to ascertain who may and who may not be appointed executors, we apprehend that but few appointments would

fail to be contested by some of the relatives of testators, who are often too easy to be dissatisfied, or by persons who themselves desire to be administrators for personal aggrandizement, or who would rejoice in so fitting an opportunity to gratify some private hatred. Such inquiries would involve questions of very difficult and doubtful decisions, such as, how good a man must be to qualify him for an executor, and how bad he must be to disqualify him. How could any certain rule of determination be established? Inquiries of such a nature would be the most vague and uncertain in their results of any ever instituted in a court of justice, and would, in our opinion, be absurd in the extreme." *Berry v. Hamilton*, 12 B. Mon. 191.

Prior to 1885, certainly, the law, and not the court of probate, determined who should and who should not be executors, and it defined beforehand with tolerable clearness the matters that disqualified a person from being an executor. It also, to say the least, regarded with a good deal of favor the right of a testator to choose his executor from the

class not disqualified. The construction contended for would radically change the law in all these respects. It seems to us this would be a violent construction to put upon the language used. Had the Legislature intended to make so radical a change in our law, it would have used words much better adapted to convey such a meaning than the language now under consideration. For these reasons we cannot adopt the construction contended for by the present appellants, and think the construction we have adopted will give full force and effect to the intention of the Legislature in putting into the statute the words "incapable to accept the trust." If the persons appointed and approved of as executors, under our construction of the law, prove to be incapable of executing the trust, or shall neglect to perform the duties thereof, or shall waste the estate, ample power is given for their removal, and the appointment of better men in their stead.

There is no error in the judgment appealed from.

The other Judges concurred.

TEXAS SUPREME COURT.

Edward ROSS *et al.*, *Ptfs. in Err.*,

A. W. MORROW *et al.*

(.....Tex.....)

1. **A person was held not to be an innocent purchaser of land from heirs without notice that another person was also an heir** where he testified that he knew the latter well and was with him much in boyhood; also that he knew the mother for many years while she was living with her second husband, but did not know the relationship of the parties.
2. **A person becomes of age** on the day before the twenty-first anniversary of his birthday.
3. **The period of limitation of an action which accrues at a person's majority** begins to run the day before his twenty-first birthday. That day is to be included in the com-

putation of the time, and therefore a period limited by years will expire on the second day before his birthday anniversary.

(June 7, 1892.)

ERROR to the District Court for Burnet County to review a judgment in favor of defendants in an action brought to try title to certain real estate. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Robson & Rosenthal and Moore & Duncan, for plaintiffs in error:

In computing the time in which an action is barred, the day on which the cause of action accrues, or the day on which an event is to happen, is excluded from the time to be computed. When time is to be computed after an act done, or the happening of an event, the day on

NOTE.—On what day a person becomes of age.

To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law and those legal decisions which from time immemorial have settled this matter in reference to all the important affairs of life. When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a man may do, and an infant, that is, a person under the age of twenty-one years, cannot do? On these questions the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day before the twenty-first anniversary of his birthday. It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth, and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday, and upon any and every moment of that day may

do any act which any man may lawfully do. *State v. Clarke*, 8 Harr. (Del.) 557; *Hamlin v. Stevenson*, 4 Dana, 587; *Wells v. Wells*, 6 Ind. 447; *Bardwell v. Purrrington*, 107 Mass. 419; *Phelan v. Douglass*, 11 How. Pr. 198; *Herbert v. Torball*, 1 Sid. 162, 1 Keb. 589; *Grant v. Grant*, 4 Young & C. 256.

In *Fitzhugh v. Dennington*, 6 Mod. 250, 1 Salk. 44, *Chief Justice Holt* says, without citing any case on the point: "It has been adjudged that if one be born on the first day of February at eleven o'clock at night, and the last day in January in the one and twentieth year at one of the clock in the morning he makes his will, and dies, yet such will is good, for he then was of age."

In *Bedfield on Wills*, p. 20, the author, although declaring his personal dissent from the correctness of the doctrine, says: "This rule seems to have maintained its ground for nearly two centuries without question."

The rule is so laid down in *Swinburne* (pt. 2, § 2, pl. 7); in *Blackstone's Commentaries* (vol. 1, p. 468); in *Kent's Commentaries* (vol. 2, p. 233); in *Bingham*

which an act is to be done, or the event is to happen, is to be excluded from the count.

Smith v. Dickey, 74 Tex. 61, and authorities there cited.

Mr. T. E. Hammond, for defendants in error:

The court did not err in finding that defendants in error were innocent purchasers for a valuable consideration and without notice of the claims and rights of plaintiffs in error to the land in controversy in the suit.

Flanagan v. Oberthier, 50 Tex. 379; *Clarke v. Koehler*, 32 Tex. 679; *Hill v. Moore*, 62 Tex. 610; *Eduards v. Brown*, 68 Tex. 329.

In computing the age of a person, the day of his birth is included. A person is therefore of the age of "twenty-one years" the day before the twenty-first anniversary of his birthday. And hence Nathan Ross was twenty-one years of age on the 16th day of April, 1881. He was barred by the five years' Statute of Limitation, on the 15th day of April, 1886,—the day before the institution of the suit of plaintiffs in error.

7 Wait, Act & Def. pp. 129, 180, and authorities there cited.

Hobby, P. J., filed the following opinion:

This is an action of trespass to try title to the land described in the petition. It was brought on the 16th of April, 1886, by Edward, Henry, Nathan, and Nancy Ross, the children and heirs of Anderson Ross, against the defendants, A. W. and J. T. Morrow. It was agreed that both parties derive title from Jesse Burnham as a common source, who occupied it in 1857. The land was the community property of Jesse Burnham and his wife, Nancy Burnham, who were married in 1837. Anderson Ross was the child of Nancy Burnham by a previous marriage with J. G. Ross. She died in February, 1863, leaving said Anderson Ross and five other children by her second marriage with Jesse Burnham her heirs. Anderson Ross died in December, 1864, leaving as his heirs the plaintiffs. Jesse Burnham died in 1883. Prior to his death, on January 11, 1864, he conveyed to his children, Emily, Sarah, Waddy, Gid, and Adelia Burnham, by the marriage with Nancy Burnham, the land in

controversy. This conveyance was acknowledged and recorded in September, 1865. They took possession of and resided on the land until they sold it to the defendants for a valuable consideration in April, 1870. The defendants have been in possession and have paid the taxes thereon since. The court found that the defendants were purchasers in good faith, for value, and that they had no knowledge of the fact that the plaintiffs had any interest in the land until the institution of this suit. The court also found that Nat. Ross was born on the 17th day of April, 1860, and that he was twenty-one years old on the 18th day of April, 1881, and that the five-years limitation as to him expired on the 15th day of April, 1886, one day before the institution of this suit. Henry Ross, one of the plaintiffs, and Mrs. Josepha Ligon, one of the defendants, are admitted to be barred by limitation, and hence do not appeal from the judgment. Plaintiffs in error Edward and Nathan Ross and Mrs. Homuth bring the case up to review so much of the judge's conclusions of facts and law as holds that the defendants in error are purchasers in good faith, and holds that Nathan Ross is barred by the five-year Statute of Limitation. The errors assigned present only those two points.

The first assignment is that the court erred in rendering judgment against plaintiffs in error, and in favor of defendants in error, "because the facts undisputed show that the land sued for was the community property of Jesse and Nancy Burnham, deceased, at the date of the death of the said Nancy, who died intestate; that at the death of said Nancy she left surviving her six children, one of whom was Anderson Ross, the father of plaintiffs in error; that five of said children of Nancy had conveyed their interest in the land in controversy to defendants in error, but neither said Anderson Ross nor his heirs had ever transferred or parted with their interest; that the said Anderson Ross is dead, and the plaintiffs in error are his heirs, and as such were entitled to a one twentieth each of the land sued for." The finding of the court that the defendants were innocent purchasers without notice of the rights of the plaintiffs, and the further finding that the plaintiff Nat. Ross was barred

on Infancy (p. 2); and by *Mr. Justice Metcalf*, in his valuable commentaries upon Contracts (20 Am. Jurist, 232; Met. Cont. 38). In addition to this great weight of authority, the same rule has been adopted by some of the American courts. (*State v. Clarke*, 3 Harr. (Del.) 557; *Hamlin v. Stevenson*, 4 Dana, 597.) To this we may add that the same rule is promulgated in the latest English edition of *Mr. Jarman's valuable treatise upon Wills*. (1 Jarman, Wills, ed. 1861, 30).

"Full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth." If he is born on the first of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by nearly forty-eight hours; the reason assigned is, that in law there is no fraction of a day, and if the birth were on the first second of one day, and the act on the last second of the other, then the twenty-one years would be complete, and in law it is the 16 L. R. A.

same thing whether a thing is done upon one moment of the day or on another. 1 Bl. Com. *463; Metcalf, Cont. p. 38.

In the comparatively recent case of *Bardwell v. Purrington*, *supra*, it was held that a person born on the eighth day of September, 1852, would become of the full age of twenty-one years if he should live to the seventh day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day.

The same case held that an instrument executed by the overseers of the poor to bind J. S. as an apprentice under Gen. Stat., chap. 111, § 4, which purports to bind him from its date until a day named, "when the said J. S. will arrive at the age of twenty-one years, during which time the said J. S. shall faithfully serve," is not wholly void because under the rule of law excluding fractions of a day in computation of time J. S. will become of full age on the day next preceding that so named. F. S. R.

by the Statute of Limitation of five years, are both made the basis of assignments, and present the questions decisive of the case. There is no doubt that the plaintiffs inherited the interest of their father, Anderson Ross, in the estate of his mother, Mrs. Nancy Burnham, and that at her death in February, 1863, he inherited one sixth of her community interest in the land in dispute. This being so, the plaintiffs are entitled to recover this interest, unless the defendants are shown to be innocent purchasers for value without notice of the fact that Anderson Ross was the heir of Nancy Burnham at the time of their purchase from the other five heirs of said Nancy and Jesse Burnham, or unless they have acquired title by limitation. The proof relating to the question whether or not the defendant A. W. Morrow was ignorant of the fact that Anderson Ross had any interest in the land is as follows: He testified that he "did not know that Nancy Burnham had any other children except Gid, Waddy, Sarah E., and Adelia Burnham and Mrs. Emily Hunter; that he did not know that Nancy Burnham was the mother of Anderson Ross; that he bought the entire tract in controversy in this suit; that Anderson Ross never lived with Jesse and Nancy Burnham; that he never saw him at their house, and that he had no knowledge of said Anderson being one of the family; that the persons constituting the family of Jesse Burnham at the time of the purchase by witness of the land in controversy were Gid, Waddy, Sarah E., and Adelia Burnham and Mrs. Emily Hunter; and that he thought these people constituted the entire Burnham family. On cross-examination, witness testified that he lived in Fayette county from 1838 to 1852; that he lived at Rutersville, about five miles from La Grange; that he was not acquainted with Jesse Burnham while he lived in Fayette county; that he knew of him, and that he lived at La Grange; that Jesse and Nancy Burnham removed from Fayette to Burnet county in 1853 or 1854; that he knew Jesse and Nancy Burnham well from about 1856, when they lived in Burnet county; that he knew them as man and wife, and was acquainted with their children in Burnet county; that he was at their house in 1862, and lived in their neighborhood in Burnet county from and after the year 1868; that he knew Anderson Ross well; that as boys he and Anderson Ross associated together a good deal; that he did not know that Nancy Burnham was the mother of Anderson Ross; that Anderson Ross lived in Fayette county on what was known as 'Ross Prairie,' about three miles from Rutersville; that he did not live with Jesse and Nancy Burnham in Burnet county." He testified that he paid \$3 per acre for the entire tract involved in this suit, 684 acres of which he owns, and 800 acres of which he conveyed to his codefendant, A. W. Morrow. We think that, the defendants having notice of the fact that the property was the community property of Jesse Burnham and his wife, and of the fact of her death, and having bought the land from her heirs, they cannot claim, under the 16 L. R. A.

facts of the case, to be purchasers without notice of who her heirs were.

The court found that Nathan Ross was born on April 17, 1860, and that he was twenty-one years old on the 16th day of April, 1881, and that five years had expired on the 15th day of April, 1886, one day before the institution of this suit. The court held, therefore, that he was barred by the Statute of Limitation of five years. The rule adopted in computing the age of a person is that the day of his birth is included; and on the day before the twenty-first anniversary he is held to be twenty-one years of age. Under the operation of this rule, Nathan Ross was twenty-one on the 16th day of April, 1881. 7 Wait, Act. & Def. 129. On that day, April 16, 1881, his disability of minority was removed, and he could have instituted his suit at any moment of that day. The Statute of Limitation, therefore, commenced to run against him on that day. It follows from this that the 16th day of April, 1881, the day on which he attained his majority, must be included in the computation of time against him; and, including it, the five years allowed him under article 3201, Sayles' Civil Stat., expired on the 15th day of April, 1886, one day before the institution of this suit. The court, therefore, correctly held that he was barred. The question is discussed in *Phelan v. Douglas*, 11 How. Pr. 193. In that case, the plaintiff was born on the 14th December, 1820. "By well-settled rules," it was said, "he was competent to bring suit as being of full age on the 13th December, 1841." By the law of New York, he was allowed ten years after the termination of his infancy within which to sue. He brought suit on the 13th day of December, 1851. It was claimed in that case by the plaintiff that the suit was brought in time. The defendant contended that the right of action expired on the 12th day of December, 1851. The question was whether, under the foregoing facts, plaintiff was barred by limitation. The court in the discussion of the question says: "The rule is well established that, when an act is to be done in a certain number of days, months, or years from the happening of an event or the doing of an act, in computing the time the day on which the event happened or the act was done is to be excluded." Such, too, it is said, is the rule in respect to time of pleading and service of process,—the day of service is excluded. "The reason of the rule is that the law takes no notice of fractions of a day, except in cases where the hour itself becomes material." But "this reason of the rule," the court says, "ceases whenever the party affected has a whole day as one of those to be included in the computation." In the case cited the plaintiff's disability was removed with the last moment of the 12th December, 1841, and he could have sued during the whole of the 13th December, 1841. He had ten years after the removal of such disability to bring his suit. In computing the time, the 13th December was included, because he had the "whole and entire part of that day to sue in; not a frac-

tional part, but every moment of it." So computing the time, the ten years allowed in the case cited expired with the expiration of the 12th December, 1851. As he did not sue until the 18th December, 1851, the entire ten years had elapsed, and he was barred. The case cited is decisive of the question in this case.

But for the error in holding that appellees were purchasers without notice of the rights of Anderson Ross, as an heir of Nancy Burnham, the judgment should be reversed, and the cause remanded.

Adopted by Supreme Court, June 7, 1892.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. *Plff. in Err.*,

v.

J. B. ROBINSON.

(.....Fed. Rep.)

Injury caused by electricity generated by a thunder storm in a telephone wire which was negligently allowed to hang across a highway so low that a traveler came in contact with it in the dark, renders the telephone company liable as the wire furnished the means by which the dangerous force was communicated and the injury caused.

(May 30, 1892.)

ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Before Pardee, *Circuit Judge*, and Locke and Bruce, *District Judges*.

Statement by Bruce, *District Judge*:

Plaintiff in error was sued by defendant in error in the district court of Cooke county, Tex., for damages in the sum of \$12,000. He states his cause of action as follows:

"Your petitioner, J. B. Robinson, a resident of Cooke county, Tex., complaining of the Southwestern Telegraph & Telephone Company, a private corporation incorporated under the laws of the state of New York, but doing business in the state of Texas and having a legal office in Gainesville, Cooke county, Texas, respectfully represents that on or about the 29th day of October, A. D. 1889, the defendant owned and operated a telephone line between the cities of Gainesville and Dallas, Tex., and intermediate points, the connection between said cities being made by a single wire suspended by means of poles in the manner of telegraph wires, usually about thirty feet from the ground; that its said telephone line or wire crossed the public highway between Dallas and McKinney, known as the 'Dallas and McKinney Road,' about five miles south of Plano, in Dallas county; that at said points and over said road on the aforesaid date, and for several weeks prior thereto, the defendant negligently suffered and permitted

its aforesaid wires to be and remain suspended over said road within a few feet of the ground, and within such proximity thereto that travelers on the said road unavoidably and necessarily came in contact therewith; that the said wire so suspended over said road, which was a public highway between two large cities, and daily traveled by many people in vehicles and on horseback, all of which was known to the defendant, was a dangerous and unlawful obstruction of said road, and a public nuisance, and that the defendant on the aforesaid date, and long prior thereto, knew of the condition of said wire at said point, or might have known it by the exercise of reasonable care but nevertheless negligently permitted it to remain in the condition aforesaid; that the said wires are the best known conductors of electricity, and are the only vehicles in general use for the transmission of electric currents, and, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to inflict death or do great injury to those coming in contact with them, and that from this fact arises the peculiar danger of allowing such wires to remain suspended so low that people will come in contact with them,—all of which was on the aforesaid date and long prior thereto well known to the defendant, or might have been known to it by the exercise of ordinary care; that on the afternoon of the aforesaid date, as plaintiff was traveling on horseback on the said Dallas and McKinney highway during the prevalence of a heavy thunder storm, such, however, as is usual in that section at that season of the year, he came in contact with the defendant's said wire at the point aforesaid, in consequence of its being suspended so near the ground; that it was a dark, stormy evening, and that the wire was invisible to plaintiff, and plaintiff came in contact with it through no fault or negligence on his part, but through the gross negligence and carelessness of the defendant, as aforesaid, in leaving said wire suspended over a public highway within a few feet of the ground; that at the time said wire was heavily charged with electricity generated by the storm then prevailing, as aforesaid, and, on coming in contact with it, plaintiff received a full charge of the fluid, which knocked him from his horse and completely paralyzed him for the time being, depriving him of

NOTE.—For notes on proximate and remote cause, see *Smith v. Kanawha County Court* (W. Va.) 8 L. R. A. 32; *Read v. Nichols* (N. Y.) 7 L. R. A. 130; 16 L. R. A.

Louisville N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 193; *Smethurst v. Independent Congregational Church* (Mass.) 2 L. R. A. 695.

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... see also 17 L. R. A. 726; 18 L. R. A. 479, 759; 22 L. R. A. 635; 25 L. R. A. 552; 26 L. R. A. 101, 810; 27 L. R. A. 365.

the power of speech and locomotion; that plaintiff lay in the road where he had been thrown, in the rain and storm, until picked up by a passer-by, and carried to a neighboring house, and there plaintiff was confined to his bed for more than five weeks, suffering during this period severe bodily pain and mental anguish. Plaintiff represents that he is but little past middle age, and before said injuries was of a vigorous mind and robust constitution, and capable of great endurance and physical and mental activity, but that, in consequence of said injuries, his health and mental faculties have been permanently and seriously impaired, and his capacity to pursue his usual avocation practically destroyed, to his actual damages ten thousand dollars. Plaintiff further represents that, on account of said injuries, he has been put to great expense for medical attention, and that his condition is such as to require, for the future, constant medical treatment and the care of his family, who are thus withdrawn from their customary duties, to his actual damages two thousand dollars. Wherefore, plaintiff sues, and prays that the defendant be cited to answer herein, and that on final hearing he have judgment for his said damages, costs, and for further general and special relief."

The case was removed into the circuit court of the United States for the northern district of Texas, and the defendant answered as follows:

"Now comes defendant, and for answer by way of demurrer to plaintiff's cause of action says, first, that the plaintiff ought not to have and maintain this cause, for that his original petition does not state facts sufficient to constitute a cognizable and enforceable demand before the law. Of this he prays the judgment of the court. And for further answer, if such be necessary, defendant says it denies each and singular the allegations in the plaintiff's petition contained, and says it is not guilty of the wrongs, injuries, and negligent conduct charged; and of this it puts itself upon the country. And, answering further, it says if plaintiff was injured in any manner, it was the result of his negligence,—that he failed to exercise that reasonable degree of care, in traveling at the dangerous time in which he alleges he was traveling, and in avoiding contact with defendant's line during a thunder storm, that a reasonably prudent man ought to have exercised under like circumstances. Wherefore, defendant says plaintiff ought not to recover, and of this it puts itself upon the country."

The case was heard, and the demurrer was overruled, to which ruling the defendant excepted, and the trial before court and jury resulted in a verdict for plaintiff in the sum of \$2,500, for which amount, with interest and costs, judgment was afterwards rendered. Motion for new trial was filed, heard, and overruled by the court. The assignment of error is that in the record of the proceedings of the above cause in the trial court there is manifest error, in this, to wit:

"The court erred in overruling the general demurrer of the said Southwestern Telegraph 16 L. R. A.

& Telephone Company to the original petition and cause of action of the said J. B. Robinson, as will appear from an inspection of the said petition, demurrer, and judgment of the court thereon."

Mr. John W. Wray for plaintiff in error.

Messrs. M. L. Crawford, W. O. Davis, and J. L. Harris for defendant in error.

Bruce, District Judge, delivered the opinion of the court:

The question and the only question for review here is whether the plaintiff stated a cause of action in his petition, and if the demurrer to the cause of action, as stated by the plaintiff in the court below, was properly overruled. In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506, it is said negligence is the failure to do what a reasonable and prudent person would ordinarily have done, under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. It would seem too plain to require argument that the allegations of the petition show negligence on the part of the telephone company. Under the facts and circumstances stated the wire was an obstruction upon the public highway. Travelers were liable to collide with it, and injurious consequences to them would follow as the natural and probable result of such contact. Article 629 of the Revised Civil Statutes of Texas provides: "Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of the state, in such manner as not to incommode the public in the use of such roads, streets, or waters."

The duty on the part of the telephone company was clear to prevent its wire from becoming an obstruction on the highway. Under the circumstances shown the defendant in error might have been hurt by coming in contact with the wire of the telephone company, and injuries to the defendant in error might have resulted, independent of the fact that the wire at the time was loaded with a charge of electric fluid from the clouds and storm then prevailing. So that it is difficult to see how this verdict could be disturbed even if the contention of the plaintiff in error is correct, that the electricity with which the wire was charged at the time was the proximate and immediate cause of injury to the defendant in error, for which the telephone company cannot be held responsible. Negligence is a mixed question of law and fact, and is a question for the jury, under proper instructions from the court. It is not claimed here that the court misdirected the jury in its charge on the law of the case, and the verdict is: "We, the jury, find for the plaintiff in the sum of twenty-five hundred dollars." The jury found negligence on the part of the telephone company, resulting in injuries to the defendant in error, and for which they assess his damages at \$2,500. It

is not shown that the jury found that the wire of the telephone company was charged with electricity at the time the defendant in error came in contact with it, and that the electric fluid was the cause of the injury to the defendant in error, and so it is not clear that there was any error in the ruling of the court, even upon the theory of the case insisted upon by the plaintiff in error. No point is made on the question of contributory negligence, and the contention of the plaintiff in error seems to be that the petition states the cause of action to have been the injuries which resulted from the fact that the wire at the time of the contact with it by the defendant was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. Persons, however, must be held to know the ordinary operation of the forces of nature, and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element or the main element in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injury to the defendant in error. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and insulated are dangerous to persons who may at such times be brought in contact with them, and the petition charges that, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to cause death or great injury to those coming in contact with them; and whether this is so or not is a question of fact. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main

cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force or power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 52, 19 L. ed. 67, the court says: "If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account. In *Gleeson v. Virginia M. R. Co.*, 140 U. S. 485, 35 L. ed. 458, the court held that a landslide in a railway cut caused by an ordinary fall of rain is not an act of God, which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway; and on page 441 of the opinion in that case the court, quoting from an English case, says "that the plaintiff was entitled to a verdict on the ground that, if a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by, and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it,"—citing 1 Thomp. Neg. pp. 846, 847.

No case is cited like the one at bar, but the principles upon which cases of this character have been decided sustain the verdict in this case, and the judgment of the court is affirmed.

MARYLAND COURT OF APPEALS.

David A. FLACK *et al.*, *Appts.*,

v.

Frank GOSNELL, Trustee of James W. Flack.

(.....Md.....)

One tenant in common has no lien against his cotenant's interest in the

property for rents in excess of his share collected and retained by such cotenant before partition of the land.

(June 7, 1892.)

A PPEAL by complainants from a judgment of the Circuit Court for Baltimore City

NOTE.—How far share of cotenant collecting rents is subject to lien in favor of his cotenant.

In *Hannan v. Osborn*, 4 Paige, Ch. 343, 3 L. ed. 463, the court said such rents although they may form an equitable lien on the premises as between tenants in common while they continue to hold the premises in common yet are a personal charge upon the individual receiving the same and upon his death are primarily payable out of his personal estate.

In an action for partition between the cotenants, the judgment may correctly make the amount found due from the one who has received the rents of the premises liens on his share of the real estate for the excess received beyond the share which be-
16 L. R. A.

longs to him. *Scott v. Guernsey*, 60 Barb. 180, affirmed 48 N. Y. 124. See also *Wright v. Wright*, 59 How. Pr. 186.

And the fact that the rents are collected by the mortgagee of some of the undivided shares is immaterial. *Kingsland v. Chetwood*, 39 Hun. 608.

But the heir or devisee of the cotenant who collects the rent will not take his interest charged with the lien in favor of the cotenants. *Platt v. Platt*, 8 Cent. Rep. 61, 105 N. Y. 488.

In *Roberts v. Beckwith*, 79 Ill. 248, which was an action to recover a one-fifth share of the rents of property of which a man and his wife had been in exclusive possession although owning only four fifths of it, the court said it was proper to render a decree against the wife as well as against the hus-

sustaining a demurrer to so much of the complaint in a partition suit as sought to charge the interest of one of the cotenants with his cotenants' share of rents which he had collected and appropriated to his own use. *Affirmed.*

The facts sufficiently appear in the opinion. Argued before Alvey, Ch. J., and Miller, Robinson, Bryan, McSherry, Fowler and Irving, JJ.

Mr. William E. Hoffman, for appellants: In this state, co-heirs are coparceners. *Hoffar v. Dement*, 5 Gill, 182, 46 Am. Dec. 628.

Coparceners are like partners. *Hamilton v. Conine*, 28 Md. 685, 92 Am. Dec. 724.

Cases of accounts between tenants in common, joint tenants, partners, part owners of ships and their masters, fall under the like considerations. They all involve peculiar agencies like those of bailiffs or managers of property, and require the same operative power of discovery and interposition of equity.

1 Story, Eq. 18th ed. § 466; *Freem. Coten.* 2d ed. § 269.

In cases of partition a court of equity will by its decree adjust all the equitable rights of the parties interested in the estate.

Story, Eq. § 656.

In partition cases this court has held to the general rule with reference to allowances, charges, and liens.

Warfield v. Walter, 11 Gill & J. 68; *Lawes v. Lumpkin*, 18 Md. 334; *Ridgely v. Bond*, Id. 443; *McLaughlin v. Barnum*, 81 Md. 425. See also *Israel v. Israel*, 80 Md. 120, 96 Am. Dec. 571; *Brown v. Thomas*, 46 Md. 636; *Long v. Long*, 62 Md. 74; *Gittings v. Worthington*, 67 Md. 189; *Worthington v. Hiss*, 70 Md. 172; *Hoffman v. Oromwell*, 6 Gill & J. 144.

Freeman on Cotenancy, 2d ed. § 425, says advantages of partition in equity are that the court "may decree a pecuniary compensation to one of the parties for owelty or equality; may compel cotenants to account with one

another in regard to rents and profits received," etc.

The usual rule is that one who has actually received rents and profits of the real estate will be charged therefor in partition.

Moak's Underhill, Torts, pp. 381, 392.

This is not a new doctrine contended for by appellants, but is an established rule of law.

Kingsland v. Chatwood, 39 Hun, 606; *Scott v. Guernsey*, 60 Barb. 164, 48 N. Y. 107; *Fisher v. Hersey*, 85 N. Y. 633; *Green v. Putnam*, 1 Barb. 501; *Haywood v. Judson*, 4 Barb. 228; *Hannan v. Osborn*, 4 Paige, 336, 8 L. ed. 460; *Hitchcock v. Skinner*, 1 Hoffm. Ch. 80, 6 L. ed. 1058; *Wright v. Wright*, 59 How. Pr. 186; *McArthur v. Scott*, 81 Fed. Rep. 521; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Doughaday v. Crowell*, Id. 201; *Obert v. Obert*, 10 N. J. Eq. 98; *Brookfield v. Williams*, 2 N. J. Eq. 346; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Roberts v. Beckwith*, 79 Ill. 246; *Dean v. O'Meara*, 47 Ill. 120; *Illinois Land & L. Co. v. Bonner*, 75 Ill. 315; *Honey v. Goings*, 18 Ill. 107, 54 Am. Dec. 427; *Mahoney v. Mahoney*, 65 Ill. 406; *Holloway v. Holloway*, 97 Mo. 628; *Rosier v. Griffith*, 81 Mo. 171; *Scandlin v. Allison*, 32 Kan. 376; *Carver v. Coffman*, 8 West. Rep. 396, 109 Ind. 552; *Alleman v. Hawley*, 117 Ind. 537; *Bridgeford v. Barbour*, 80 Ky. 529; *Sned v. Atherton*, 6 Dana, 281, 32 Am. Dec. 70; *Graham v. Graham*, 6 T. B. Mon. 562, 563, 17 Am. Dec. 166; *Talbot v. Todd*, 7 J. J. Marsh. 456; *Miller v. Mills*, 4 Neb. 382; *Dall v. Confidence Silver Min. Co.* 3 Nev. 531; *Puckard v. King*, 3 Colo. 211; *Goodenow v. Kuer*, 16 Cal. 471; *Humphrey v. Foster*, 13 Gratt. 653; *Carter v. Carter*, 5 Munf. 108; *Arnett v. Munnerlyn*, 71 Ga. 14; *Hines v. Munnerlyn*, 57 Ga. 32; *Pope v. Harkins*, 16 Ala. 321; *Backler v. Farrow*, 2 Hill, Eq. 111. See also *Lawson, Rights, Rem. & Pr. p. 446A*, § 2733; *Adams, Eq. 8th ed. p. 282*; *Lorimer v. Lorimer*, 5 Madd. Ch. 368; *Wills v. Slade*, 6 Ves. Jr. 498; *France v. France*, L. R. 18 Eq. 173; *Story v. Johnson*, 2 Younge & C. 586; *Hill v. Fullbrook*, Jac. Ch. 574; *Pascoe v. Swan*, 27 Beav. 508.

band and make the amount found due a lien on her interest in the property.

In *Hines v. Munnerlyn*, 57 Ga. 32, a bill was filed for a partition and to enjoin a sale of the property under a mortgage which had been given by the cotenant in possession. In dealing with the question of rents the court said, while it may be true that the complainants have not strictly a legal lien upon the corpus of the joint property or upon their cotenants one half of it for what he may be indebted to them for the exclusive use of the property, still the complainants have a clear equitable right to have the share of the joint property charged with the indebtedness in the decree for partition, especially where the cotenant is insolvent; and the lien so decreed will be given precedence over the mortgage.

This case was followed in *Arnett v. Munnerlyn*, 71 Ga. 17.

Where one cotenant is in receipt of all the rents and in the exclusive enjoyment of the whole premises refusing to let his cotenant in, and such ousted tenant has paid money to relieve the common property of incumbrances, the court will declare a charge in favor of such ousted tenant for the amount of his share of the rents and for the amount which his cotenant should contribute toward the

incumbrance on the latter's share in the property to be paid out of the proceeds of the partition sale before division is made. *Holloway v. Holloway*, 97 Mo. 640.

In *Beck v. Kallmeyer*, 48 Mo. App. 563, the question is discussed quite fully and the court decides that if one tenant mortgages his undivided interest and collects the rents accruing from the property, the lien of the cotenant for his share of those rents takes precedence over the mortgage; and this applies as to rents collected either before or after the mortgage and prior to its foreclosure.

Although in *McArthur v. Scott*, 81 Fed. Rep. 521, it was decided that the equitable claim of one tenant in common against his cotenant for rents and profits received in excess of his share is superior only to subsequent mortgages or liens.

In contradistinction to the above line of authority is the case of *Burch v. Burch*, 82 Ky. 622, which held that there is no lien in favor of a joint tenant against his cotenant for rents collected by the latter before a partition of the land. In that case the court considers the question on principle and cites no authority for its conclusions. This decision was followed in *Clark v. Hershey*, 52 Ark. 473.

H. P. F.

Messrs. Thomas M. Lanahan and Frank Gosnell for appellee.

Irving, J., delivered the opinion of the court:

The facts of this case are as follows: Thomas J. Flack died in 1874, seised and possessed of the reversions in fee of several lots of ground in the city of Baltimore out of which rents issued amounting in the aggregate to \$800.50 annually. His heirs-at-law consisted of two sons, a daughter, and some grandchildren, the children of a deceased child. One of his sons, James W. Flack, becoming involved, made an assignment for the benefit of his creditors to Frank Gosnell (the appellee) of all his estate, which included his undivided interest in his father's estate. The bill is for partition of this real estate among the heirs-at-law of the intestate; and among other things, charges that James W. Flack had collected all the rents from his real estate, and had not accounted for them to his cotenants; and, among other things, prays that in such partition they may "have the interest and estate of said James W. Flack in said parcels of ground and premises, as well against him as also said Frank Gosnell, [trustee under said deed of trust,] held and made liable for and applied towards the satisfaction of the rents collected, received, and appropriated as aforesaid." In other words, the bill prays that James W. Flack's interest in the undivided real estate shall be impounded for the payment to the several heirs of their interests in the rents of the estate collected by him. To so much of the bill as seeks thus to subject the undivided interest of James W. Flack in this property or its proceeds after sale thereof, to the payment of any rents collected and retained by James W. Flack in excess of his share thereof the appellee demurred. The court sustained the demurrer, and the only question on this appeal is whether that ruling of the circuit court was right. As curtly stated by the appellee in his brief, the question is, Has one tenant in common a lien against his cotenant's interest in the property for rents in excess of his share collected and retained by such cotenant before partition of the land?

The counsel for appellants has exhibited most commendable industry and research in the collection of authorities supposed to sustain his contention. Some of his citations from other states do seem to sustain his view, but they do not commend themselves to us as resting on solid ground of reason and equity. They are certainly not in harmony with the law as it prevails in England, and as it has been understood and adopted in this state. The several text-books cited by the appellant, viz., *Freeman, Cotenancy*; *Moak's Underhill, Torts*; and *Story's Equity*,—according to our understanding of them, do not support the view for which the appellants' counsel contends; while Mr. Jones in his work on *Liens*, (vol. 2, p. 96, § 1155) says expressly that such lien as that claimed by the bill and in argument does not exist. The only reason he says for enforcing it for improvements put on the land rests on the

doctrine of contribution, and arises from the necessity of preserving the estate or enhancing its value for the benefit of the joint owners. *Judge Story* says that, strictly speaking, no lien exists even for repairs and improvements, but equity compels compensation in that case before partition of the land. Mr. Jones, in the section cited, says: "There is no reason why there should be a charge or incumbrance upon the interest of one joint owner to satisfy a claim of his cotenant for rents and profits received. The right to partition exists, and may be enforced, and, pending the action therefor, the chancellor may amply protect the rights of each joint owner by placing the land in the hands of a receiver. But it is not the policy of the law to enforce liens upon the interest of one joint owner of land in favor of another for unadjusted, and, to innocent purchasers and creditors, often unknown, accounts for rents and profits." Similar reasons are most forcibly assigned by *Judge Lewis* in *Burch v. Burch*, 82 Ky. 622, the reasoning and conclusion in which is adopted in *Clark v. Hershey*, 62 Ark. 498.

The interest of James W. Flack in this real estate of his father was, like that in any other real estate he owned, liable to be sold or mortgaged, and would be subject to the lien of any judgment obtained against him. The fact that it was an undivided interest would make no difference in its liability in these respects. No good reason has been suggested why such an interest should be subjected to secret liens, which the general policy of the state discountenances, with any more readiness by a court of equity than any other real estate. The claims of the several cotenants for their share of the rents received by James W. Flack were recoverable by law, and suit could have been instituted therefor at any time. The Act of 4 Anne, chap. 16, is in full force in this state; and its 27th section makes express provision for such a case; but it gives no lien on the undivided interest in the land of the tenant collecting the rents. The fact that James W. Flack assumed the right or duty of collecting the rents during all those years, in which it is charged he received them without being made a bailiff by express authority, does not change the nature of appellants' claim, nor subject James W. Flack to any other or greater liability for the rents so collected by him than if he had been duly and fully authorized to do all that he did do. We think the case entirely covered by what this court said in *Devries v. Hiss*, 72 Md. 560, and we see no reason for departing from what the court said in that case. In it the court did lay hands on the share of P. Han-son Hiss in the estate for the payment of the rents and profits he had collected, but they did so because the estate which he took under his father's will was an equitable estate, and not a legal one. The whole question turned upon the inquiry whether his estate was equitable or legal; and the court decided it was an equitable estate, and therefore could be subjected in a court of equity to the payments to the several cotenants their shares of what he had received. The lan-

guage of the court is: "The equitable interest could be intercepted to make good the defalcation. Mr. Devries took a conveyance from P. Hanson Hiss of his interest subject to this equity, and he cannot claim more than his grantor would have been entitled to receive." If the estate which passed to Gosnell, trustee, had been an equitable estate, it would be subjected, as has been asked by the complainant, precisely as Devries' interest was, to the payment of his

grantor's defalcation to his cotenant; but, being a legal estate, it cannot be impounded as asked without disregarding our decision in *Devries' Case*, and the reasoning which brought us to that conclusion; nor without doing violence to the policy of the state in respect to liens on real estate. The circuit court was clearly right in its ruling on the demurrer, and it will be affirmed.

Affirmed and remanded.

RHODE ISLAND SUPREME COURT.

STATE OF RHODE ISLAND

John J. MURPHY.

(.....R. I.....)

1. **Forgery is not a felony at common law.**
2. **An indictment for forgery need not allege that the offense was feloniously committed; at least not unless drawn under a statute declaring it to be a felony.**
3. **There is no duplicity in an indictment for forgery by reason of an allegation that defendant had in his custody a false, forged, and counterfeit order, and did feloniously utter and publish the same as true knowing it to be forged.**
4. **The name of the person to whom the forged instrument was passed should be given in an indictment for uttering such instrument, or if not known this fact should be stated as an excuse for its omission, since it is a material part of the description of the offense.**
5. **The existence of a corporation whose ownership is alleged in an indictment is not sufficiently proved by evidence that certain persons were doing business under a company name and owned all the property of the company, and that a statute had been passed incorporating the company where there is no further proof of any organization effected under the statute.**

(May 7, 1882.)

PETITION by defendant for a new trial after being convicted upon an indictment charging him with forgery. *Granted.*

The facts are stated in the opinion.

Mr. Charles C. Mumford, for defendant, in support of the petition:

The first count was fatally defective in that it did not state that the forgery was feloniously done.

It has never been decided what constitutes a felony in this state.

Some states have by statute declared any offense punishable by imprisonment in the state prison to be a felony. And in other states, independent of statute, crimes punishable by

imprisonment in state prison are declared felonies.

State v. Felch, 58 N. H. 1; *State v. Smith*, 8 Blackf. 459.

In view of these cases it is submitted that any crime which the Legislature has regarded as of such considerable gravity as to be punishable by imprisonment in the state prison, should be deemed a felony.

Another reason for considering such offenses felonies arises from the fact that by the statutes of this state a sentence to imprisonment in state prison renders the convict incapable of holding any office of honor, etc., or of acting as an elector.

Pub. Stat. chap. 248, § 61.

In Massachusetts, where the court declared the crime of receiving stolen goods to be a felony, the decision is rested largely on the ground that the conviction would render the offender incapable of testifying as a witness.

Rohan v. Savin, 5 Cush. 281.

If this view is correct then it follows that the word "feloniously" is a term of art, and its place cannot be supplied by any circumlocution.

Reg. v. Gray, 9 Cox, C. C. 417, 1 Leigh & C. 865; *State v. McCarron*, 51 Mo. 27; *Cain v. State*, 18 Tex. 887; *Bowler v. State*, 41 Miss. 570; *Mott v. State*, 29 Ark. 147; *Edwards v. State*, 25 Ark. 444; *State v. Gilbert*, 24 Mo. 880; *State v. Jesse*, 19 N. C. 297; *State v. Scott*, 72 N. C. 461; *Randall v. Com.* 24 Gratt. 644; *Mears v. Com.* 2 Grant Cas. 385.

The second count is fatally defective in that it does not set forth to whom the alleged forged paper was uttered.

It has been held in this state that a complaint for the illegal sale of intoxicating liquor is fatally defective if it does not contain the name of the purchaser.

State v. Doyle, 11 R. I. 574.

It is equally essential that there should be some party to whom the uttering was made, as that there should be a purchaser; and the argument in the case of a sale is equally strong in this case.

See also *McClellan v. State*, 83 Ark. 609; *Buckley v. State*, 2 G. Greene, 162.

Mr. Robert W. Burbank, *Atty-Gen.*, for the State.

NOTE.—In many of the states the question of whether or not forgery is a felony can be definitely settled by examining the statutes. The common-law authorities upon the subject are so fully collected

in the above case that any note upon the subject would of necessity be drawn from the same sources and would therefore furnish little material that cannot be obtained from the opinion.

Tillinghast, J., delivered the opinion of the court:

The defendant petitions for a new trial on the following grounds, viz.: *First*, because of erroneous rulings by the court below in matters of law; *second*, because the verdict was against the evidence and the weight thereof; *third*, because of newly discovered evidence; and, *fourth*, because the defendant did not have a full, fair, and impartial trial. The indictment, omitting the formal part thereof, was in the following form, viz.:

"That John J. Murphy, *alias* John Doe, of Pawtucket, in said county of Providence, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and ninety-one, without force and arms, at Pawtucket aforesaid, in the aforesaid county of Providence, falsely and fraudulently did make, forge, and counterfeit a certain order and request for the delivery of goods, which said order and request is of the tenor following, that is to say:

Pawtucket, Jan. 14, 91.

Pawtucket Steam & Gas Pipe Co.: Please deliver to bearer:

1 16-in. Stillson wrench.

1 18 "

2 $\frac{3}{4}$ " St. cocks.

3 1 "

6 $\frac{1}{2}$ x $\frac{3}{4}$ sur. yds.

Obldg. Wm. L. Graham.
E. F. Graham.

379 Main St.

—with intent thereby then and there to injure and defraud the said Pawtucket Steam & Gas Pipe Company, a corporation legally created, organized, and located at said Pawtucket, against the form of the statute in such case made and provided, and against the peace and dignity of the state." "And the jurors aforesaid, upon their oaths aforesaid, do farther present that said John J. Murphy, *alias* John Doe, on the day, month, and year last aforesaid, with force and arms, at said Pawtucket, in the county last aforesaid, did have in his custody and possession a certain false, forged, and counterfeit order and request for the delivery of goods, to wit, tools, which said order and request is of the tenor following, that is to say:

Pawtucket, Jan. 14, 91.

Pawtucket Steam & Gas Pipe Co.: Please deliver to bearer:

1 16-in. Stillson wrench.

1 18 "

2 $\frac{3}{4}$ " St. cocks.

3 1 "

6 $\frac{1}{2}$ x $\frac{3}{4}$ sur. yds.

Obldg. Wm. L. Graham.
E. F. Graham.

—and that the said John J. Murphy, *alias* John Doe, did then and there feloniously utter and publish the same as true, with intent thereby then and there to defraud the Pawtucket Steam & Gas Pipe Company and others; he, the said John J. Murphy, *alias* John Doe, then and there knowing the same to be forged, false, and counterfeit, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

Before the case was opened to the jury in the court of common pleas, the defendant's counsel moved to quash the indictment on 16 L. R. A.

the ground that the first count thereof was defective, in that it did not contain the word "feloniously," and that the second count was defective for duplicity, and also because it did not give the name of the person to whom the order in question was supposed to have been uttered. This motion was overruled by the court, to which ruling the defendant duly excepted. The first question, therefore, is whether this ruling was correct. As to the first objection which the defendant made to the indictment, namely, that the first count thereof did not contain the word "feloniously," we are of the opinion that it was not well taken. We understand the rule of pleading in criminal cases to be that in the absence of any statutory provision as to what constitutes a felony, or as to the form of the indictment, the word "feloniously" should be used in all cases where the offense charged was a felony at the common law, and that in all other cases said word is not essential, but, if used by the pleader, it may be rejected as surplusage. In several of the United States there is a statutory provision that all offenses which are punishable either by death or by imprisonment in the state prison shall be felonies. There is no statute in this state, however, declaring what crimes are felonies and what are misdemeanors, nor has it ever been decided, so far as we are aware, what constitutes a felony. We must therefore resort to the common law in order to determine the question. Felony is ordinarily defined to be an offense which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of the guilt. 1 Bishop, Crim. Law, § 448; 4 Bl. Com. 94-96; 1 Russell, Crimes, § 42. Of course, it is to be borne in mind that this definition of felony is mainly historical, and shows what it was several centuries ago, while it conveys only a faint conception of what it is now. In fact, there is not, nor ever was, practically any such thing as felony in the United States. For while we speak of certain crimes, such as larceny, robbery, burglary, rape, arson, murder, etc., as felonies, yet it is mainly because we have been taught that at the common law they are so denominated. But when we come to apply the ancient English test of felony, as set forth in the above definition, we find that there is not, strictly speaking, any such crime known to our law. Indeed, the rigor of the common law itself has been so far modified by statute in England that there now remain but very few of the characteristics of the ancient crime of felony. The change in the form of the indictment, however, has not kept pace with the change in the consequences of the crime, so that it is still necessary to allege in all of those cases where the crime was a felony at the common law, and where the statute has not provided what should constitute the offense, or prescribed a form of indictment, that it was done "feloniously." *Edwards v. State*, 25 Ark. 444, and cases cited; *Mott v. State*, 29 Ark. 147; *Cain v. State*, 18 Tex. 887, and cases cited; *Bowler v. State*, 41 Miss.

570; *State v. Gilbert*, 24 Mo. 380; *Reg. v. Gray*, 9 Cox, C. C. 417, 1 Leigh & C. 365-371; *Mears v. Com.* 2 Grant, Cas. 385.

The question, then, which presents itself in this case is whether forgery was a felony at common law. We do not find that it ever was. The definition of forgery at common law as given by Blackstone (4 Com. 247) is: "The fraudulent making or alteration of a writing to the prejudice of another man's right." As given in 2 East, P. C. 861, which is supported by Bacon, Abr. "*Forgery*," B. and followed in 2 Russell on Crimes, 358, "the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law." Wharton, in his excellent work on Criminal Law, (vol. 1, § 654) says: "By the common law forgery is a misdemeanor." "By statutes passed in England and the United States, various kinds of forgery are made felonies. Whether in particular cases the statute has absorbed the offense is a matter of special statutory construction. It may be generally stated that unless the statute in its terms undertakes to be absorptive, establishing a statutory offense coextensive with the offense at common law, forgery may still be pursued as a common-law misdemeanor in cases to which the statute does not reach in those states where a common-law criminal jurisdiction exists. On the other hand, when the statute in its terms is coextensive with the common law, then the statutory remedy must be exclusively followed; and eminently important is it for the pleader to recollect this in cases where by statute the offense is made a felony." The same author, in giving a form of indictment for forgery at common law, (1 *Precedents of Indictments & Pleas*, 264,) does not use the word "feloniously." The same is true of the form given in 2 Bishop, *Crim. Proc.* § 357. See also Train & H. *Precedents of Indictments*, 223, 224. According to 1 Hale, P. C. 682, 683, it appears that by the Statute of 5 Eliz. chap. 14, forgery was not made a felony unless it was a second offense. It has been held by very high authority that, even in cases where certain crimes are declared by statute to be felonies, if the felonious intent constitutes no part of the crime, that being complete under the statute without it, and depending upon another and different criminal intent, the rule requiring the use of the word "feloniously" can have no application. Thus, in *United States v. Staats*, 49 U. S. 8 How. 41, 12 L. ed. 679, which was an indictment under the Act of Congress approved March 3, 1823, making the forging of any deed, power of attorney, order, receipt, etc., for the purpose of obtaining or receiving from the United States any sum or sums of money, etc., a felony, it was held that the indictment was sufficient to charge the offense without the use of the word "feloniously." In delivering the opinion of the court Mr. Justice Nelson said: "The general rule is that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that

constitute it. Nothing is left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the Act; but if in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the substance and legal effect of the enactment; and, when words or terms of art are used in the description that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime. In all cases of felonies at common law, and some, also, by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime. Sir William Blackstone observes that the term 'felony' originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods, but that by long use it came at last to signify the actual crime committed. He further remarks that the idea of felony is so generally connected with that of capital punishment that it is difficult to separate them, and the interpretation of the law conforms to that usage; and therefore, if a statute makes any new offense felony, the law implies that it shall be punished with death, that is, by hanging as well as by forfeiture, unless the offender prays the benefit of clergy. 4 Bl. Com. 97. This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law, and also in many cases when made so by statute; because, if it is used in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense,—as much so as the intent to maim or disfigure in the case of mayhem, or to defraud in the case of forgery, are essential ingredients in constituting these several offenses. But in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority." In the case at bar the essence of the offense charged is the "intent to defraud." It is therefore complete without the use of the word "feloniously." And, even though the offense was made a felony by our statute, the word "feloniously" would not be necessary under the decision from which we have just quoted. But, however this may be it is sufficient to say that, the offense charged not being a felony at common law, it is unnecessary to allege that it was feloniously committed. The cases cited by the defendant's counsel in support of his contention that the word "feloniously" is essential are either cases in which the offense charged was a felony at common law, or was made such by the stat-

ute of the state in which it was committed. But, as the case before us does not fall within either of those classes, the authorities have no bearing upon this branch of the case. We therefore decide that the first count in the indictment is good, and hence that the ruling of the court below in this regard was correct.

The second part of the defendant's objection to the ruling of the court is that it refused to rule that the second count in the indictment was bad for duplicity. We think this ruling also was correct. The statute under which the indictment was framed (R. I. Pub. Stat. chap. 243, § 1) provides that "every person who shall falsely make, alter, forge, or counterfeit, or procure to be falsely made, altered, forged, or counterfeited, any public record, . . . bill of exchange, promissory note, . . . order, . . . with intent to defraud, or who shall utter and publish as true, or who shall procure to be uttered and published as true, any such false, forged, altered, or counterfeited record, . . . knowing the same to be false, forged, altered, or counterfeited, with intent to defraud, shall be imprisoned not exceeding ten years nor less than two years." This statute, while it enumerates many forbidden acts, yet creates but one offense, if committed by one and the same person at the same time. The offense may be committed in various ways; but, however committed,—whether by forging, counterfeiting, or procuring to be forged or counterfeited, or by uttering and publishing, or procuring to be uttered and published, etc., or by doing all of these together,—subjects the offender to one and the same punishment. In Bishop, Crim. Proc. § 486, the author says: "It is common for a statute to declare that if a person does this, or this, or this, he shall be punished in a way pointed out. Now, if in a single transaction he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." In Wharton on Criminal Pleadings & Practice, 9th ed. § 251, it is laid down that "where a statute as has already been observed, makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be a distinct offense; keeping a gaming table and inducing others to bet upon it may constitute a distinct offense; for either, unconnected with the other, an indictment will lie; yet, when both are perpetrated by the same person at the same time, they may be coupled in one count." In *State v. Nolan*, 15 R. I. 539, 4 New Eng. Rep. 753, this court recognized the rule laid down in *State v. Wood*, 14 R. I. 151, viz., that, where several cognate acts are forbidden dis-

junctively, the complaint or indictment may ordinarily charge them all conjunctively in a single count. See also cases cited. See also other cases cited in the opinion by Stiness, J., in support of said rule. See also *Com. v. Hall*, 4 Allen, 805. We are therefore of the opinion that there is but one offense alleged in said second count, and hence that it is not bad for duplicity.

As to the third and last ground of the defendant's objection to the second count, viz., that it does not give the name of the person to whom the order in question was supposed to have been uttered, we think it was well taken. The name of the person to whom the forged instrument was passed, being a material part of the description of the offenses, should have been given if known, or, if not known, this fact should be stated as an excuse for the omission. 2 Bishop, Crim. Law, § 379; *Buckley v. State*, 2 G. Greene, 162; *McClellan v. State*, 32 Ark. 609; *Butler v. State*, 5 Blackf. 280; *State v. Doyle*, 11 R. I. 574; *State v. Smith*, R. I. Index II., 17. We are therefore of the opinion that the second count is bad for insufficiency of description, and that the motion to quash the same should have been granted.

The second ground upon which the petition for new trial is based is that the verdict was against the evidence, and the weight thereof. The only evidence introduced at the trial of the organization of the Pawtucket Steam & Gas Pipe Company under its charter was the following, viz.: Charles A. Lloyd, called in behalf of the prosecution, testified that the Pawtucket Steam & Gas Pipe Company was located at Pawtucket, and that it paid him his wages. He also testified that he took his pay out of the safe; that James H. Andrews was the treasurer, and D. L. Fales secretary; that witness was one of the clerks, and R. C. Fletcher the other; that Mr. Andrews owns part of the property and Fales owns some. In cross-examination he testified that "the Pawtucket Steam & Gas Pipe Company owns all the pipe, wrenches, fittings, and stock in the shop." "Andrews does not own any of it." "Fales does not own any of it." "I mean that they owned stock in the Pawtucket Steam & Gas Pipe Company when I said they owned part of the property." The attorney-general offered in evidence the "schedule" containing the act of incorporation of the Pawtucket Steam & Gas Pipe Company. After the state rested the case for the prosecution the defendant's counsel moved that the jury be directed to bring in a verdict of not guilty, as the organization of the Pawtucket Steam & Gas Pipe Company under its charter was not shown. This motion being denied, the case was submitted to the jury upon the evidence for the prosecution. In the charge to the jury the court instructed them that, unless they were satisfied upon the evidence that the Pawtucket Steam & Gas Pipe Company had organized under its charter, it would be their duty to return a verdict of not guilty. The defendant's counsel then asked the court to charge the jury that the testimony of Lloyd to the effect that he was employed by the Pawtucket Steam & Gas Pipe Company, and giving the names

of its president and treasurer, was no proof of its organization under its charter. This instruction was refused, and the court instructed the jury that the testimony of Lloyd was evidence of the organization of the corporation, and it was for the jury to say whether or not it was sufficient to satisfy them of the fact of organization; to which instruction and refusal to instruct as requested the defendant, by his counsel, then and there duly excepted. The jury returned a verdict of guilty, and the only question raised upon this branch of the case is whether the evidence above set out was sufficient to prove the organization of said corporation. We think it was not. The evidence simply shows that James H. Andrews and D. L. Fales were doing business at Pawtucket under the name of the Pawtucket Steam & Gas

Pipe Company, the former as treasurer and the latter as secretary, and that this concern owned all of the property in the shop. It also shows that an act had been passed by the General Assembly incorporating said company. But we do not think the proof was sufficient to establish the fact that any organization under said act was ever effected. It being necessary for the state to prove the organization of the company under said act in order to show that it had been defrauded as alleged in the indictment, and having failed to do so, the case was not made out and the defendant was entitled to an acquittal. The verdict was therefore against the evidence, and must be set aside. The other grounds set forth in the petition need not be considered.

Petition for new trial granted.

PENNSYLVANIA SUPREME COURT.

Thomas GATES, *Appt.*,

v.

PENNSYLVANIA R. CO.

(.....Pa.....)

For injuries caused by defects in a highway bridge which a railroad company is bound to maintain over its tracks, the railroad company cannot escape liability on the ground that an action would lie for the injury against the township.

(July 12, 1892.)

NOTE — *Right of one injured on highway to proceed in the first instance against the one ultimately liable.*

In view of the multitude of cases in which actions have been maintained directly against the one responsible for a defect in a highway to recover for injuries resulting from such defect, it seems remarkable that so few attempts have been made to defeat a recovery on the ground of the primary liability of the municipality in which the highway is situated. Without doubt the true explanation of this dearth of authority is the one suggested in the principal case, viz., the absence of any serious doubt upon the question.

In *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183, 8 Am. Rep. 415, it was contended that defendant was not liable for the injury for which the suit was brought because the *locus in quo* was within the limits of a highway which the town was bound to keep in repair. The court said that the city might possibly be liable; but, if so, it would have a right of reclamation against those creating the nuisance. Much more then could the party injured maintain his action directly against the corporation causing the injury.

In *Davenport v. Ruckman*, 37 N.Y. 563, the court held that there was no objection to joining the town and the person ultimately liable in one action.

In *Calder v. Smalley*, 66 Iowa, 219, in which the action was brought against the person ultimately liable, the court said we need not inquire whether the city may be liable as well as defendant. It is sufficient for the purpose of this case to hold that defendant is liable.

And in *Landru v. Lund*, 38 Minn. 533, it was held that where an individual and the city are both lia-

A PPEAL by plaintiff from a judgment *non obstante veredicto* of the Court of Common Pleas for Huntingdon County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. George B. Orsady, for appellant.

The duty to keep county roads reasonably safe for public travel is parallel with the duty of borough and city councils, who are required by similar statutes to keep the public streets in proper repair for safe use by the public, and it has been determined frequently that

ble, suit may be brought against both or either at the pleasure of the one injured.

In Wisconsin the charters of many of the cities require the bringing of the action in the first instance against the one ultimately liable, and those provisions have been several times before the courts. They have been held valid. *Hinks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735.

The plaintiff in order to recover against the city must exhaust his legal remedy against the one who is responsible for the defect in the street. *Raymond v. Sheboygan*, 70 Wis. 818; *Hiner v. Fond du Lac*, 71 Wis. 74.

Even to the extent of obtaining judgment and having an execution thereon return unsatisfied. *Henker v. Fond du Lac*, 71 Wis. 616.

And he must have brought his action against such person with reasonable diligence. *McFarlane v. Milwaukee*, 51 Wis. 691.

Although the fact that he had not exhausted his legal remedy is a matter of defense on the part of the city and the plaintiff need not plead and prove it in the first instance. *Amos v. Fond du Lac*, 46 Wis. 695.

Such provisions are not applicable where the actual negligence of the city concurs with the negligence of the lot-owner in causing the injury, and in such case the action may be brought against either in the first instance. *Passworth v. Milwaukee*, 64 Wis. 389.

In Minnesota a statute which attempted to impose on the lot-owner a liability in the first instance to third persons for injuries arising from defects in sidewalks was held unconstitutional. *Noonan v. Stillwater*, 33 Minn. 204, 53 Am. Rep. 23.

H. F. F.

an action will lie against the person or corporation causing the injury independent of the right of action against the municipality.

Oakland R. Co. v. Fielding, 48 Pa. 320; 2 Wood, Railway Law, 558.

Where a railroad company erects a bridge across its tracks to supply a public road appropriated in building the railroad, it is its duty to keep in repair the whole structure, the approach and embankments, even where they extend beyond the boundaries of the location of their line.

1 Redf. Railways, 6th ed. 428; *White v. Quincy*, 97 Mass. 480; *Titcomb v. Fitchburg R. Co.* 12 Allen, 254; *Burritt v. New Haven*, 42 Conn. 193; *Hayes v. New York Cent. & H. R. Co.* 9 Hun, 63.

A railway is liable to passers on the highway for a crossing so negligently constructed as to cause injuries to persons lawfully using it.

Person, Railway Accident Law, § 158; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 294.

Where the defect in the highway is caused by the works of the railway company, the latter will be responsible for all injuries in consequence, although the party might also obtain a redress from the town bound to maintain the highway.

1 Redf. Railways, p. 420; *Gillett v. Western R. Corp.* 8 Allen, 560.

Messrs. W. & J. D. Dorris for appellee.

Mitchell, J., delivered the opinion of the court:

The jury found a verdict for the plaintiff under instructions which are not now before us, and the court below entered judgment for the defendant, *non obstante veredicto*, on a point reserved. The learned judge held that the railroad company defendant was bound, not only to build, but to maintain, the bridge. This conclusion is not challenged by the present appeal, and we must accept it as correct. But the learned judge further held that, as the primary duty to the public to keep the highways in safe condition rests upon the township, the plaintiff's action should have been brought against it, and not against the railroad. This is the only question raised by this record. For the purposes of this case as now presented, it might be sufficient to say that it appears to be conceded, all through the evidence, that the township never did any repairs on the bridge or its approaches, including the place of the accident, and never in any way showed an acceptance of the work or an assumption of duty in regard to it. Whether or not the defendant was legally bound to continue the exclusive care and maintenance, it did so in fact, and, having undertaken the duty, was liable for negligence in its performance. That the town might have neglected its duty, either in not assuming charge itself, or in not enforcing proper performance by the defendant, was a question that might arise between the party injured and the town when the latter should be sued, but, clearly, cannot affect the question of the defendant's liability for the negligent performance of a duty it had in fact undertaken.

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But it is desirable to consider the case upon a somewhat broader view. The basis of the opinion of the learned judge below, and the argument of the appellee, is that the township is liable to the plaintiff, and it seems to have been accepted without question that in such case the defendant was not liable. But this does not appear to us to be a necessary or just conclusion. It is opposed, in the first place, to the general rule that a party injured by the concurrent tort of two may sue either, and this right is not affected by any considerations of primary or secondary duties of the tortfeasors as between themselves. But, further, if the railroad is charged with the duty of maintaining the approaches of the bridge in a safe condition for travel, then it is the party ultimately liable. Its duty in that regard is a duty absolute, not to the township merely, but to the public, to be enforced generally by the supervisors as the representatives of the public, but specially for his own relief, by any person specially injured by neglect of it. As against such person, the failure of the township to enforce performance would not excuse the railroad. If the supervisors accepted the performance as sufficient, and thought the bridge safe, that would not be a defense if the jury were of a different opinion. The township and the railroad are not in the relation of master and servant or principal and agent, nor in any position for the application of the rule *respondent superior*. They are independent parties, each charged with a duty to the public, involving liability to an individual specially injured by neglect of such duty. It is no defense to either to say, "You might have sued the other;" and certainly none for the railroad to say, "You can sue the township, and then the township can sue me." When it is said in the cases that the town is primarily liable, it is not meant that the town must be sued first, but that it has a duty to the party injured which cannot be escaped by showing that there is another party secondarily liable to it; and it would be contrary to all our legal reasoning to permit the second party, thus finally liable to pay, to defend on the ground that it is sued in the first instance. The towns have made a strenuous, but vain, struggle to establish the converse proposition, that they should not be liable because there was another party ultimately liable over to them. That effort failed because the parties were charged with independent duties, and each was directly responsible to those injured by its own neglect. After such failure, it would seem to be *a fortiori* that the converse proposition is untenable.

Again, it is unquestionable that any one negligently leaving an obstruction in the highway is at once liable to a party injured. *Pennsylvania R. Co. v. McTigue*, 46 Pa. 316. The municipality does not become liable until notice, express or implied from lapse of time. To hold that the liability of the obstructor ceased when that of the city began would be to hold that a liability for a wrongful act might be escaped by the continuance of the wrong.

Turning, now, to the authorities, we have

not found any decision upon the precise point, but the general drift of analogous cases seems to support the views already expressed. That the party who places or is responsible for permitting an obstruction in the highway is liable to one injured thereby is very ancient common law, and has been uniformly held in this state from *Beatty v. Gilmore*, 16 Pa. 468, to *Dickson v. Hollister*, 128 Pa. 421, while the unsuccessful effort of municipalities to escape liability where there is another party who may be charged has already been alluded to. See *Newlin Twp. v. Davis*, 77 Pa. 817; *Dalton v. Upper Tyrone Twp.* 187 Pa. 18. I have not found in either line of decisions a single one which is rested upon grounds that would make the right of action against either party a defense for the other against the party injured. On the contrary, while this point is nowhere specifically raised or passed upon, with reference to the party ultimately liable, the intimations tend clearly against such a defense. Thus *Philadelphia v. Weller*, Leg. Gaz. Rep. 400, 4 Brewst. 24, was an action for injuries resulting from a hole in the street, which a passenger railway company was charged with the duty of repairing. The city defended on the ground that the action should be against the company. Hare, J., instructed the jury that the liability of the railway company was not exclusive, and this was affirmed by this court, *Woodward, Oh. J.*, saying, "It is not worth debating whether the primary duty to keep the streets in repair is upon the city or the railway company, for both are liable in damages to a citizen injured by neglect to repair, and he may recover against whichever party he sues." And in *Oakland R. Co. v. Fielding*, 48 Pa. 820, it was held that a passenger railway company charged with the duty of keeping a street in repair was liable for an injury resulting from a defect in the cartway, though the defect arose from the imperfect replacing of the pavement which had been removed for the introduction of water pipes into an abutting property. The defendant asked the court to charge that "the city of Pittsburgh, or the owners of the property adjacent, are in law liable, for any want of care in putting any street in repair, which may have been opened for the purpose of putting in water pipes;" but the court, *Williams, J.*, negatived the point, and charged that defendants were liable whether the other parties would also be or not, (see page 324,) and the case was affirmed on this charge. And in *Borough of Brookville v. Arthurs*, 180 Pa. 501, it was held that permitting a defect in the sidewalk was negligence in both the property owner and the borough, and inferentially, therefore, both or either would be liable to the party injured, though they were not such joint wrong-doers as to preclude the borough from recovering over against the owner the damages it had been compelled to pay, if as between themselves the owner was ultimately the responsible party.

Looking beyond our own state, we find the law thus unqualifiedly stated in *Dillon on Municipal Corporations*, ed. 1890: "No 16 L. R. A.

person . . . has the right to do any act which renders the use of the street hazardous, or less secure than it was left by the municipal authorities. Whoever does so . . . is liable to any person who sustains any special injury therefrom." Section 1032. "The ultimate liability in such cases is upon the author or continuer of the nuisance; but if the party injured elects to proceed against the municipal corporation for failing in its duty. . . . he must show notice," etc. Id. § 1034. Where a street is rendered defective by the act of a railroad company, "the question arises, Who is responsible—the railroad company, which caused the defect, or the town, which is charged with the general duty of keeping in repair the public ways? The course of decision is to hold the town primarily responsible to the person sustaining the injury, thus compelling it, when liable, to seek indemnity from the railroad company." Section 1037. But it is added in the note to the same section: "The traveler may, of course, elect to proceed at once against the railroad company, if he chooses." Among the cases cited for this is *Lowell v. Boston & L. R. Corp.*, 23 Pick. 24, 84 Am. Dec. 38. The railroad company had made a cut across the highway, and its servants had neglected to replace the barriers. The person injured sued the town, and recovered, and the town then brought this suit against the company for indemnity. It was held that the town could recover, and in the opinion *Wilde, J.*, says, (p. 31:) "The defendants were answerable to the parties injured for all damages. But the doubt is whether they are responsible to the plaintiffs." And again, (p. 34:) "If the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs." In *Elliott v. Concord*, 27 N. H. 204, where the town was held liable in the first instance to the party injured, it was said for the plaintiff *arguendo*, "plaintiff may have a remedy against the town or the railroad corporation;" and this argument prevailed with the court, though the liability of the railroad company was not specially noticed in the opinion. In *Willard v. Newbury*, 22 Vt. 458, *Redfield, J.*, charged the jury: "The town were liable to the plaintiff, and he was not obliged to look to the company, even if they had also been negligent, and might so have become liable to any one suffering injury on that account." This was affirmed by the court, and it is plainly intimated that there was no doubt of the railroad's liability. This was followed and affirmed in *Ratty v. Duxbury*, 24 Vt. 155, where the gist of the decision is that the party injured is not bound to sue the railroad, but it is clearly implied that he may do so. The New England decisions, as noticed by *Judge Dillon*, are influenced to some extent by the fact that the duty of towns there is entirely statutory, but the principles upon which the foregoing cases are decided are equally applicable in Pennsylvania, where the duty of the municipalities, whether at common law or by statute, is essentially the same as by the statutes of the

states above cited from. It is quite clear to us from our examination of the subject that the general consensus of judicial opinion, and the basis of the reasoning on which many of the decisions are rested, is that the party injured may, if he so elects, sue at once the active wrong-doer who is ultimately liable; and the absence of any express adjudication

of the point is due mainly, if not altogether, to the absence of any serious doubt on that question, and the fact that the real struggle has uniformly been by the towns to escape their primary liability.

Judgment reversed, and judgment entered for plaintiff on the verdict.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Honora HART

v.

Ann COLE.

(..... Mass.)

The risk of defects in a tenement building, such as unsafe outside steps, is assumed by one who goes there to attend a wake, at least where there is nothing to show that he had an invitation or was in any way related to any of the occupants.

(June 22, 1892.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from the defective condition of defendant's premises, which resulted in a verdict in plaintiff's favor. *Sustained*.

The facts are stated in the opinion.

Mr. E. M. Johnson for defendant.

Mr. H. F. Naphen for plaintiff.

Knowlton, J., delivered the opinion of the court:

This case presents for consideration important questions which have never been decided in this commonwealth. The defendant was a tenant for life of a building consisting of several tenements, which she let to different tenants, who used the outside steps in common as a means of access to their tenements.

These steps were in the possession of the defendant, and it was her duty to keep them in a reasonably safe condition for the use of her tenants, and of other persons who were using them by her invitation, express or implied. There was evidence tending to show that the plaintiff, while coming from a wake in one of the tenements, was injured in passing down the steps by a defect negligently suffered by the defendant to be there. The deceased person was a brother of the wife of one of the tenants, and there was no evidence that he was an acquaintance of the plaintiff, or that she was expressly invited to the wake, or that she was in any way re-

lated to any of the occupants of the house. The jury were instructed that the defendant was liable to any one injured by a defect negligently suffered to be in the steps if the injured person was lawfully going to or from the house in the exercise of due care, having lawful business there, and if the steps were apparently designed and intended as a means of access to the house and of egress from it. In *Plummer v. Dill* (Mass.) 81 N. E. Rep. 128, we considered at some length the question whether an owner of real estate fitted up for use in business is liable for its unsafe condition to one who goes there on business of his own not connected with the business actually or apparently carried on there; and it was held that such a person was a mere licensee, to whom the owner owes no further duty than to refrain from putting traps or pitfalls in his way, and from negligently doing injurious acts to his prejudice. We have now to consider how far an owner of a dwelling-house is liable for its condition to one who comes there without express invitation, and not for the transaction of any kind of business carried on by any of the occupants; and also what should be deemed an implied invitation in a case of that kind. The defendant is liable to a visitor of the tenant for the condition of the steps if the tenant himself would have been liable had the steps been included in the tenement let and not otherwise. It seems clear that one coming to a dwelling-house to do business in which he alone is interested cannot expect a warmer welcome, or claim greater care for his safety, than if he went for the same purpose to the place of business of the occupant. In either case he is a mere licensee. In preparing a convenient entrance to his house one does not invite there peddlers, book agents, and others who come solely for their own convenience or profit. So far as they are concerned, his preparation of his premises for travel is an indifferent act. It has no such relation to them as it has to those who come to do business which he carries on there. The inducement, invitation, and implied representation of safety which he holds out to the latter are not for

NOTE.—There seems to be no doubt that the owner of a tenement house remains responsible to strangers for the safety of those portions of the building the possession of which he retains. See note to *Dollard v. Roberts* (N. Y.) 14 L. R. A. 238.

The owner of premises is not, however, bound to answer to a mere licensee upon the premises for injuries caused by defects therein. *Gordon v.* 16 L. R. A.

Cummings, 9 L. R. A. 640, and note, 152 Mass. 518.

How far an invited guest is a mere licensee is an interesting question which has as yet been considered very little, and the slight discussion of the question in the above case is therefore regarded as worthy of note as well as the application by the court of the licensee doctrine to one entering the building because of curiosity.

them, and the law imposes no affirmative obligation, and creates no active duty, to those who come as volunteers. He merely gives them free license and permission to use his premises, and impliedly agrees that he will not set traps for them, or wrongfully do anything to their injury. But, in general, they must take his premises as they find them.

How far an implied invitation is held out under all conceivable circumstances, and whether an implied invitation to come as a guest for friendly intercourse can create a liability greater than that to an ordinary licensee, it is not easy to decide. No case in this country involving these questions has been brought to our attention. In *Southcott v. Stanley*, 1 Hurlst. & N. 246, it is said, in substance, that the liability of an owner of a dwelling-house to a visitor who is there on his express invitation is no greater than that to a licensee. The ground taken by Chief Baron Pollock and his associates seems to be that a guest, gratuitously enjoying hospitality by express invitation at the house of his friend, must be presumed to have accepted the invitation with an understanding that he is to enjoy only such things as his host possesses, and that to such a guest the host owes no legal duty to furnish him with anything better than he has for himself. In the late case of *Indermaur v. Dames*, L. R. 1 O. P. 274, Willes, J., treats a guest as a mere licensee, and says that the protection in ordinary cases "depends upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. . . . The class to which a customer belongs includes persons who go, not as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupant, and by his invitation, express or implied." In Pollock on Torts, at page 417, the author says: "With regard to the person, one acquires this right to safety by being upon the spot, or engaging in work on or about the property whose condition is in question, in the course of any business in which the occupier is interested." In Campbell on Negligence, 2d ed. at page 64, is this statement: "'Invitation,' therefore, in the technical sense of the word as employed in this class of cases, differs from 'invitation' in the ordinary sense, implying the relation between host and guest. In the case of host

and guest it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. A guest must take the premises as he finds them, with any risk owing to their disrepair, although the host is bound to warn his guest of any concealed danger upon the premises known to himself." It seems to be the rule in England that an ordinary guest in a dwelling-house, although expressly invited, has no greater rights than a licensee. The case at bar does not require us to decide whether that rule should be applied in Massachusetts, for the plaintiff was not on the defendant's premises under an invitation, express or implied. We have already said that the same rule should be applied to one visiting a dwelling-house out of curiosity or for his own convenience as if his visit were to a shop or other place of business. We do not doubt that such relations of friendship or of social intimacy may exist between individuals as to warrant a finding of an implied invitation to come as a friend at any time, and that one in such relations visiting his friend would have the same rights as if expressly invited, whatever those rights may be. Under the doctrine as above stated the plaintiff is forced to contend that whenever a wake is held there is an implied invitation to every one of the same nationality and religion as the deceased person to attend it. Whatever ground there may be for holding that there is an invitation to relatives or near friends, there is no evidence to warrant the application of such a rule in this case; and there is no evidence, and there are no facts of common knowledge, to support it in reference to strangers. It may be true that strangers to the deceased person and to his family sometimes go to a dwelling-house, and attend his wake or his funeral. But, in the absence of clear proof to support the contrary view, it must be held that such persons are mere licensees, and that the family of a deceased person, in having a funeral or a wake in their dwelling-house, do not invite the whole world to come there. In the present case there was no evidence to warrant the submission to the jury of the question whether the plaintiff was on the defendant's premises under an implied invitation, and the ruling that the defendant's liability extended to all persons lawfully on the premises was too broad. For these reasons there must be a new trial. We see no other error in the rulings.

Receptions sustained.

MISSOURI SUPREME COURT (1st Div.).

Simpson C. YOUNGER, *Appt.*,

v.

Abram JUI'AH, *Resp't.*

(.....Mo.....)

1. The rule of a theater that colored

NOTE.—For notes on the subject of civil rights, see *People v. King* (N. Y.) 1 L. R. A. 208; *Ferguson v. Gies* (Mich.) 9 L. R. A. 589. 16 L. R. A.

people can sit in the balcony only does not violate the 14th Amendment, which declares that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States."

2. Colored persons to whom tickets for the orchestra of a theater are sold at the box office may be prevented from using them and required to give them up for

balcony tickets, or for the return of their money, where the tickets were sold without knowledge that the persons who were to use them were colored, and the rule of the theater as well as a custom and usage prevailing in the state permit colored persons in the balcony only.

3. A discrimination against colored persons by permitting them to sit only in the balcony of a theater is not unlawful, in the absence of any statute to the contrary.

(July 2, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged wrongful refusal of defendant's servants to permit plaintiff to occupy seats in defendant's theater, for which he had purchased tickets. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry R. Hall, for appellant:

A theater is a public place.

When an owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use.

Munn v. Illinois, 94 U. S. 118, 24 L. ed. 77; *Joseph v. Bidwell*, 28 La. Ann. 382; *Bowlin v. Lyon*, 67 Iowa, 536; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Donnell v. State*, 48 Miss. 661.

An owner of property to whose use the public has an interest or, in other words "quasi public" in its nature can make no discrimination against a certain class of people, on account of color.

U. S. Const. 14th Amend.; Mo. Const. art. 2, § 10, Bill of Rights; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Strauder v. West Virginia*, 100 U. S. 803, 25 L. ed. 664; *Neal v. Delaware*, 108 U. S. 870, 26 L. ed. 567; *Coger v. North West U. Packet Co.* 87 Iowa, 145; *Baylies v. Curry*, 128 Ill. 287; 8 Bl. Com. p. 168, *212; *People v. King*, 1 L. R. A. 293, 110 N. Y. 418; *Donnell v. State*, 48 Miss. 661; *Ferguson v. Gies*, 9 L. R. A. 589, 82 Mich. 358.

The sale of the ticket with coupons attached for certain seats, created an interest in the purchaser thereof in the seats so designated by the coupons, and a refusal to allow plaintiff to occupy his seats so purchased was a breach of the duty owing by defendant to plaintiff, and if such breach of duty was coupled with a tort, the defendant was liable to plaintiff for exemplary or punitive damages.

Sedgw. Damages, pp. 44, 48, and *note*; *Kennedy v. North Missouri R. Co.* 86 Mo. 864; *Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 287; *McGinnis v. Missouri Pac. R. Co.* 21 Mo. App. 399; 2 Parsons, Cont. pp. 161, 162.

The case should have gone to the jury to pass on the question of punitive or exemplary damages, also indignities imposed willfully, maliciously or wantonly committed.

Brassfield v. Hannibal & St. J. R. Co. 19 Mo. App. 651; *Perkins v. Missouri, K. & T. R. Co.* 55 Mo. 201; *Hicks v. Hannibal & St. J. R. Co.* 16 L. R. A.

68 Mo. 829; *Smith v. Pittsburgh, Ft. W. & O. R. Co.* 28 Ohio St. 10.

The doctrine of revocable license will not apply in a case of this character.

A license for the enjoyment of certain privileges for land, obtained under an executed verbal contract founded on a sufficient consideration, is irrevocable by the licensor.

Washb. Easem. 4th ed. p. 8; *Taylor v. Waters*, 7 Taunt. 874; *Thompson v. McElarney*, 82 Pa. 174; *Baylies v. Curry*, 128 Ill. 287; *Drew v. Peer*, 93 Pa. 234; *Lacy v. Arnett*, 83 Pa. 169; *Snowden v. Wilds*, 19 Ind. 10, 81 Am. Dec. 870; *Mumford v. Whitney*, 15 Wend. 380; *Fuhr v. Dean*, 26 Mo. 116; *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265; *Gibson v. St. Louis Agr. & M. Asso.* 83 Mo. App. 165; *House v. Montgomery*, 19 Mo. App. 170.

Messrs. Henry Wollman and Alexander New, for respondent:

The Supreme Court of the United States has decided that in so far as the Federal legislation known as the "Civil Rights Bill" attempted to operate directly upon theater owners, it was unconstitutional, it being within the province of the state government (and not the Federal) to pass such laws, if they saw fit.

109 U. S. 8, 27 L. ed. 836.

Therefore there being no Federal legislation on this subject that has any application at all to this case, the whole subject, by the decision of the "civil rights" cases, is relegated back to the common law, or to the statutes of each particular state.

The state of Missouri has passed no Civil Rights Act, so we must be governed in this case by the common law.

At common law a theater was regarded, as it should be, private property, and the owner thereof had a right to admit or exclude any person whom he saw fit.

Bowlin v. Lyon, 67 Iowa, 536.

Theaters being private property, the courts hold that the owner thereof can admit or exclude any person whom he sees fit, and that even after having admitted a person, his right to remain was simply in the nature of a revocable license, and if the owner so desires, such party must withdraw.

Clifford v. Brandon, 2 Campb. 358; *Wood v. Leadbitter*, 18 Mees. & W. 887; *Burton v. Scherpf*, 1 Allen, 183, 79 Am. Dec. 717; *Pearce v. Spalding*, 12 Mo. App. 141.

A parol license is revocable. If a theater ticket is not merely a revocable license, it would be necessary to bring an action of ejectment or unlawful detainer against the occupant, if he refused to give up possession after the performance.

Fuhr v. Dean, 26 Mo. 119.

Even if a theater were a "public place," still the proprietor would have a right to make regulations as to where white and colored people should sit.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547.

No class of people have a right to demand that necessarily they should receive exactly the same accommodations that another class of people have. The plaintiff in this case was offered seats in another part of the house, which by rule, was set apart for colored people and there is nothing in the testimony to show that it was an inferior part of the house. Even in the

public schools, which are supported by the public, and in the public cars, a distinction can be made between white and colored people and separate schools and separate cars may be maintained.

State v. McCann, 21 Ohio St. 198; *Bertonneau v. Directors of City Schools*, 3 Woods, 177; *Cory v. Carter*, 48 Ind. 327; *Roberts v. Boston*, 5 Cush. 198; *People v. Easton*, 3 Abb. Pr. N. S. 159; *Dallas v. Foadick*, 40 How. Pr. 249; *United States v. Buntin*, 10 Fed. Rep. 730; *People v. Gallagher*, 98 N. Y. 438, 45 Am. Rep. 232; *Westchester & P. R. Co. v. Miles*, 55 Pa. 209; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis & C. R. R. Co.* 23 Fed. Rep. 318; *Cheapeake, O. & S. R. Co. v. Wells*, 85 Tenn. 613; *Murphy v. Western & A. R. Co.* 23 Fed. Rep. 637; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405.

The proprietors of theaters in order to make their businesses succeed are bound to maintain their businesses in a way that will make them popular with the public, or, in other words, they must satisfy the public demands, in every way possible.

See *Westchester & P. R. Co. v. Miles*, 55 Pa. 209.

Black, J., delivered the opinion of the court:

The questions presented for our consideration in this case arise out of the action of the court in sustaining a demurrer to the plaintiff's evidence. The substantial averments of the petition are that the defendant was the lessee of the Ninth Street Theater in Kansas City; that plaintiff purchased two tickets calling for seats in the orchestra, and that defendant and his employes unlawfully and maliciously refused to seat him in the seats so purchased. There is the further allegation that defendant and his agents unlawfully, maliciously, and insultingly ejected plaintiff from the theater. The evidence discloses these facts. After the plaintiff had purchased the tickets as alleged, he and his companion, a colored woman, passed up a flight of stairs. An employé, stationed at the upper landing, received the tickets, detached portions of them, and handed the seat coupons back to the plaintiff. He and the woman passed to the orchestra floor, where he gave the seat coupons to an usher, and they all three started towards the seats. On their way, this usher was met by another one, and the two had a conversation. Plaintiff, in his evidence, says they held a "whispered confab for a few minutes;" that during this conversation he overheard the word "nigger;" that one of the ushers informed him he could not have the seats; that there had been some mistake. After a further conversation the usher said: "You cannot stay here. It is against the rules." The usher then proposed to exchange the tickets for others, and seat him in a different part of the house, and for that purpose started up to the balcony, but the plaintiff refused to follow. As to what then occurred, the plaintiff testified: "I went on down to the box office, and presented the tickets to the person

who sold them to me, and asked him why I could not have the seats. He seemed to be indignant, and said, 'You can have them.' He looked at me again, and I suppose he discovered that drop of African blood in me, and said: 'It is a mistake; those seats are occupied.' " The person in charge of the ticket office offered to exchange the tickets for tickets in the balcony, or refund the money paid by plaintiff, but the latter refused both offers, and left of his own volition. He and his companion went to another theater, where he procured seats set apart for colored persons. He had attended entertainments at the defendant's theater on former occasions, and, when in company with colored persons, took a seat in the balcony, but when alone was admitted to the orchestra. He says the usher on the occasion in question used sneering language, but his further examination shows clearly that the usher did no more than say in firm but respectful language that he could not have the seats because it was against the rules of the house. The charge made in the petition that defendant ejected plaintiff from the theater is not supported by any evidence, and must therefore be disregarded.

The tickets for seats in the orchestra were sold to plaintiff on the supposition that they were to be used by white persons. This is evident. It is clear, too, that defendant had a rule to the effect that colored persons attending his place of amusement should occupy seats in the balcony; and the only real question in this case is whether he had a right to make and enforce such a rule. If he had, the plaintiff had no cause of action. It is earnestly insisted on behalf of the plaintiff that such a rule amounts to discrimination against colored persons, and that such discrimination is prohibited by the 14th Amendment of the Constitution of the United States. The clauses of that Amendment relied upon by the plaintiff are those whereby it is declared that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." These clauses do not undertake to confer new rights, nor do they undertake to regulate individual rights. They are simply prohibitory of state legislation, and of state action. All this was held and ruled in the *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 836. As there stated, "individual invasion of individual rights is not the subject-matter of the Amendment." This state has enacted no law having any application to the present case. It does not undertake to say how theaters and other places of amusement shall be managed. As the state does not by itself or through the city of Kansas undertake to regulate theaters, and as the clauses of the Fourteenth Amendment before noted are prohibitory of state action only, they have nothing to do with the question in hand. There is nothing upon which the prohibitions can operate. Many of the states have enacted laws known as "civil rights statutes," and we are cited to cases upholding and giving effect to such laws. Under

them it has been held that the proprietor of a theater will be liable in damages for a refusal to admit a colored person, (*Joseph v. Bidwell*, 28 La. Ann. 382; *Donnell v. State*, 48 Miss. 661;) and for a refusal to admit a colored person to the several circles or grades of seats in a theater, (*Bayliss v. Curry*, 128 Ill. 287,) and for refusing a colored person admission to a skating rink, (*People v. King*, 110 N. Y. 418, 1 L. R. A. 293,) and for drawing any line of distinction between a white and black man at a restaurant, (*Perguson v. Gies*, 89 Mich. 358, 9 L. R. A. 589.) But, as we have no such statute, these cases furnish no aid in the solution of the question now in hand. We have held that our statute which establishes separate schools for colored children does not violate the Fourteenth Amendment, and this for the reason that separation of children for such purposes is but a reasonable regulation of the exercise of a right conferred upon all children, whether white or black. (*Lehew v. Brummell*, 103 Mo. 546, 11 L. R. A. 838. And so it has been held in several states, as will be seen by the authorities cited in that case, and in the brief of defendant in this one. We believe it is conceded on all hands that a common carrier of passengers may make and enforce reasonable rules for seating passengers; and it has been held that such a carrier, in the absence of any statute to the contrary, may separate white or black passengers in a public conveyance, as a railroad car. *West Chester & P. R. Co. v. Miles*, 55 Pa. 209. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, the defendant was the master and owner of a steamboat enrolled and licensed under the laws of the United States. The plaintiff, a colored woman, being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought suit for damages. She based her cause of action upon a statute of Louisiana, which provided that the rules prescribed by common carriers should make no discrimination on account of color. The state court construed the law as applying to those engaged in interstate commerce; but the supreme court of the United States held the Act unconstitutional so far as it applied to foreign and interstate commerce. Says the court: "Congressional inaction left Benson [the defendant] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana, or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as

he is within Louisiana. . . . We think the statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the state." While the statute was held void as to cases like the one then in hand, because it interfered with interstate commerce, still the opinion, as we view it, proceeds upon the theory that, in the absence of valid legislation, the defendant had the right to set apart a portion of the steamboat for the special and exclusive use of white passengers. If common carriers may make and enforce such rules, there can be no good reason assigned why proprietors of theaters may not do the same thing. This being so, it is not necessary to a proper disposition of this case to say how far or to what extent theaters are to be regarded as public places; nor is it necessary to say to what extent they may be made public places by statute or local municipal laws. In any event, the proprietors of theaters may make and enforce such rules as the one now in question. Colored persons have their own schools, their own churches and often their own places of amusement. Whites attending places of amusement designed specially for colored persons may be required to occupy separate seats. When colored persons attend theaters and other places of amusement conducted and carried on by white persons, custom assigns to them separate seats. Such separation does not necessarily assert or imply inferiority on the part of one or the other. It does no more than work out natural laws and race peculiarities. It ordinarily contributes to the convenience and comfort of both. The colored man has, and is entitled to have, all the rights of a citizen, but it cannot be said that equality of rights means identity in all respects. Here the defendant did not exclude, or attempt to exclude, colored persons from his theater. He provided accommodations for them, but in doing so required them to purchase tickets for and take seats in the balcony, and this rule adopted by him accords with the custom and usage prevailing in this state. Such custom has the force and effect of law until some competent legislative power shall establish some other and different rule. The defendant's rule was no more than a reasonable regulation which he had a right to make and enforce.

The judgment is therefore affirmed.
All concur.

NEW YORK COURT OF APPEALS (2d Div.).

Charles H. SOUTHARD, *Appt.*,

v.

John J. CURLEY *et al.*, *Respts.*

(.....N. Y.)

Proof beyond a reasonable doubt is not

necessary in an action to reform a written contract because of a mistake.

(*Follett*, Ch. J., *dissents*.)

(June 7, 1892.)

NORM.—The question involved in the above case is so thoroughly examined in the opinion and the 16 L. R. A.

authorities so fully reviewed that a note could add little value to the case.

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Queen's County Circuit in favor of defendants in an action brought to recover damages for the alleged breach of a contract to purchase certain hotel property. *Affirmed.*

The facts are stated in the opinion.

Mr. Horace Secor, Jr., for appellant:

A party who seeks to establish a mutual mistake in a written contract must prove it beyond a reasonable doubt.

Mead v. Westchester F. Ins. Co. 64 N. Y. 458; 1 Story, Eq. Jur. 11th ed. § 157, and notes; *Deeruz v. Sun Fire Office of London*, 51 Hun, 147; *Tucker v. Madden*, 44 Me. 206; *Linn v. Barkey*, 7 Ind. 69; *Emmons v. Stahlnecker*, 11 Pa. 886; *Newton v. Holley*, 6 Wis. 592. See also *Ford v. Joyce*, 78 N. Y. 618; *Gillespie v. Moon*, 2 Johns. Ch. 585, 1 L. ed. 500; *Lyman v. United Ins. Co.* 17 Johns. 376; 1 Story, Eq. Jur. 18th ed. §§ 156, 157; *Nevius v. Dunlap*, 83 N. Y. 680; *Kerr, Fraud & Mistake*, 2d ed. 491.

Mr. Charles N. Morgan, for respondent Curley:

There is no rule of law applicable to the trial of issues of fact in civil actions which requires a party to prove his case beyond a reasonable doubt.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 570; *Probst v. Delamater*, 1 Cent. Rep. 507, 100 N. Y. 266.

Even where the effect of a verdict is to declare a person guilty of a crime, the rule is declared inapplicable in civil actions.

People v. Briggs, 114 N. Y. 66.

Mr. August Kohn, for respondent Jeremiah M. Brosnan:

While all the cases reported require clear and positive and satisfactory proof, none require the jury to be satisfied beyond a reasonable doubt of the existence of a mistake.

Marrin v. Bennett, 26 Wend. 169; *Lyman v. United Ins. Co.* 2 Johns. Ch. 680, 1 L. ed. 519; *Getman v. Beardsley*, 2 Johns. Ch. 274, 1 L. ed. 376; *Gillespie v. Moon*, 2 Johns. Ch. 585, 1 L. ed. 500; *Phanix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 2 L. ed. 646; *Boardman v. Davidson*, 7 Abb. Pr. N. S. 489; *Nevius v. Dunlap*, 83 N. Y. 676; *Hill v. Hill*, 10 N. Y. Week. Dig. 239.

Parker, J., delivered the opinion of the court:

This action was instituted for the purpose of recovering the damages which the plaintiff claims to have sustained by reason of a breach by the defendants of the following agreement:

"September 10, 1889. I, C. H. Southard, of Baldwins, Queen's County, N. Y., agreed to sell to John J. Curley and J. M. Brosnan, of Rockaway Beach, L. I., said county and state, all [here follows a description of the property in question,] for the sum of thirty-one thousand dollars, to be paid at 30 or 60 days from date of this agreement; and I hereby acknowledge the receipt of check of one hundred dollars from John J. Curley and J. M. Brosnan, both of Rockaway Beach, N. Y. C. H. Southard. Signed and delivered in presence of J. M. Brosnan and John Curley."

16 L. R. A.

The property described in the agreement was a portion of the Mammoth Hotel at Rockaway Beach. The answer averred the purchase of the building by the plaintiff of the owners of the land on which the building was located, the securing of an option by the defendants to purchase the premises from the owners within a given period; their desire to secure an option for the purchase of so much of the hotel building as remained standing; and that the agreement which they in fact made with the plaintiff was to pay him \$100 for an option to purchase the building within 80 or 60 days for the sum of \$31,000, but the defendant Brosnan, in the haste of drafting the memorandum of agreement, omitted to insert that the sale was optional with the defendants. The answer demanded, among other relief, that the writing be so reformed as to express the true meaning of the parties.

No exceptions were taken to the admission of testimony, but an exception was taken to the refusal of the court to direct a verdict in favor of the plaintiff, at the close of the case, and the appellant urges that an error is thus presented. We do not so regard it. The issue presented by the pleadings permitted the introduction of testimony tending to show that the writing relied on by the plaintiff did not state the agreement which the parties made. On the trial evidence tending to establish the allegations of the answer in such respect was without objection introduced; and, without stopping to recite it, it is sufficient to say that it would support a decree so reforming the writing as to provide that the \$100 was paid for the right to purchase the property described within the period provided, and for the sum named. The denial of plaintiff's motion to direct a verdict, therefore, was not error.

No exception was taken to the charge of the court, but the plaintiff requested the court to charge "that the burden of proof is on the defendants to satisfy the jury, beyond a reasonable doubt, that there was a mutual mistake in this case," and the exception taken to the refusal of the court to charge as requested is now assigned for error. It is a rule of the criminal law that the guilt of the accused must be fully proved; that neither a preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt; a degree of conviction, it is said which ought only to be produced when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis. But a distinction has always been recognized and maintained between criminal and civil cases in respect to the degree or quantity of evidence necessary to support a judgment; in the latter class of actions the law being satisfied with a finding in accordance with the preponderance of, or weight of preponderating, evidence. The difference in the form of oath administered to jurors in civil cases and criminal actions is in accordance with this funda-

mental distinction. But it is urged that in an action brought to reform a written contract on the ground that, owing to a mistake, it fails to express the agreement which the parties to it actually made, the courts have at last adopted the rule of criminal actions, that the evidence must be such as to establish the mistake beyond a reasonable doubt. That such was not always the rule is conceded, but it is claimed that the later adjudications have settled the rule in accordance with the appellant's contention. In 1 Story, Eq. Jur. § 157, the doctrine is stated as follows: "Relief will be granted in cases of written instruments only when there is a plain mistake, clearly made out by satisfactory proofs. It is true that this, in one sense, leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice; for in many cases judges will differ as to the result and weight of evidence, and consequently they may make different decisions upon the same evidence. But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions." The rule declared by Story was in accordance with the adjudications at the time of his writing, and in accordance, doubtless, with the general understanding of the profession at the present time. Judge Redfield, in his revision, has added to section 157, Story, Eq. Jur. 11th ed., the following: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt. The distinction here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases." Mr. Pomeroy, in his work on Equity Jurisdiction, (vol. 2, § 859) reaches the same conclusion. He says: "The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing,—in the language of some judges, the strongest possible,—or else the mistake must be admitted by the opposite party. The resulting proof must be established beyond a reasonable doubt." We have examined all of the authorities cited by Judge Redfield and Mr. Pomeroy in support of the rule which they have attempted to deduce from them, as well as those cited by the appellant. It would hardly be proper in this connection to attempt a review of them all, but we have selected from different jurisdictions a number of cases which are fairly representative, as to the expressions made use of by the courts, touching the degree or quantity of proof essential to support a decree reforming a written instrument on the ground of mistake. It should be observed in passing, however, that in none of the cases was the court called upon to determine whether the trial court observed the proper rule in passing on the evidence, or whether, as here, it had correctly or not instructed the jury in that re-

gard. What rule should guide the trial court was not, therefore, necessarily discussed by counsel; and we have failed to find any evidence of a discussion by any of them of the question whether the rule in criminal actions, touching the degree and quantity of proof necessary to support a judgment of conviction, is applicable to cases of this character. It should also be remarked that the expressions in the several opinions relied on as establishing the rule contended for were generally, if not universally, made in connection with such a discussion of the evidence as induced an affirmation or reversal of the judgments under review.

Lord Hardwicke, in *Henkle v. Royal Exchange Co.*, 1 Ves. Sr. 317, said: "There ought to be the strongest proof possible." In *United States v. Munroe*, 5 Mason, 572, the court said: "The evidence must be clear, unequivocal, and decisive,—not evidence which hangs equal, or nearly *equilibratio*." In *Andrews v. Essex F. & M. Ins. Co.*, 8 Mason, 6, by Story, J.: "But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases, to withhold its aid where the mistake is not made out by the clearest evidence, according to the understanding of both parties, and upon testimony entirely exact and satisfactory." In *Gillespie v. Moon*, 2 Johns. Ch. 585, 1 L. ed. 500, Chancellor Kent remarks: "Does it satisfy the mind of the court?" Fry, Spec. Perf. 2d Am. ed.: "The proof must be clear, irrefragable, and the strongest possible." *Bold v. Hutchinson*, 5 De G. M. & G. 558: "If it is perfectly palpable that there has been a mistake, the court will correct it. The question before me is whether I am satisfied that a settlement has been made in error." *Coale v. Merryman*, 35 Md. 382: "The evidence must be such as to satisfy the mind of the court." *Lyman v. Little*, 15 Vt. 576: "Equity will not correct a mistake in a written instrument except on clear and undoubted testimony." *Miner v. Hess*, 47 Ill. 170: "It must leave little, if any, doubt." *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45: "The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt." In laying down this rule the court did not refer to other adjudications. *Sawyer v. Hovey*, 3 Allen, 381, 81 Am. Dec. 659: "The mistake must be made out according to the understanding of both parties, by proof that is entirely exact and satisfactory." *White v. Williams*, 48 Barb. 222: "The relief will not be granted except when the mistake is very plain, and operates contrary to the intention of the parties." *Trusts v. Larned*, 27 Iowa, 380: "The evidence of mistake must be such as will strike all minds alike as being unquestionable and free from reasonable doubt." *Nevius v. Dunlap*, 83 N. Y. 676: "To entitle a party to the decree of a court of equity, reforming a writ-

ten instrument, he must show first a plain mistake, clearly made out by satisfactory proofs." *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453: "The proof upon this point should be so clear and convincing as to leave no room for doubt." *Ford v. Joyce*, 78 N. Y. 618: "The mistake should be proved as much to the satisfaction of the court as if admitted." *Newton v. Holley*, 6 Wis. 564-578: "The mistake must be made out in a most clear and decisive manner, and to the entire satisfaction of the court." *Linn v. Barkey*, 7 Ind. 69: The mistake "must be established beyond a reasonable controversy." *Hill v. Hill*, 10 N. Y. Week. Dig. 239: "The proof of the mistake should be clear and positive. It should not leave a reasonable doubt." *Boardman v. Davidson*, 7 Abb. Pr. N. S. 439: The mistake "must be shown by clear and entirely satisfactory proof; and the relief will not be granted when the evidence is loose, equivocal, or contradictory, or is in its texture open to doubt or to opposing presumption." In *Devereux v. Sun Fire Office of London*, 51 Hun, 147: The evidence of mistake "should be clear and convincing, and such as to leave no reasonable doubt as to the existence of the mistake alleged." *Little v. Webster*, 16 N. Y. S. R. 107: "The evidence should be strong and conclusive, and in some cases it has been held, should be beyond all reasonable doubt. But perhaps this expression is too strong. There must be at least very conclusive evidence that by mistake the contract does not represent the intention of the parties." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417-435, 85 L. ed. 1062-1070: "But to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."

The quotations made indicate a universal agreement that a contract shall not be reformed on loose, contradictory, and unsatisfactory evidence; a settled determination that, when a mistake is alleged, it must be clearly established by satisfactory proofs, or the contract will stand as made. But, in giving expression to the necessity of observ-

ing such caution, some judges have employed conservative language; others, extreme,—a difference doubtless due to the fact that the question before the court for discussion in the different cases was not, what is the abstract rule as to the degree or quality of the evidence required? but rather whether the particular evidence under consideration justifies a reformation. While in a few instances apparently unconsidered expressions may be found to the effect that the mistake must be established beyond a reasonable doubt, so may a variety of other expressions, differing in form, but equally well supported, be found, such as: "It must be proved as much to the satisfaction of the court as if admitted;" "the proof must be clear, irrefragable, and the strongest possible;" or "there must be a plain mistake established by satisfactory proofs." A situation which suggests that we heed the caution of Folger, J., in *Taylor v. New York*, 82 N. Y. 17: "It is not always well to take particular phrases and sentences from an opinion, and read them as giving the core of the judgment." The same thought was expressed in *Hastings Bank v. Hibbard*, 48 Mich. 457: "It must always be remembered that general language in legal discussions is to be construed with its surroundings, and cannot be dealt with in the abstract."

Bearing in mind these admonitions as we examine the opinions alluded to, we reach the conclusion that they do not require us to declare that this strong rule of criminal procedure has become a part of the practice in civil actions. Certainly, this need not be done, in view of the many authorities which, both before and since *Judge Story* penned the rule that "relief will be granted in cases of written instruments only when there is a plain mistake, clearly made out by satisfactory proofs," have asserted the same doctrines in terms or in substance.

We think the refusal to charge as requested was not error.

The judgment should be affirmed.

All concur, except Follett, Ch. J., dissenting.

ALABAMA SUPREME COURT.

GAY, HARDIE & CO., *Appts.*,

v.

BRIERFIELD COAL & IRON CO. *et al.*

(.....Ala.....)

1. A suit in the circuit court of the United States to foreclose a mortgage and an unexecuted decree of foreclosure and sale, in which case the issue of certificates had been authorized, does not prevent a state court from taking jurisdiction of a suit by creditors of the mortgagor who are not parties to the suit in the

Federal court but who alleged in their bill that the mortgage and bonds secured thereby are fraudulent and void as well as the issue of certificates and the decree of foreclosure although it may be that the relief sought cannot all be granted.

2. A stipulation for the removal of a cause to another county waives an objection that it was not brought in the proper county.

(November 26, 1891.)

APPEAL by complainants from a decree of the Chancery Court for Jefferson County

NOTE.—The leading authorities on the question when and how far one court may entertain a suit which affects to some extent matters which are in process of litigation before a court of concurrent jurisdiction are so fully collated in the above case 16 L. R. A.

that no further attempt to collate authorities will be here made, but the subject will be found to have been treated in *notes* to *Sharon v. Terry* (Cal.) 11 L. R. A. 572; *Carson v. Dunham* (Mass.) 3 L. R. A. 306; *Tefft v. Sternberg* (Ga.) 5 L. R. A. 231.

sustaining a demurrer to a bill filed to collect a claim held by complainants out of assets of the defendant corporation. *Reversed.*

The facts are stated in the opinions.

Mr. Alexander T. London, for appellants:

A third person who may be affected by a judgment or decree may impeach it in equity for fraud.

Bigelow, Fr. 90; *Michaels v. Post*, 88 U. S. 21 Wall. 426, 22 L. ed. 521; *Rand v. Walker*, 117 U. S. 845, 29 L. ed. 907; *Eslava v. Eslava*, 50 Ala. 82; *Stallworth v. Blum*, Id. 46; *Lee v. Lee*, 55 Ala. 590; *Dunklin v. Harney*, 56 Ala. 177; *Dunklin v. Wilson*, 64 Ala. 162; *Humphreys v. Burleson*, 72 Ala. 1.

One court, whether state or Federal, will not take jurisdiction, so as to deprive another court, which had previously acquired jurisdiction over property, of its control or possession of the property.

Winwall v. Sampson, 55 U. S. 14 How. 52, 67, 68, 14 L. ed. 323, 328, 329; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 302, 28 L. ed. 729; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 612; *Taylor v. Curryl*, 61 U. S. 20 How. 588, 15 L. ed. 1028; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Cornell v. Heyman*, 111 U. S. 176, 28 L. ed. 890.

A person not a party to the suit or proceedings in a Federal court, and whose claim is not one which could have been properly set up there, notwithstanding the fact that the property may be in the possession of a receiver appointed by another jurisdiction, can maintain a bill to impeach the whole proceedings under which the receiver was appointed, provided he does not seek to disturb the possession of the receiver. So long as the assertion of the rights claimed by the third person does not affect or disturb the possession of the receiver or the court first acquiring jurisdiction, it can be maintained.

Buck v. Colbath, 70 U. S. 8 Wall. 334, 342, 18 L. ed. 257, 260; *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Tua v. Carriere*, 117 U. S. 208, 29 L. ed. 855; *Holladay Case*, 27 Fed. Rep. 880, 848; *Beach, Receivers*, § 20; *Cornell v. Heyman*, 111 U. S. 176, 28 L. ed. 890.

The suit in the Federal court was a bill to foreclose a mortgage as alleged in the bill here, and an adverse claimant cannot be made a defendant to such a bill.

Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; *Peters v. Bowman*, 98 U. S. 56, 59, 25 L. ed. 91, 92; 1 Dan. Ch. Pr. 277, note 2, 839, note 2; *Wiltse, Foreclosure*, § 192; *Hambriek v. Russell*, 86 Ala. 199.

The case at bar does not differ in principle from *Drury v. Cross*, 74 U. S. 7 Wall. 299, 19 L. ed. 40.

Messrs. Pettus & Pettus for appellees.

Coleman, J., delivered the opinion of the court:

Complainants, as simple contract creditors of the Brierfield Coal & Iron Company, file their bill on behalf of themselves, and all other creditors who may come in as such and contribute to the prosecution of the suit. The case made by the bill, so far as is necessary to be stated, omitting names, is this: That on May 4, 1882, the Brierfield Coal &

Iron Company was organized, as a corporate body, with an authorized capital stock of \$750,000 divided into 7,500 shares of \$100 each, of which amount \$375,000 was subscribed. That after organization, and before any business was done, the president, in pursuance of a resolution adopted by the stockholders, opened other books of subscription, for the purpose of raising money to purchase the necessary property and machinery and outfit to open and operate coal and iron mines, and manufacture coke and iron, etc. The last subscription was made under the following agreement: "Now, therefore, the undersigned agree to pay to said company the amounts respectively set opposite our names, in such sums and at such times as the directors of said company may require, and to receive from said company for each nine hundred dollars paid in the sum of one thousand dollars in a six per cent mortgage bond of said company, and nine hundred dollars in the capital stock of said company; not more than . . . per centum of each subscription to be called for during one month." Four hundred and twenty thousand dollars of this last subscription was taken. No report of the last subscription was made, or in any manner made public. That on 1st of September, 1882, the stockholders, who were the subscribers, authorized the issue of \$500,000 of first mortgage bonds, to run 80 years, and to bear 6 per cent interest, payable semi-annually, and to secure their payment authorized the execution of a trust mortgage on all its property and effects. That the bonds were issued, \$1,000 in bonds for each \$900 paid in as aforesaid; and also, in addition to the bonds issued, to each subscriber, for \$900 paid, \$900 of stock was issued, which purported on its face to be fully paid for. That the mortgage was executed and duly recorded, and is made Exhibit A to the bill. That nothing was paid for the stock and bonds, except certain amounts paid on account of the subscription; and that the bonds were issued to and are now held by parties having full notice and knowledge of the agreement on which the same were issued, and the larger part are held by the original subscribers. That during the years 1886 and 1887 the Brierfield Coal & Iron Company became indebted to orators for a large amount. That in July, 1887, the said company became financially embarrassed, and the trustee named in the deed of trust, in pursuance of a provision in the deed of trust, demanded and received "a further assurance" to secure the bonds which had been issued, and within a few days thereafter demanded and took possession of all the property of said company; and on the 3d day of August, 1887, the said trustee filed his bill in the circuit court of the United States for the middle district of the state of Alabama, and asked authority from the said circuit court to issue certificates, which should be a first lien upon the property of said corporation. That when the bill was filed by the trustee there was due and unpaid of the subscription for the stock a large amount, to wit, \$500,000, and with the knowledge of these facts the trustee, with the knowledge and

consent of the directors and of said corporation, procured an order of the court for that purpose, and issued \$65,000 in certificates, which were to be a first lien or charge upon the property. That on 28th July, 1887, the corporation was insolvent, and after the trustee took possession of the property it ceased to carry on the business for which it was organized. That the bonds were issued without consideration, and, under the laws of Alabama, were void. That under the bill filed in the said circuit court of the United States, with the consent of the corporation, the court has decreed a foreclosure of the mortgage, and further assurance and a sale of the property. That the debts of the corporation not included in the mortgage amount to \$150,000, and that the issue of the bonds was a fraud on the creditors, and the "deed of further assurance" was fraudulent, and made with intent to hinder, delay, and defraud the creditors; and that the bill was filed and prosecuted in the Federal court, and the certificates were issued for the purpose of hindering, delaying, and defrauding the creditors of said corporation. Other facts to show fraud are averred.

The bill states that complainants and the other creditors had no notice or knowledge or information of the terms upon which the bonds were issued, or the consideration of the same; or of the mortgage or further assurance until after the bill was filed in the circuit court of the United States. The bill prays that the bonds be declared fraudulent and void, and that the mortgage and further assurance be decreed fraudulent and void, and the issue of certificates be declared fraudulent, and that the decree of foreclosure and sale be declared fraudulent and void against complainants, and for an account. Only the trustee and the corporation are made parties defendant in the present bill. To the bill as a whole the respondents severally demurred and each assigned several grounds of demurrer, but all raise, and were intended to raise, in different ways, the question of the jurisdiction of the chancery court; the plaintiffs' bills showing that the circuit court of the United States, under a bill filed by the trustee, had decreed a foreclosure and sale of the property, which was then unexecuted, and had authorized the issue of the certificates. No other question is raised by the demurrers, and none other will be considered.

The principle is universally acknowledged that, when two courts have concurrent jurisdiction, that which first takes cognizance of the cause has the right to retain it to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or where property is *in gremio legis*, if a court of rightful jurisdiction, no other court can interfere, and wrest from it the possession and jurisdiction first obtained. As was said in *Peck v. Jenness*, 48 U. S. 7 How. 624, 625, 12 L. ed. 846: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; 16 L. R. A.

and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, has once attached, that right cannot be arrested or taken away by proceedings in any other court. These rules have their foundation not merely in comity, but in necessity; for if one court may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

The rule here declared has been adopted and followed invariably by all subsequent decisions. Many of them, however, have given it a very broad and extensive significance, while others have limited its meaning, and consequently the application of the principle has not, in all respects, been uniform. In the case of *Vaughan v. Northrup*, 40 U. S. 15 Pet. 1, 10 L. ed. 639, it was held that an administrator appointed in one state must account for the assets received by him, according to the law of his appointment, and could not be sued in the court of another state for the assets he received, and held by him in his official capacity. *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007, was a case where an estate had been declared insolvent, and the assets were being administered in the state courts for the benefit of all the creditors. It was held that the property was *in gremio legis*, and not subject to levy by the United States marshal at the suit of a creditor suing in the Federal court. In the case of *Peale v. Phipps*, 55 U. S. 14 How. 873, 14 L. ed. 460, commissioners had been appointed to settle up and distribute the assets of an insolvent bank, and it was held that no other court had jurisdiction to interfere at the suit of creditors, and apply the assets to the payment of their claims; that it was the duty of all creditors to apply to the state court, which had taken jurisdiction of the settlement and distribution of the assets. The principles declared in this decision are reaffirmed in *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. In the case of *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028, a writ of attachment issued by a state court had been levied upon a vessel, and the vessel replevied. Suit was afterwards begun in a court of admiralty to enforce seamen's wages, and the writ placed in the hands of a marshal. It was held that the state court, having possession first, the possession would not be interfered with by the admiralty court,—citing *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470. In this case there was a dissenting opinion by Taney, *Ch. J.*, who recognized the general principle, but held that because of equities of the claimants, (the lien of seamen's wages,) of which alone the admiralty court had jurisdiction, the jurisdiction of the admiralty court did not violate the rule.

The rule declared by Taney, *Ch. J.*, seems to be the law in this state, in which it has been declared that although the probate and

chancery courts may have concurrent jurisdiction, yet if there are peculiar equities of which the probate court cannot take jurisdiction, then the chancery court may proceed, without a violation of the rule. *Gould v. Hayes*, 19 Ala. 448; *Wilkinson v. Stuart*, 74 Ala. 198. The case of *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749, after reaffirming the principle in 7 How. *supra*, declared that property in the hands of the United States marshal, seized by him upon a writ from the circuit court of the United States, could not be replevied or interfered with by a writ from a state court; and further held that the principle did not depend upon the rights of the parties involved, and that it applied to persons who were not parties to the original or first suit. In *Biggs v. Johnson County*, 78 U. S. 6 Wall. 166, 18 L. ed. 768, it was declared that the rendition of a judgment did not exhaust the jurisdiction, but that it continued until the judgment was satisfied. Process subsequent to the judgment was as necessary as process antecedent. That process of the state courts could not interfere with the jurisdiction of the Federal courts; neither the Federal courts with the state court; that, where there was concurrent jurisdiction, the one which first had jurisdiction of the matter continued to exercise it without interference. In the case of *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, Woods, J., declared that the rule was not limited to cases where the purpose was to interfere with the possession of the receiver, but extends to suits in assumpsit, or other cases where the effect of the suit or judgment against the receiver would be to diminish the assets in his hands. Miller, J., in a dissenting opinion, uses the following language: "I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within its jurisdiction, is bound, or even is at liberty, to deny the plaintiff his lawful right to a trial because the defendant is a receiver, appointed by some other court, and to leave the suitor to that for remedy," and, quoting approvingly from *Kinney v. Crocker*, 18 Wis. 75, continues: "There can be no room to question this conclusion [the right to sue a receiver without leave of the court] in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds, under the order of a court of chancery, but only an attempt made to obtain a judgment at law in a claim for damages." In *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 66, 14 L. ed. 322, 323, it was held that property in the hands of a receiver for one court could not be sold so as to pass title to the purchaser under execution issued from another court. If such a sale was pronounced valid, it would have the effect to wrest from another court its rightful possession of the property. In *Buck v. Colbath*, 70 U. S. 8 Wall. 384, 18 L. ed. 257, —opinion by Miller, J.,—it was held that whenever property has been seized by an officer of a court, the property is in possession

of the court, and no other court can take possession of it. This general principle has its limitations. It is only while the property is in the possession of the court, actually or constructively. When the litigation is ended, or the possession discharged, other courts can then deal with it. No contest can then arise about the possession. Officers of the court seizing property described in the mandate, such as writs of replevin at common law, orders of sequestration in chancery, or process *in rem*, will be protected; but when the writ issued is to be levied generally, without particular instructions or description of the property to be taken in possession or levied upon, and the officer exercises a discretion in the execution of the writ, he may be sued in trespass for an abuse of the discretion, or a wrongful use of the writ, but no suit can be maintained to take from him the possession of the property.

The chancery court of Louisville, Ky., by a decree directed its marshal to deliver the church (the matter of controversy) to Watson and others. While this suit was pending, and the church was in the possession of the marshal of the chancery court, Jones and others filed a bill in the United States court to get possession of the church, and to enjoin the marshal from delivering the church to Watson, and to enjoin Watson from taking possession of the church. In *Watson v. Jones*, 80 U. S. 18 Wall. 718, 20 L. ed. 670, Miller, J., said: "The decisions of this court in the cases of *Taylor v. Carryl*, *Freeman v. Howe*, and *Buck v. Colbath* are conclusive that the marshal of the chancery court cannot be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the courts for the possession; and the cases of *Diggs v. Wolcott*, 8 U. S. 4 Cranch, 179, 2 L. ed. 587, and *Peck v. Jenness* are conclusive against any injunction from the Federal court forbidding Watson *et al.* from taking possession of the church which the decree of the chancery court required the marshal to deliver to them." But the court held, under the prayer for general relief, the court was authorized to grant any relief to the plaintiff, authorized by pleadings and proof, "which did not enjoin the defendants, Watson and others, from taking possession of the church, or which did not disturb the possession of the marshal of the Louisville chancery court." We do not cite this case as indorsing altogether the conclusion reached by the court in the relief granted, but as an authority recognizing and declaring the limitations placed upon the general rule laid down in 7 How. *supra*, and which has been followed in so many decisions.

The case of *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, arose in this way: Hyde & Bro. brought suit in the United States circuit court against Frey *et al.*, and sued out an attachment, which was levied upon a large stock of goods in the possession of Krippendorf, who claimed them as his own. Krippendorf executed a forthcoming bond to the marshal. After judgment

against Frey,—the goods having been disposed of,—Krippendorf paid their value to the marshal. He then filed his bill on the equity side of the same court in which the attachment suit was brought, made the marshal and the attaching creditors defendants, set up his claim to the money in the hands of the marshal, and prayed that the marshal be enjoined from paying it over to the creditors. The court held that Krippendorf might have maintained trespass against the marshal, but that he could not replevy the property in a state court, as it must be regarded as in the custody of the United States circuit court. It was held that the bill was maintainable, not as an original bill in equity, but as ancillary to the principal action at law, in which the attachment issued, and should be regarded as merely a petition in that cause, and on account of the peculiar relations of the court of the states and the United States it was permissible as a necessary result to prevent a failure of justice, and to furnish in such cases a certain, adequate, and complete remedy against injurious abuses of the processes of the court, by supplying a means in the principal suit of trying the title to property in the custody of the law. The case of *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, reaffirms the doctrine declared in *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, and holds that it is error for a state court to permit the recovery of the possession of property by the rightful owner against a marshal of the United States, held by him by the levy of an attachment or execution issued from a Federal court; that the property is in the custody of the law, and its possession cannot be disturbed by the process of any state court. This case further holds that the owner could maintain suit in trespass against the marshal, or by petition in the court from which the writ issued to the marshal the owner could be fully protected, either in her rights of ownership to the property or the money in the hands of the marshal; citing a number of authorities, which have been referred to and quoted from in this opinion.

In the case of *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 28 L. ed. 729, Heidritter brought suit in assumpsit in the state of New Jersey, and in the same suit averred facts to fix and establish a mechanics' lien upon a building of the defendant. At the time the suit was commenced to fix and enforce the mechanics' lien, the premises in controversy were in the actual possession of the United States marshal, having been seized by the collector of internal revenue, and were being held pending the prosecution of a suit to have the premises condemned and declared forfeited for having been unlawfully used as a distillery. The building was sold under the judgment of the state court, and plaintiff Heidritter became the purchaser. The defendant held under the marshal's deed,—the premises having been sold by him on execution from the Federal court. The court held that the proceedings in the state court to enforce the mechanics' lien took place when the property was in

the exclusive custody and control of the district court. The substantial violation of the jurisdiction of the district court consisted in the control over the property in its possession, assumed and asserted in commencing the proceedings to enforce against it the lien claimed by the plaintiff, prosecuting the claims to judgment, and consummating them by a sale,—citing *Wierall v. Sampson*, *supra*, and others. The opinion proceeds, however, as follows: "But it is to be understood, as a qualification of what has been said, that we do not mean to decide that the plaintiffs in the action in the state court might not, without prejudice to the jurisdiction of the district court, commence their actions, so far as that was a step required by the Mechanics' Lien Law of New Jersey, for the mere purpose of fixing and preserving their rights to a lien, provided always, they did not prosecute their actions to a sale and disposition of the property, which by relation would have the effect of avoiding the jurisdiction of the district court under its seizure. . . . The distinction seems reasonable and just, and is supported by decisions,"—citing *Clifton v. Foster*, 103 Mass. 233, 4 Am. Rep. 589; *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007; *Fonley v. Lavender*, 88 U. S. 21 Wall. 276, 22 L. ed. 586.

In the case of *Walling v. Miller*, 108 N. Y. 178, 10 Cent. Rep. 494, it was held that the possession of the receiver must not be disturbed, except by permission of the court, by persons having adverse, though paramount, claims; and a sale under execution of property in the custody of a receiver, though under a levy made prior to his appointment, is void, unless authorized by the court. That before the sale was made leave to make the sale should be granted by the court which appointed the receiver. That the appointment did not destroy the lien and application might also be made to the court for payment of the execution out of the proceeds of the sale made by the receiver.

In the case of *Drury v. Cross*, 74 U. S. 7 Wall. 298, 19 L. ed. 40, the directors fraudulently procured a mortgage to be foreclosed for a much larger sum than was due, by which, by a fraudulent combination with the purchaser, they were to be benefited. Upon a bill by creditors it was decreed that the purchaser should be held liable as a trustee for the creditors.

In the case of *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428, the general principle of law under consideration was conceded. The real question before the court for decision, and which was decided, was whether the state court or the Federal court first had jurisdiction, and it was held that by the filing of the petition and the proceeding in the state court for the foreclosure of the mortgage that court was the first to assume and exercise jurisdiction; and the court further held that the decree ascertaining and fixing the amount of the indebtedness of the mortgagor to the mortgagee was conclusive and binding upon other creditors of the mortgagor, so far as it fixed a liability of the mortgagor, and its amount, to the mortgagee. The principles

of law raised by the demurrers of the respondents in the case under consideration were not involved in the case of *Stout v. Lye*, *supra*.

The *Holladay Case*, in 27 Fed. Rep. 880, was a bill in equity in the Federal court by Hickox against Holladay to set aside a fraudulent conveyance made by Ben Holladay to his brother, Joseph Holladay. After disposing of other questions which arose in the case, the opinion proceeds as follows: "The answer of Holladay also contains an allegation in bar of this suit, to the effect that on November 7, 1883, and prior to the commencement thereof, the circuit court of the state for the county of Multnomah, in a suit then pending therein between Ben Holladay and Joseph Holladay, appointed a receiver of all the property mentioned in the bill herein, who is now in possession of the same as such receiver, which suit is still pending in said court. In support of this defense, counsel submit the proposition that, while property is in the hands of a receiver appointed by a court, no other court can acquire or take jurisdiction of a suit concerning such property, and cite a number of authorities in support thereof. But the proposition is altogether too broad, and is unsupported by the authorities cited. The receiver has no right in the property, but only the possession thereof. So long as that is not disturbed or questioned, parties may litigate in the same court, or elsewhere, questions concerning the ultimate right and title to the property. And therefore, notwithstanding the suit of *Holladay v. Holladay*, and the possession of the receiver therein, this court may take jurisdiction of a suit to set aside or postpone an alleged fraudulent conveyance of any of this property by Ben Holladay which hinders or delays the plaintiff in the enforcement of his judgment against said Holladay.

"In *Buck v. Colbath*, 70 U. S. 8 Wall. 334, 18 L. ed. 257, this question is examined by Mr. Justice Miller, and the conclusion reached that the rule among courts of concurrent jurisdiction that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising therein, is subject to limitations." See also *Andrews v. Smith*, 19 Blatchf. 100, 5 Fed. Rep. 883. "The object of the suit in the state court between the two Holladays is not stated in the answer. But, in the nature of things, it cannot involve the matters in controversy here, and particularly the question of whether the plaintiff is entitled, as a creditor of Ben Holladay, to have these conveyances to Joseph Holladay set aside or postponed in favor of the judgment against the former. If this court should find that these conveyances were made with intent to hinder and delay the plaintiff in the collection of his demand, under such circumstances as makes the grantee therein a participant in the fraud, it would be its duty to decree that they be set aside or postponed in favor of the plaintiff's judgment. So far there would be no interference with the process of the state court, or the possession of its receiver. Whether this court will stop there, and remit the

plaintiff to his execution out of the same state court on his judgment therein, or provide for the sale of so much of the property by a master as may be sufficient to satisfy the same, together with the costs incurred in this court, will depend on circumstances. The latter course cannot be pursued while the receiver is in charge, for that would necessarily interfere with his possession. But so long as the plaintiff's right to enforce the judgment, and for the amount found due him, depends on a decree of this court, it is proper, and very convenient, that any disposition of the property in question to satisfy the same should be made on its process. And provision may be made in the decree that the sale shall be delayed until the receiver is discharged, or that the plaintiff may apply on the footing of the decree for an order of sale as soon as such discharge takes place."

In the case of *The Daniel Kaine*, 35 Fed. Rep. 786, Payne recovered a judgment in the state court of Pennsylvania against James Linn, a tenant in common of the steamboat *Daniel Kaine*; execution issued, and the sheriff made this return: "Levied upon all the right, title, and interest of the defendant in the steamboat *Daniel Kaine* in the hands of the United States marshal, and gave notice to the United States marshal, Miller, of said levy, and made claim upon proceeds of boat." After stating these facts, the court proceeds: "Was it, then, beyond the reach of his execution creditors whose judgment was in the state court? It is, indeed, undeniable, that this court has obtained exclusive jurisdiction over the vessel for all the purposes of the suit which had been here instituted, (*Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 28 L. ed. 729,) and it is not to be doubted that property once attached or levied on is in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, especially if that officer is acting under a different jurisdiction, (*Hagan v. Lucas*, 85 U. S. 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749.) It will be perceived, however, that the sheriff's levy here did not involve the disposition or control of the property. It was made in manifest subordination to and in recognition of the right of the marshal to hold and dispose of the vessel. Nor was actual seizure necessary to give efficacy to the sheriff's levy, as it was made, not upon the *res* itself, but merely upon the defendant's interests. *Srodes v. Caven*, 3 Watts, 258; *Welsh v. Bell*, 82 Pa. 13. But the execution creditor here need not stand on the sheriff's levy. In Pennsylvania a *fi. fa.* binds all the defendant's personal property in the bailiwick, whether there is a levy or not; and the lien attaches from the time the writ is put in the sheriff's hands. *Duncan v. McCumber*, 10 Watts, 212. The issuing of the execution from the court of common pleas was not an interference with the marshal, and in nowise tended to bring about a conflict of jurisdiction. What good reason, then, is there for denying to this execution creditor the benefit of a lien? In *Heidritter*

v. *Elizabeth Oil-Cloth Co.*, *supra*, the court noticed and carefully distinguished between the proceedings in the state court for the purpose of declaring and establishing the mechanics' lien, and the subsequent proceedings involving the sale of the property, the latter only being adjudged void."

In the case of *Ball v. Tompkins*, 41 Fed. Rep. 486, after stating the general principle that "this court cannot invade the possession of the subject-matter of controversy already taken by the state court having concurrent authority, and in the exercise thereof; for the rule is here, as elsewhere, that the court which first acquired possession of the subject will retain it and the power to dispose of it, by its own adjudication,"—citing 8 How. 12 L. ed. *supra*; 24 How. 16 L. ed. *supra*; 21 Wall. 276, 22 L. ed. 536—proceeds as follows: "And this brings us to the pivotal question in the present inquiry: What is the nature and character of the possession of the state or Federal court which excludes the exercise of authority over the subject or thing by the other? From the authorities on this subject, (which in the circuit courts are not altogether harmonious,) and from the reasons for the rule, I apprehend it to be substantially that the possession contemplated as sufficient to make it exclusive is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal, a substance, or a mere right. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the court's having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. The pendency of a controversy in a suit in a state or Federal court is no bar to a suit in the other court involving the same controversy, (*Stanton v. Embrey*, 98 U. S. 548, 23 L. ed. 983,) and each will proceed in its own course to a judgment establishing the right. The control which each court has over its own processes has always been found adequate to prevent mischief from diverse judgments in the several jurisdictions. But in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some subject, it will let the thing alone, so long as that dominion is retained, and proceed if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit; if not, it will stop. There are many cases in the Supreme Court Reports where this subject has been discussed, and these principles applied. Some of them have been already cited. Others are *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729; *Rio Grande R. Co. v. Vinet*, 132 U. S. 478, 33 L. ed. 400.

Under the Act of Congress of March 3, 1887, receivers appointed by the courts of the United States may not be sued without leave in any court having jurisdiction over 16 L. R. A.

the subject. No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized, even by the court appointing the receiver, and is not open to revision by it if the court rendering the decision had jurisdiction of the subject-matter and the parties. The manner in which it shall be paid, and the adjustment of the equities between all persons having claims on the property and effects in the hands of a receiver, must be under the control of the court having custody through its receiver, but this does not affect the jurisdiction of other courts, conclusively to establish by judgment the existence and extent of a claim. *Dillingham v. Anthony*, 73 Tex. 47, 8 L. R. A. 634. It is a well-established rule that when there is a fund in court for distribution, creditors, or those entitled to share in the distribution, may come in by petition, and have their claims adjusted by the court administering the trust, and receive their distributive share. Such were the facts in the case in *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007, and *Peals v. Phipps*, 55 U. S. 14 How. 872, 14 L. ed. 460, and some others cited. But when a bill is filed to foreclose a mortgage the proper parties are the mortgagor and mortgagee. The fund primarily is applied to the mortgage debt, and balance to the mortgagor. A stranger to the mortgage, in the absence of a statute or rule of court, cannot have himself made a party without the consent of the complainant. *Renfro v. Goetter*, 78 Ala. 318; *Flournoy v. Harper*, 81 Ala. 494; *Hambrick v. Russell*, 86 Ala. 199.

Neither do the complainants in the case under consideration have that relation to the matter or parties in the foreclosure suit which would enable them to file a bill of review of the decree in that case, and show error, apparent on the record, or by bill in the nature of a bill of review, and show that they were overreached and defrauded by its procurement. They were neither parties nor privies to that proceeding, and have no title or claim of ownership to the property conveyed by the mortgage. *Whiting v. Bank of United States*, 88 U. S. 13 Pet. 6, 10 L. ed. 38; *Humphreys v. Burleson*, 72 Ala. 1, 6; *Dunklin v. Harvey*, 56 Ala. 181; *Newlin v. McAfee*, 64 Ala. 364; *Curry v. Peebles*, 83 Ala. 226; *Lee v. Lee*, 55 Ala. 602; *Opelika v. Daniel*, 59 Ala. 215.

Extracts at length have been quoted from leading cases that the reasoning and conclusions of the different courts construing, limiting, and applying the general principle stated in 7 How. 12 L. ed. *supra*, may be the better understood and appreciated. All the authorities recognize the importance of carefully preserving the boundary line between courts of concurrent jurisdiction, in order to prevent conflicts, and to preserve in harmony their relations to each other. Harmony between the state and Federal courts is the life of our complex system of government, and should be guarded by a "flaming sword which turns every way." To prevent abuse of the principle and the successful

perpetration of injustice or fraud, through forms of law, courts accord to suitors and litigants all necessary latitude, and they are not restricted to any one form for the adjudication of any question or right, provided only that such adjudications are not upon questions pending in another concurrent court which had prior jurisdiction, and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent court, or interfere with or disturb the possession of any subject-matter then *in gremio legis*. Possibly plaintiffs might sue the Brierfield Coal & Iron Company in a court of law, and recover judgment, and have execution, as in the case of *The Daniel Kaine*, in 35 Fed. Rep. 796, *supra*; or file a bill on the judgment as in the *Holladay Case*, 27 Fed. Rep. 830, *supra*; or, when necessary to fix and establish a lien, they may proceed for this purpose as in the case of *Heidritter v. Elizabeth Oil Cloth Co.*, *supra*; and in neither instance transgress the domain of the United States court. Any attempt to enforce the judgment or lien thus established by interfering with the possession or subject-matter under the control of the concurrent court would be nugatory. In accordance with the principle declared by Miller, J., in the case of *Watson v. Jones*, the court should grant any relief authorized by the pleadings and proof, which did not conflict with the decree of the United States court, or disturb the possession of the property in the hands of the court, although the bill may ask for some relief which perhaps cannot be granted. It may be that, notwithstanding the complainants do not claim any ownership in the property conveyed by the mortgage, or may not have that relationship to the foreclosure suit, which, under the decisions of this state cited above, would authorize them to file a bill of review, or an original bill in the nature of a bill of review, to correct or set aside the decree rendered in the circuit court of the United States for error apparent, or for fraud in its procurement, under the liberal system declared in the case of *Krippendorf v. Hyde*, *supra*, to prevent abuse and injustice, plaintiff might get relief by filing a petition as ancillary to the foreclosure suit. We express no opinion as to that question. We do hold, however, that if the trustee in the deed of trust, and the defendant corporation, the Brierfield Coal & Iron Company, and the stockholders and directors, with the knowledge and assistance of the bondholders, fraudulently combined and colluded together to hinder, delay, and defraud the creditors of the defendant corporation, and to carry out this fraudulent purpose procured the certificates mentioned in the pleadings to be fraudulently issued, and fraudulently procured the execution of the deed of further assignment, and that the bonds secured by the trust were without consideration, and issued in violation of law, of which the holders had notice, and a decree of foreclosure of the deed of trust was procured in the United States court for the same fraudulent purpose and intent, which facts seem to be substantially averred in the bill, and which, on 16 L. R. A.

demurrer, must be regarded as true, the complainants, as creditors, are entitled to relief in some court. We further hold that the jurisdiction of the chancery court of the state of Alabama of all these matters is full and complete, and, unless these questions are pending in some other court of concurrent jurisdiction in such way and manner as may be pleaded in bar to this suit, the complainants, upon proof of the averments of the bill, are entitled to every relief in this court. *Watson v. Jones*, *supra*. In granting relief, if the pleadings and proof justify it, the chancery court will be controlled by the limitations and principles herein declared, so as not to conflict with the jurisdiction of the Federal court. We do not wish to be understood as intimating that the bill is in all respects without defect as to parties, or that a proper decree could be rendered upon the pleadings in their present shape, or that any decree would affect the rights of bondholders, or holders of the certificates, who have not been made parties to the cause. We simply adjudge the grounds of demurrer assigned, being against the bill as a whole, are not well taken, and should have been overruled.

Reversed and remanded.

Stone, Ch. J., concurring:

In this case the chancellor sustained the demurrer to the bill, and, no amendment being offered, there was a decree declaring the bill contained no equity of which that court could entertain jurisdiction. From that interlocutory decree the present appeal is prosecuted. The demurrer admitted the truth of every material averment that is well pleaded. *Florellen v. Crane*, 58 Ala. 627. We will treat the material averments as admitted facts. The Brierfield Coal & Iron Company was incorporated in 1882, with an authorized capital stock of \$750,000. The amount of stock actually issued and disposed of is not expressly shown. It is shown, however, that by a resolution of the board of directors, adopted soon after the organization, \$500,000 of the mortgage bonds of the company were issued, having 30 years to run, bearing 6 per cent interest, and the interests to be paid in semi-annual installments. The payment of the interest and principal of these bonds was secured by a first mortgage, executed and recorded, conveying all the property of the corporation, real and personal. The mortgage created a trustee, and clothed him with authority to execute its power and purposes. The bonds are not negotiable securities, according to the averments of the bill. This issue of \$500,000 of coupon bonds was not intended for sale in the market as bonds. Stock in the company to the amount of \$450,000 was ordered to be sold, and was sold at par, with the agreement and understanding that to every purchaser of \$900 of the capital stock there should be delivered, and was delivered, \$1,000 of the bonds, on no consideration other than the \$900 of stock purchased and promised to be paid for. So, when the stock should be paid for in full, the subscribers, or owners of the shares of the capital stock,

would have received, for \$900 paid out, \$900 of the paid-up capital stock of the company, and the corporation's coupon bond for \$1,000. To what extent calls were made for payment of this \$450,000 of stock, or any other stock taken in the company, was not known to the complainants, and is not shown in the bill of Gay, Hardie & Co. It is averred, however, that the sum of \$500,000 of the subscriptions for stock remains unpaid. These bonds for \$500,000 were subscribed for by eight persons in unequal amounts, who still claim to own the same, or the great bulk of it. The husband of one of these eight is named as trustee in the mortgage given for the security of the bonds. Pursuant to authority and power expressed in the said first mortgage, the trustee, in July, 1887, obtained from the Brierfield Coal & Iron Company a further assurance for the security of said bonds, which described and conveyed to him, for such purpose, all the real and personal property of every description owned by said corporation. In less than a month after obtaining this further assurance, to wit, in August, 1887, the trustee or assignee named in the mortgage filed a bill in the circuit court of the United States, and made defendants to his bill the said Brierfield Coal & Iron Company, the said original stock and bondholders, and certain named creditors of the corporation. The bill set forth the said \$500,000 of bonds as a debt of the corporation, and certain other alleged debts incurred in running the works of said iron and coal company, for which Peter, the president of the corporation, had rendered himself or his property liable. According to the averments of that bill, a considerable part of the subscription of \$450,000 of stock has not been collected, and no excuse is rendered why this has not been done. The object of the bill was to have the effects of the corporation placed in trust or in the hands of a receiver, and to have that trustee or receiver clothed with authority to borrow money, and to that end to issue receiver's certificates of indebtedness. This for the purpose of keeping the works of the corporation in operation, and to meet current expenses. There was no expressed wish or prayer to have the mortgage foreclosed, and the property sold at that time; but the averred object was to save the property by continuing the works in operation, and thus paying the corporation's debts. The bill and its prayer, however, were so framed as that a foreclosure and sale could be effected under it. The circuit court of the United States took jurisdiction of the case, placed the property in the hands of a trustee or receiver, and authorized him to issue certificates of indebtedness, which were declared to be a first lien on the property and its earnings. Under this authority certificates of indebtedness were issued to the extent of \$65,000. In 1889 the circuit court of the United States made a decree in said cause foreclosing said mortgage and further assurance, and ordering an account to be taken of said bonded and other named indebtedness of the corporation, and ordering a sale of its property and effects. Under this decree the

property was advertised to be sold, the sale to take place August 19, 1889. On that day the present bill was filed in the state chancery court by a nonsecured creditor of the Brierfield Coal & Iron Company.

The bill in the present case, filed by Gay, Hardie & Co., sets forth that during the years 1886 and 1887 the said Brierfield Coal & Iron Company became indebted to them for goods, wares, and merchandise sold to said corporation in the sum of near \$11,000 of principal indebtedness. It charges that said alleged bonded indebtedness of \$500,000 was issued and incurred in direct contravention of the Constitution and statutes of the state of Alabama; that they were issued upon no consideration whatever, and are fraudulent. It charges further that said suit by the trustee to foreclose said mortgage and further assurance was and is, by reason of the legal invalidity of the bonds, fraudulent, and instituted and prosecuted with intent to delay, hinder, and defraud the creditors of the corporation, and that the corporation is insolvent. The bill is so framed as that other creditors can come in and make themselves parties, and share in the fruits of the recovery. The prayer and purpose of the bill are to have the alleged bonded indebtedness annulled as fraudulent, and to have the effects of the corporation applied to its bona fide debts. It will thus be seen that before this suit was instituted the circuit court of the United States, by virtue of the bill previously filed in that court by the trustee, had taken jurisdiction of the affairs of the corporation, and, through a receiver, or quasi receiver, of its own appointment, had taken control and possession of its entire effects; and that possession had not been relinquished by a final determination of the suit. The present bill makes only two defendants,—the Brierfield Coal & Iron Company, and the trustee in the mortgage, the complainant in the said suit in the circuit court of the United States. Each of these defendants demurred to the bill, specifying several grounds of demurrer, but they are all reducible to a single proposition, namely, that the circuit court of the United States, having acquired jurisdiction and possession of the effects of the corporation, no other court can, by any process at its command, interfere with that possession, or prevent or obstruct that court in the complete administration of the effects of the corporation.

Ours is a compound government. We have a Federal government, which, for certain specified purposes, and to a certain extent, makes us one. The dominating aim of this union of states had two main objects: *First*, in all our relations, political and commercial, with other countries, we are a unit; *second*, in those matters which pertain to the harmony, good neighborhood, and equal civil rights of the citizens of the several states out of which conflicts and collisions might arise, the general government is clothed with all the power which the framers of our institutions deemed necessary to prevent such conflicts and collisions. But the powers of the Federal government are the creatures of grant. Each of the governments, Federal and state,

has a judiciary, a necessary arm for the enforcement of delegated power and preservation of good order. And in the administration of justice controversies may and do arise, in the adjustment of which the courts of the two governments have concurrent jurisdiction. Here we approach the danger line, and we should take our steps cautiously, lest we tread on forbidden ground. Properly administered, each tribunal can exercise all its rightful jurisdiction, and grant all rightful relief to the suitors before it, without abridging the equal rights of other equally meritorious suitors before other tribunals, having equal power. The difficulty lies in determining when or from what arbiter the mandate can be authoritatively uttered, "Thus far shalt thou go." That two material bodies cannot occupy the same space at the same time, is an established law of physics. If this impossible feat be attempted, collision must be the result. So, when one court has acquired and is in the exercise of jurisdiction over a subject-matter *inter partes*, no other court of simply concurrent power can take jurisdiction of that same subject-matter between the same parties. And the rule is much more inflexible when, under some order or process of its own, the court first acquiring jurisdiction has obtained possession of the *res*, which is the subject of the suit. When this is the case, the thing is in the custody of the court, and, until disposed of by final judgment or decree, that possession cannot be interfered with by any other court of concurrent jurisdiction, whether its powers be invoked by a party to the first suit or by a stranger to that litigation. This, it has been justly said, is not alone a duty of comity. It is an edict of necessity. Its nonobservance would lead to all the conflict and confusion so well expressed by *Justice Grier* in *Peck v. Jenness*, 48 U. S. 7 How. 612, 12 L. ed. 841.

The exhaustive opinion of my Brother Coleman in this case has rendered it not only unnecessary, but improper, that I should again collate the authorities. I fully concur with him in his statement of the rule, and the extent of it. The reason of the rule exists in the prevention of collisions between courts of concurrent jurisdiction. Neither the reason nor the rule finds any field of operation when the proceedings in one jurisdiction do not in any manner interfere with those in the other; and in this connection it is immaterial whether the two courts of concurrent jurisdiction derive their powers one from the Federal and the other from a state government, or both from the same government. The same rule and measure of non-interference apply in the one category as in the other. Under the suit by the trustee in the United States court, all the property of the Brierfield Coal & Iron Company was placed in the hands of a trustee or receiver, to be administered for the purposes specified in the mortgage and further assurance. Until that court finishes the litigation there pending, and relinquishes its possession of the property, no other court can disturb that possession, or interfere with the untrammelled adjudication of the issues raised in that suit.

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And the decision or decree rendered or to be rendered in that suit will bind all the parties to it, and their privies, unless it is reversed by a court having authority to revise its judgment. *Stout v. Lye*, 103 U. S. 86, 26 L. ed. 428. In other words, while the proceedings in that court are *in fieri*, and the corporation's effects are in the hands of that court's trustee or receiver, no other court of concurrent jurisdiction, and no suitor in such court, can disturb or interfere with such possession, or with that court's untrammelled adjudication of the questions before it. The rule has no greater extent than this. 3 White & T. Lead. Cas. Eq. pt. 2, p. 1402.

As has been shown, the bill in the circuit court of the United States was filed and is prosecuted by the trustee appointed in the mortgage and deed of further assurance executed by the Brierfield Coal & Iron Company. Its ultimate object was and is to foreclose those conveyances, and with the proceeds to pay the quasi receiver's certificates, and the \$500,000 of bonds hereinbefore described. Only the corporation, the holders of those bonds, and certain creditors with whom some of those bonds have been deposited as security for money borrowed, are made parties to that bill. Gay, Hardie & Co. are neither made parties, nor is their claim mentioned in the bill. Not being defendants to that suit, they cannot be heard in defense of it; and the law furnishes them no coercive means of having themselves made defendants. The law arms the complainant with the supreme discretion and option of determining whom he will make parties defendant to his bill, and the only risk he incurs is that, if he omit a necessary party, he is liable to suffer in the decree he obtains. There is no process known to the law by which a stranger to the record can procure himself to be made a defendant. *Renfro v. Goetter*, 78 Ala. 811; *Flournoy v. Harper*, 81 Ala. 494; *Ex parte Printup*, 87 Ala. 148. True, in the prayer of the bill is found this clause: "If any of the creditors of said Brierfield Coal & Iron Company, who are not made parties defendant to the bill, or any persons holding and asserting claims against the trust estate in the hands of orator, desire to have their rights determined in this honorable court, that they be permitted [to make] themselves parties defendant in this cause, on filing their petition therein, setting forth their said debts, demands, and claims, and that said matters shall be heard and determined in this cause." Under the authorities cited above, the practice here invited would have been patently irregular, and we know of no precedent for it. Moreover, it does not appear that Gay, Hardie & Co. had notice of said offer, or even of the filing of that bill, in time to avail themselves of it for any practical purpose in that suit. We will not comment further on that clause at this time. Should it occur in the further progress of said suit in the circuit court of the United States that the creditors of the Brierfield Coal & Iron Company are notified to come in, and propound and prove their claims, that would be no adequate remedy to Gay, Hardie & Co. if the averments of their bill be true.

Under such notice they would come in as claimants under that suit, and not as defendants, armed with the power to controvert the legality of the bonds and mortgage. They could claim only in subordination, not in antagonism, to the purposes of that suit. Thus handicapped their claim would be subordinated to the certificates of indebtedness which have been issued, and to the \$500,000 of bonds already decreed by that court to have a paramount lien on all the property embraced in the mortgage and further assurance. Gay, Hardie & Co. are simple contract creditors, without a judgment and without a lien. Their bill may be in part rested on section 8544 of the Code of 1886, which is in the following language: A creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed, by his debtor." See the many rulings on that statute cited in the note *Gibson v. Trowbridge Furniture Co.* (Ala.) 9 So. Rep. 370. We say the bill rests on that statute because its averments tend to make a case therein provided for, as we will hereafter show. See also *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546; *Lawson v. Warren*, 89 Ala. 584; *Martin v. Carter*, 90 Ala. 96.

The charges of fraud and fraudulent purposes, as set forth in the present bill, may be briefly summarized as follows: *First.* The bonds for \$500,000, and the mortgage given to secure their payment, were given upon no consideration, and in violation of article 14, § 6, of the Constitution of Alabama. *McPatrick v. Dispatch Pub. Co.* 83 Ala. 604; *Williams v. Evans*, 87 Ala. 725, 6 L. R. A. 218. *Second.* A large amount of the stock subscription to the corporation remains unpaid, and it is not shown that the corporation has made, or is making, any attempt to collect it, and no excuse is offered for the failure. The said bill in the circuit court of the United States, as represented in the present bill, admits this sum to be large. The bill in this case charges it is \$500,000. *Third.* The said trustee's bill, if correctly set forth, while it admits this large unpaid balance of stock subscription, seeks to sell the entire effects of the corporation for the payment of illegal and worthless bonds, and this in a bill which has for its parties only those persons who are interested in their payment and collection. If the averments of the present bill be true, (and in this hearing we must treat them as true,) there is not only no adversary interest presented in the suit by the trustee, but, in the nature of things, none could be regularly presented. A judgment thus obtained is collusive, and can have no binding effect on creditors who are not, and have no legitimate means of making themselves, parties. Only parties and their privies in estate or blood are estopped from disputing the ascertained facts on which judgments of courts are founded. As to creditors who are strangers to the record, if fraudulent they are of no avail. When they are made a fraudulent contrivance, or

aid in hindering, delaying, or obstructing creditors in the enforcement of their just demands, they acquire no additional force by the circumstance that, in form, they are the solemn judgments of a court. Nothing is simpler or easier of accomplishment than to reduce an unfounded or fraudulent claim to judgment, when the ostensible antagonists concur in the desire to do so; and the court or presiding judge, being ignorant of the secret intent, and acting only on the case shown in the pleadings, is without knowledge of the purpose intended. He is thus sometimes made the innocent instrument of a most atrocious fraud. Chancery sweeps away such contrivances as chaff before the wind. 1 Black, Judgm. §§ 593 et seq.; *Michaels v. Post*, 88 U. S. 21 Wall. 398, 22 L. ed. 520; *Estava v. Estava*, 50 Ala. 82; *Lee v. Lee*, 55 Ala. 590; *Dunklin v. Wilson*, 64 Ala. 162; *Dunklin v. Harvey*, 56 Ala. 177; *Humphreys v. Burleson*, 72 Ala. 1; *Metropolitan Bank v. Durant*, 22 N. J. Eq. 85, 24 N. J. Eq. 556; 2 Pom. Eq. §§ 919, 970; 1 Story, Eq. § 252a et seq.; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 620, 21 L. ed. 731, 735.

As we have said, we are dealing with the case made by the averments of the bill. According to those averments, the bonds were issued without any consideration, and in direct violation of the Constitution of this state. It is not shown, nor can it be presumed, that the corporate effects sold under the circuit court's decree will bring a sum in excess of the amount of the quasi receiver's certificates and the bonded indebtedness. If they do not, the other creditors have nothing to look to for payment of their demands, unless they can successfully controvert the legality of the bonded indebtedness. No answers have been filed to the present bill, and we cannot know what the defense may be. It would be worse than idle for us to speculate about it, and we will not attempt it. Let us charitably hope the grave charges made may prove unfounded. At this stage of the litigation, we will not comment on the frauds that may be, and sometimes are, perpetrated through the seeming forms of law. We have said that the chancery court must not and cannot interfere with the possession acquired by the circuit court of the United States until that court finishes its work, and relinquishes its possession. What steps can be taken in the chancery court, while the conditions remain as they are shown in the transcript before us? It is certainly true that no court will or can restrain or intermeddle with another court of co-ordinate jurisdiction. It does, however, often interfere with parties who are conducting litigation before another tribunal.

It would seem there can be no objection to taking testimony to establish the justness of complainant's claim, and, if true as charged, the fraud of the corporation through its officers in placing or attempting to place its effects beyond the reach of its bona fide creditors. Nor does it appear that steps cannot be taken to subject the unpaid subscriptions of stock in the corporation, if there be such, to the payment of the demand of complain-

ants. It is not shown that the circuit court of the United States has taken any jurisdiction of this subject, or has been asked to do so. In the averments and prayer of the bill, if correctly stated, it rather appears to have been given the go-by. *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, and authorities cited.

What recourse complainants can assert against the property of the corporation itself, or against its proceeds, after it shall have passed out of the possession of the circuit court of the United States, would seem to depend on the inquiry whether it passes to the bondholders or to strangers as purchasers. Possibly, in the one case, if the averments of the present bill be true, the property itself may continue subject, while in the other, only the proceeds could be reached. We make these suggestions, without intending to commit ourselves absolutely to their correctness. I concur in the reversal of the chancellor's decree.

An application for rehearing was subsequently filed in response to which *Stone, Ch. J.*, on behalf of the court, delivered the following opinion:

It is contended before us that the bill in this case ought to have been dismissed, because of an error in the local jurisdiction: that is, that the bill was filed in Colbert county, the residence of Chambers, the trustee, but of no other party to the suit. The contention is that Chambers was a naked trustee, having no interest in anything involved in the litigation, and that his residence did not and could not constitute him a material defendant, so as to authorize the suit to be brought in that county. Code 1886, § 8421. This case was not heard in Colbert, but in Jefferson county. It was removed to the latter county by an order entered on the minutes of the Colbert court, as follows:

"580. *Gay, Hardie & Co. v. Brierfield Coal & Iron Co., W. L. Chambers, as Trustee.* By the consent of counsel for the respective parties in the above-entitled cause the same is removed for trial from the chancery court of Colbert county to the chancery court of Jefferson county, and the register of Colbert county is hereby directed to transfer to the chancery court of Jefferson county all the original process and papers in said cause, and a bill of his cost to this date. The register of Colbert county will file in his office the consent of counsel and this decree. December 18th, 1889. Thomas Cobbs, Chancellor."

In addition to the foregoing, the following orders were made and filed in the chancery court of Jefferson county after the cause was removed to that county, and this without any reference being made to the irregularity of filing the bill in Colbert county, if that be an irregularity:

"*Gay, Hardie & Co. v. Brierfield Coal & Iron Company, et al.* In chancery. Fall term, 1889-1890. It is ordered by the court that this cause be, and the same is hereby, submitted on demurrer to bill, to be heard on briefs. . . . " *Gay, Hardie & Co. v.*

The Brierfield Coal & Iron Co. In chancery. This cause, coming on to be heard, was submitted upon the demurrers to the bill, and was argued by counsel, and, being duly considered, it is ordered, adjudged, and decreed that the demurrers are well taken, and are sustained. Thomas Cobbs, Chancellor. Filed and enrolled this June 26, 1890. Chas. A. Senn, Register."

We considered it unnecessary to decide whether or not the suit was properly brought in Colbert county. If not, then the conduct of the parties was a waiver of the irregularity. *Hair v. Moody*, 9 Ala. 399; *Byrd v. McDaniel*, 26 Ala. 583.

We should do injustice to the research of counsel, if we did not pronounce the application for a rehearing on this case to be able, and fully up to the merits of the question it discusses. It certainly demonstrates that, so long as the circuit court of the United States has control and possession of the property and effects of the Brierfield Coal & Iron Company, no other court can interfere with that possession, or hinder it in any way in the free consideration and adjudication of the questions before it. And the judgment or decree it may render will, unless reversed on appeal, be determinative of the rights involved, as between the parties to that suit. Does it or can it extend any further? When that court pronounces judgment, and relinquishes possession, it cannot be affirmed that any right or claim has become *res judicata*, unless both the claim and claimant have been before the court. Such is the mandate of all enlightened jurisprudence. 3 Black, Judgm. §§ 500, 504; 1 Greenl. Ev. §§ 534, 535.

No particular claim can attach to the fact that the suit of Preston B. Plumb, referred to in the present bill of *Gay, Hardie & Co.*, was pending in a court deriving its powers from the government of the United States. The same doctrine of noninterference will apply, and only the same, as if that suit had been pending in a state court, with a limited exception, not material to this case. The present suit does not propose to obstruct or hinder the United States court in the free control of the property it has in its possession, or in the untrammelled administration of justice between the parties it has before it. It claims, however, and rightfully claims, that the judgment of that or of any other court, rendered on issue joined between the parties to that suit, does not and cannot determine property rights against other claimants who were not parties to that litigation. It founds its claim on the fundamental principle that judgments bind, and only bind, parties to the suit, and their privies. It claims that if, in a contention between A and B, the right be adjudged in A, this does not estop C from asserting and proving that the paramount title is in him.

Another argument in support of the main ground on which the equity of the bill in this case is rested. As we have shown in a former opinion, taking the averments of the bill for our guide, when the projectors of the Brierfield Coal & Iron Company placed its stock on the market with a view to organ-

ization, it was done with the agreement that every subscriber who would purchase and pay for the stock of the corporation should, without further payment or consideration, receive a thousand-dollar bond of the company for every \$900 of stock subscribed and paid for; and the payment of these bonds was to be secured by a mortgage on the entire property and effects of the corporation. This agreement was made good, and the subscribers for the stock received not only the certificates of stock they subscribed and paid for, but, in addition, the said bonds of the company, in excess of the money paid, secured by a first mortgage on the entire property of the corporation. Ten dollars of this first and highest secured debt and obligation of the company for every nine dollars subscribed and paid in. We have recently had occasion to consider the nature and purpose of capital stock in business corporations, and the legislative policy which requires such stock as a condition on which it grants a corporate franchise. The liabilities of corporations, unlike the debts of natural persons, impose no personal debts on any one. Only the corporation's effects can be reached for the satisfaction of its debts. Hence the purpose and policy of requiring a capital stock to be subscribed and paid in. It is intended as a security and pledge for the payment of any liabilities the corporation may incur, and partakes largely of the nature of any other pawn or pledge required and given as security for the fulfillment of a promise. It is a pledge in trust, primarily for the security of creditors, and cannot rightfully be withdrawn until all debts and liabilities of the corporation are paid. *Gibson v. Troubridge Furniture Co.* (Ala.) 9 So. Rep. 370; *Corey v. Wadsworth* (Ala.) 11 So. Rep. 350.

In the organization of the Brierfield Coal & Iron Company, as the pleadings show, this policy was entirely disregarded. True, the capital stock was to be subscribed and paid for, but the money was not to be left in safe pledge for the security of persons that might become its creditors. Stripped of circuitry, the money received for stock subscriptions was only borrowed from the stock subscribers, to be repaid to them, not contingently, but in any event that might occur; repaid, not as an ordinary debt of the corporation, but as a preferred and secured debt; preferred and secured by bonds and a first mortgage on all the property of the corporation. So, if the averments of the bill be true, the Brierfield Coal & Iron Company, instead of having a capital stock subscribed and paid on call, commenced operations upon no capital stock of its own, either in possession, or in prospect, but on borrowed money, secured to be repaid with a premium by a first mortgage on all its effects, present and prospective, with nothing in pledge for other debts it might incur and without other security for the payment of such debts, except a possible surplus of assets, left after repaying the borrowed capital stock. In this way it went through the form of organizing and exercising its corporate powers. Instead of requiring a capital stock to be

paid in and administered as a security for creditors, it practically dispensed with it altogether. Instead of holding the capital stock as a trust fund primarily for the benefit of creditors, and secondarily for the stockholders, it reversed this natural order of things, transformed the stockholders into creditors, and made them a preferred class, with a prior, paramount mortgage lien over all other creditors who may have trusted or may trust the corporation. So then we have the case of an incipient corporation issuing \$500,000 of its bonds upon no consideration, and secured by a first mortgage, as shown in our first opinion, or, as we have attempted to set forth above, a simple act of borrowing from so-called "stockholders" the entire capital stock on which it proposed to do business, secured to be repaid in preference to all other liabilities by a first mortgage on all the property of the corporation. If the bill of Gay, Hardie & Co. truly represents the facts, can further comment be necessary?

The application for a rehearing must be denied.

Wiley E. CROCKER, *Appt.*,
v.

B. F. SMITH *et al.*

(.....Ala.....)

The inclusion of after-acquired property in an instrument of conveyance and the reservation of all the property for the payment of the grantor's debts will compel its construction as a will rather than as a deed when its character must be determined from its face, especially if it provides that it shall not take absolute effect until the grantor's death.

(November 24, 1901.)

A PPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in an action brought to recover an interest in certain real estate. *Reversed.*

The rights of the parties depended upon whether the following instrument was a deed or a will:

"State of Alabama,
"Pike County.

"Know all men by these presents, that I, David Fleming of the County of Pike and State of Alabama, being moved and influenced as I have uniformly been, from the natural love and affection which I have and bear for and toward my beloved wife Sarah Ann Fleming, being able to provide well for her in after life, as well as for her present comfort, that she may have and enjoy a permanent and substantial estate and property, and from the further consideration of one dollar, and further, that my said wife has aided me in the accumulation of the estate I am possessed of, I hereby give, convey, and confirm unto my said wife

NOTE.—This case is reported as another of the many instances of the expression of testamentary intention in language ordinarily appropriate to deeds rather than to wills.

For another class of informal wills—letters,—see note to *Re Richardson* (Cal.) 15 L. R. A. 685.

and her heirs in absolute right, all my entire estate, real and personal, lands, negroes, stock, and all manner of property I now or may hereafter own, except a negro girl named Elizabeth, aged four years, which girl I give, convey, and confirm unto my sister-in-law, Margaret S. Carr, wife of Calvin Carr, of said county, reserving a lifetime estate and enjoyment of said property to myself, and for the payment of all my just debts. This deed of gift to take effect absolutely at my death, and to be valid and conclusive.

"In testimony whereof, I, the said David Fleming, have hereunto set my hand and seal. Signed, sealed, and delivered this 17th of Sept. 1887.

"In the presence of
"Gappa T. Yelverton,
"J. A. Whaley.

"David Fleming."

The further facts are stated in the opinion. Mr. Alex. T. London, for appellant:

If it was intended to pass a present interest and has the other requisites essential to its operation as a deed, it will in law be so regarded; while, on the contrary, if the interest was entirely posthumous, then it is a will if properly executed as such.

Elmore v. Mustin, 28 Ala. 809; *Adams v. Brroughton*, 18 Ala. 781; *Golding v. Golding*, 24 Ala. 122; *Jordan v. Jordan*, 65 Ala. 801; *Travick v. Davis*, 85 Ala. 842.

If a paper cannot have operation as a deed, but may as a will, then in doubtful cases we should pronounce it a will *ut res magis valeat*.

Sharp v. Hall, 86 Ala. 110; *Kyle v. Perdue*, 87 Ala. 428.

This instrument could not be effectual as a deed to convey property that he might thereafter own.

Devlin, Deeds, § 945; *Tillotson v. Doe*, 5 Ala. 418, 39 Am. Dec. 830; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159.

Messrs. W. L. Parks and John Gamble, Sr., also for appellant.

Mr. P. O. Harper for appellees.

Clopton, J., delivered the opinion of the court:

The parties having agreed in the circuit court that if the instrument executed by David Fleming, September 17, 1887, is construed to be a deed, judgment should be rendered for plaintiffs; and if a will, for defendant; and, this being the only question on which any ruling was asked or made by the court, the judgment on this appeal must also depend on the interpretation of the instrument. The general characteristics which distinguish deeds from wills have been repeatedly declared, yet no definite uniform test has been stated by which to determine the character and operation of each particular instrument, and none can well be. The intention of the maker is the ultimate object of inquiry,—whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated, or impaired by the act of the grantor, it is a deed; but if the estate, title, or interest is dependent on the death of the testator, if in him resides the unqualified power of revocation,—it is a will. *Jordan v.*

Jordan, 65 Ala. 806. Ordinarily the intention is to be collected from the terms of the instrument, considered in the light of the surrounding circumstances; but, there being no proof of the circumstances under which the instrument was executed, consideration is necessarily limited to the operation of its terms. The purpose and consideration are expressed as follows: "Being moved and influenced, as I have uniformly been, from the natural love and affection which I have and bear for and towards my beloved wife, Sarah Ann Fleming, being able to provide well for her in after life, as well as for her present comfort, and that she may have and enjoy a permanent and substantial estate and property, and from the further consideration of one dollar, and, further, that my said wife has aided me in the accumulation of the estate I am possessed of;" followed by these words of conveyance: "I hereby give, convey, and confirm unto my said wife, and her heirs in absolute right, all my entire estate, real and personal, lands, negroes, stock, and all manner of property which I now, or may hereafter, own," excepting a negro girl, which was given to his sister-in-law. The instrument was sufficiently executed to operate as a deed or will, and has appended a certificate of proof of execution and of registration. It has been said that these facts raise the presumption of delivery, and are persuasive to show that the maker regarded the instrument as a deed but they bear little, if any, significance, in the absence of proof that the instrument was delivered or recorded in the lifetime of the donor. The fact that it is designated on its face as a deed of gift is ordinarily regarded of little moment; though it may become of more or less importance when, upon a comparison of the terms of the instrument, and consideration of the bearing of each on the others, the meaning is ambiguous, and the mind is left in doubt as to the intention of the makers. Though the instrument may be in the form of a deed of gift, and designated as such, it is a will; if its purpose be testamentary, it cannot operate during life, and is only consummated by death. *Dunn v. Bank of Mobile*, 2 Ala. 152. While the passing of present and immediate right of possession and enjoyment is not essential to constitute the instrument a deed, and the reservation of the use and enjoyment of the property to the grantor during his life does not, of itself, make it a will, yet if it has not present effect in fixing the terms of such future enjoyment, and requires the death of the alleged testator for its consummation,—when the interest and enjoyment are posthumous,—it is a will, if properly executed as such. *Travick v. Davis*, 85 Ala. 842; *Griffith v. Marsh*, 86 Ala. 802; *Sharp v. Hall*, 86 Ala. 110; *Elmore v. Mustin*, 28 Ala. 809. By reference to the instrument, it will be observed that the right or interest which it purports to pass is not only of all the property, real and personal, which the maker then owned, but also of all that he might thereafter own. It is manifest, in the absence of covenants of warranty, it is ineffectual to convey property thereafter acquired. As to such property, it can have no operation as a deed, but may as a will. In doubtful cases, the instrument will be pronounced a will when it cannot have operation as a deed, but

may as a will. *Sharp v. Hall, supra*. The inclusion of after-acquired property seems to indicate an intent that the instrument should not pass any present right or interest. Also the last clause reads as follows: "Reserving a lifetime estate and enjoyment of said property to myself, and for the payment of my just debts. This deed of gift to take effect absolutely at my death, and to be valid and conclusive." The reservation is not only of a lifetime estate and enjoyment, but also of all the property for the payment of his just debts. All the property is made subject to the payment of debts thereafter contracted, and only so much of the estate as remains after the death of the donor, and the payment of his debts, can pass by the terms of the instrument,—tantamount to a general power of disposition. Furthermore, it expressly provided that it shall not take absolute effect until his death, at which time it is to be valid and conclusive. When there is a reservation of a general power of rev-

ocation or disposition, and a provision that the instrument shall not be in force or take effect until the death of the maker, it is in its nature ambulatory and revocable. "When there is a general reservation, or something like a reservation, of the maker's right to deal with the property as his own, notwithstanding the instrument, and no conclusive effect can be given to it until the death of the maker, the law regards the instrument as testamentary." *Gillham v. Mustin*, 42 Ala. 866. The reservation of the property for the payment of his debts, and the provision as to the time when it should take effect, seems to have been incorporated for the purpose of limiting or qualifying what might otherwise be the legal operation of the preceding words, "give, convey, and confirm in absolute right." Applying the foregoing principles and tests, we are forced to pronounce the instrument to be a will.

Reversed, and judgment rendered for defendant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.

Theodore G. GRAHAM.

(.....Mass.....)

1. A minor's marriage valid in the state where it is made is not invalid in the state of his residence because of the fact that he went out of the state to be married for the sole purpose of evading a statutory provision requiring his father's consent; at least it is not if the laws of his domicile do not so declare it.
2. An infant husband is entitled to his own wages so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent.

(June 24, 1892.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of a prosecution against him for nonsupport of his wife which resulted in his conviction. *Overruled*.

Defendant was under twenty-one years of age at the time of the swearing out of the complaint. He was nineteen at the time of his marriage. The marriage was solemnized in Maine whither defendant and his prospective wife had repaired for the sole purpose of evading that provision of Massachusetts law which requires the written consent of a minor's father to his marriage. Such consent was never given and defendant's father had always claimed and taken defendant's wages. The defendant, after his marriage, lived with his wife for six weeks at the home of his parents, in Somerville. The father was in poor health and needed his son's wages for his

NOTE.—How far marriage of infant works his emancipation.

So far as the right of the parent to the services and earnings of his minor child is concerned, marriage of a male of itself works a legal emancipation and entitles him to the proceeds of his labor, independent of any act on the part of his father. *Dick v. Grisson*, *Freem. Ch.* 434.

The legal marriage of a daughter, although without the father's consent, works her emancipation. *Aldrich v. Bennett*, 68 N. H. 415, 56 Am. Rep. 529.

The legal marriage of a female after attaining the statutory age of lawful wedlock discharges her from all further duties to perform service for her parents. *Harvey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515.

And in England it seems there can be no emancipation unless by marriage. *Rex v. Wilmington*, 5 Barn. & Ald. 525.

It has been held, however, that a minor son is not emancipated by a marriage without the consent and contrary to the directions of his father. *White v. Henry*, 24 Me. 581.

Also that where the minor goes to another state and is married without the consent of his tutor, and in violation of the law of his domicile, he does not become emancipated. The statute providing 16 L. R. A.

that marriage shall work an emancipation refers to a marriage authorized by law. *Mallefer v. Saillet*, 4 La. Ann. 375.

And this applies to a female as well as to a male. *Babin v. Le Blanc*, 12 La. Ann. 367.

Although consent may be implied from circumstances. *Bucksport v. Rockland*, 56 Me. 23.

Hence after such marriage the tutor of the minor cannot be held liable for affording shelter and protection to his ward. A man who marries a minor in fraud of the law of her domicile acquires no right over her estate, and perhaps none over her person, except so far as yielded to him (*Clement v. Wafer*, 12 La. Ann. 599); although in general marriage defeats the rights of a guardian appointed by the court (*Porch v. Fries*, 18 N. J. Eq. 204); for the husband is entitled to the guardianship of his infant wife. *Kettletas v. Gardner*, 1 Paige, 486, 3 L. ed. 725.

The parents have no authority to compel the daughter to leave her husband. *Holtz v. Dick*, 48 Ohio St. 23, 51 Am. Rep. 791.

A minor cannot maintain an action against her parent for wrongful confinement in an insane asylum where the relation of parent and child has been resumed between them after the separation of the minor from the man to whom she had been

own support and the support of other members of his family. The defendant had no property other than said wages, and his wife had no separate property, and was unable to work, at the time of the making of the complaint. The father testified that he allowed the son to retain from his earnings from one to four dollars a week for the first six months after his marriage. At the time of the complaint the defendant's wife was quick with child; and since February, 1891, to the date of the complaint, he has made no provision whatever for her support. This period was after he was allowed from one to four dollars, as previously stated.

The defendant requested the court to rule: *First*. "A father is legally entitled to the wages of his minor son, and his marriage without the consent of his father does not of itself work his emancipation, and entitle him to his earnings. If the defendant's father claimed and took his wages, and thereby deprived the defendant of the means of supporting his wife, he cannot be convicted."

Second. "A marriage in another state, in violation of the laws of this state, will not have the effect to emancipate here the minor party to such marriage."

The court refused so to rule, but did instruct the jury that the marriage in Maine without the father's consent was valid in this commonwealth, and imposed upon the defendant all the duties and responsibilities of the marital relation; that his wife would be entitled to receive support from him; that the defendant would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest; and that it was for the jury to say whether the defendant had any income, and if so whether his neglect to support his wife was, upon all the evidence, unreasonable.

Messrs. Joseph Cummings and R. G. Fairbanks, for defendant:

At common law, a husband is not liable criminally for the nonsupport of his wife.

Ex parte Jackson, 45 Ark. 158.

This is a penal statute in derogation of the common law, and must be construed strictly.

The marriage was solemnized in Maine, in violation of Pub. Stat., chaps. 145, 146; nevertheless it is binding upon the parties to the contract.

Medway v. Needham, 16 Mass. 159, 8 Am. Dec. 131; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Parton v. Hervey*, 1 Gray, 119.

It is not contended that the marriage is illegal, but that the father cannot, without his consent, be deprived of his right to his son's wages. The marriage took place without the knowledge or consent of the father, who has always claimed and taken his son's wages.

A marriage in one state in violation of the laws of another will not have the effect to emancipate the party to such marriage in the latter state.

Babin v. Le Blanc, 12 La. Ann. 367, affirming *Maillefer v. Saillet*, 4 La. Ann. 375. See also *Clement v. Wafer*, 12 La. Ann. 599.

A father is legally entitled to the wages of his minor son, and his marriage without the consent of his father does not of itself work his emancipation and entitle him to his earnings.

Benson v. Remington, 2 Mass. 118; *Taunton v. Plymouth*, 15 Mass. 204; *White v. Henry*, 24 Me. 531; *Bucksport v. Rockland*, 56 Me. 23.

Emancipation will not be presumed, but must be proved.

Sumner v. Sebec, 8 Me. 223; *Lowell v. Newport*, 66 Me. 78.

The law of England does in some cases privilege an infant under the age of twenty-one as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge or a highway, and other similar offenses; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires.

4 Bl. Com. 22, where is cited 1 Hale, P. C. 20-22.

The plea of infancy, when justified by the facts, is honorable and proper, and is not discouraged by the courts.

married. *Hewlett v. George*, 13 L. R. A. 682, 68 Miss. 708.

The question has frequently arisen in connection with the determination of pauper settlements.

In *Taunton v. Plymouth*, 15 Mass. 203, the court said the marriage may have removed the pauper from the control of his father, and perhaps have given him a right to apply all his earnings to the support of his family; but it did not give him the capacity to make binding contracts beyond other infants, or any political or municipal rights which do not belong by law to other minors; and it held that he could not acquire a new settlement of his own.

But it had formerly been held in that state that the marriage of a female infant prevents her taking the settlement afterwards acquired by her parents. *Charlestown v. Boston*, 13 Mass. 400.

And in Vermont it was decided that marriage of a male emancipates him within the provisions of the pauper law providing for the warning out of a town of persons coming thereto, to prevent their acquiring a settlement therein. *Sherburne v. Hartland*, 37 Vt. 529. See also *Bradford v. Lunenburg*, 5 Vt. 490; *Northfield v. Brookfield*, 50 Vt. 62.

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Marriage is recognized as an act which will permit a minor to gain a settlement apart from his father, in *Rex v. Witton*, 3 T. R. 855; *Reg. v. Selborne*, 2 El. & El. 275; and *Bozrah v. Stonington*, 4 Conn. 373.

Outside of his relation to his parents, a minor's marriage seems to have little effect.

The disabilities of infancy remain. *Bool v. Mix*, 17 Wend. 119.

An infant *feme covert* cannot execute a deed even in the statutory form. *Sanford v. McClean*, 3 Paige, 117, 3 L. ed. 80.

Marriage does not increase the minor's power over his real estate. *Porch v. Fries*, 13 N. J. Eq. 204.

Under the Louisiana Code a minor emancipated by marriage may dispose of her personal but not of her real estate. *Grigsby v. Louisiana Bank*, 3 La. 492.

After an interesting discussion of the Spanish Law of Emancipation by marriage, the court in *Burr v. Wilson*, 18 Tex. 367, concludes that the privilege of pleading infancy to a suit on a note was not removed.

H. P. F.

Delafeld v. Tanner, 5 Taunt. 856, 1 Eng. C. L. Rep. 486.

Mr. Charles N. Harris, Asst. Atty-Gen., for the Commonwealth:

The marriage of a minor gives him a right, as against his father, to apply all his earnings to the support of his wife.

Taunton v. Plymouth, 15 Mass. 208; *Davis v. Caldwell*, 12 Cush. 512; *Sherburne v. Hartland*, 37 Vt. 528; *Aldrich v. Bennett*, 68 N. H. 415, 56 Am. Rep. 529; *Burr v. Wilson*, 18 Tex. 867.

The marriage was valid in this Commonwealth. The defendant was nineteen years of age, and although the age of his wife does not appear, yet it not being shown that the parties separated during their nonage, that question is not open.

Parton v. Hervey, 1 Gray, 119; Pub. Stat. chap. 145, § 8.

The fact that the marriage was solemnized in another state by residents of this state, for the purpose of evading a provision of law not contained in the first five sections of Pub. Stat., chap. 145 (Pub. Stat. chap. 145, § 10) does not render the marriage invalid under the laws of this commonwealth.

Field, Ch. J., delivered the opinion of the court:

The exceptions recite that the "defendant was nineteen at the time of his marriage and twenty when the complaint was made." The age of the wife nowhere appears, but it was not contended that she was under the age of consent. If the marriage had been solemnized within the commonwealth, it would have been valid. Pub. Stat. chap. 145, § 6; *Parton v. Hervey*, 1 Gray, 119. It is not contended that the marriage was void by the laws of Maine, but we cannot take judicial notice of the statutes of Maine; and the common law of that state must be presumed, in the absence of evidence, to be the same as the common law of Massachusetts. See *Hiram v. Pierce*, 45 Me. 867, 71 Am. Dec. 555. Section 10, chap. 145, Pub. Stat., was intended to define the cases in which a marriage should be deemed void which was solemnized in another state by persons resident in this commonwealth, who went into the other state for the purpose of having the marriage solemnized there, and afterwards returned to and resided in this commonwealth; but the present case is not within this section. The general rule of law is that marriage contracted elsewhere, if valid where it is contracted, is held valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage void, or the marriage is one deemed "contrary to the law of nature, as generally recognized in Christian countries." *Com. v. Lane*, 118 Mass. 458, 18 Am. Rep. 509; *Sutton v. Warren*, 10 Met. 451; *Com. v. Hunt*, 4 Cush. 49. The consequences of this marriage must be the same as if it had been solemnized in this commonwealth; and the presiding justice, therefore, correctly ruled that this marriage "imposed upon the defendant all the duties

and responsibilities of the marital relation."

The real question is whether, when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was that the "wife would be entitled as of right to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest." It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation; and is not clear that the marriage of a minor son without his father's consent does not have the same effect, although the decision in *White v. Henry*, 24 Me. 581, is *contra*. It has been said that "the husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be master of himself, his time, his labor, earnings, and conduct." *Sherburne v. Hartland*, 37 Vt. 528. There seems to be little doubt that, when an infant daughter marries, she is emancipated from the control of her parents. *Aldrich v. Bennett*, 68 N. H. 415, 56 Am. Rep. 529; *Burr v. Wilson*, 18 Tex. 867; *Perch v. Fries*, 18 N. J. Eq. 204; *Rez v. Wilmington*, 5 Barn. & Ald. 525; *Rez v. Eberton*, 1 East, 526; *Northfield v. Brookfield*, 50 Vt. 62. See, however, *Babin v. LeBlanc*, 12 La. Ann. 367. The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In *Taunton v. Plymouth*, 15 Mass. 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family; and in *Davis v. Caldwell*, 12 Cush. 512, it was said that an infant husband is liable for necessities furnished for himself and his family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal, of his ward's property, to the maintenance of the ward and his family, under Pub. Stat., chap. 139, § 80. We are of opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that in every case in which the marriage is valid an infant husband should be entitled to all his earnings need not now be decided.

Exceptions overruled.

WISCONSIN SUPREME COURT.

FOND DU LAC WATER CO., *Appl.*,

v.

City of FOND DU LAC, *Resp.*

(.....Wis.....)

1. The assessment for taxation of the lots, whereon are the pumping station and works of a water company, separate and apart from the water mains, franchises, and other property constituting its plant is erroneous.
2. The water mains, franchises, etc., of a water company are not properly assessed for taxation by an entry in the tax book of an assessment against the lots on which the pumping works are situated by their numbers and that of the block in which they are situated; and such assessment cannot be enlarged or extended by parol proof of intention.
3. The board of review cannot obviate a defect in the assessment of property so as to sustain an unjust and excessive valuation of it as described by receiving proof of the value of property subject to taxation and alleged to have been intended by such description.
4. The rights and franchises of a water company are proper subjects for taxation under a statute requiring all property in the state not exempted to be taxed.
5. The board of review has no authority to increase the assessment of property described upon the roll as certain lots in a certain block so as to include the water mains, rights, and franchises of the water company which owns the lots and has located its pumping station upon them.
6. The board of review cannot arbitrarily raise the valuation of property as fixed by the tax assessor, without evidence or against the evidence, under a statute requiring it to hear and examine any person who shall appear before it in reference to any assessment and when satisfied from the evidence that the assessment is wrong to change it.

(Orton, J., dissents.)

(May 24, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Fond du Lac County dismissing the complaint and dissolving a preliminary injunction in a proceeding instituted to enjoin the levying of certain taxes against plaintiff's property until there had been a revaluation of it and a revision of the assessment. *Reversed.*

Statement by Pinney, J.:

This action was brought to enjoin and restrain the defendant city and its clerk from proceeding to levy taxes upon lots 87, 88, 89, 40, 48, 49, and 50, of block 26 of the original plat of the city, the property of the

plaintiff, valued for taxation in 1890 by the assessor at \$40,000, and increased by the board of review to \$55,000, until a revision and revaluation of the same might be had; and that, if the tax shall have already been levied, the defendants be restrained from delivering the warrant to the city treasurer until such revision could be had; and the plaintiff prayed for a perpetual injunction, and for such further and other relief in the premises as might be just, upon the ground, among others, that said assessment, and the increase thereof by the board of review, were largely in excess of the true valuation, and that the rule of valuation applied to it was different and of a higher rate than the rules of valuation applied to other corporate property of the same and kindred classes in the city; that the plaintiff was cited before the board of review to show cause why the assessment of \$40,000 should not be raised, and its treasurer appeared before the board, and asked for a reduction of the assessed value of \$20,000, and tendered proof on the subject of value, which the board declined to receive; that the board without proof or other inquiry, increased the assessment as aforesaid, instead of reducing it, which increase it is alleged was fraudulent, willful, and malicious. The answer denies these allegations, and alleges that at the time the value of the plaintiff's property was much greater than the valuation placed upon it by the board of review. The court found that on said premises, at the time of the assessment and levying of the tax, were located the pumping house and pumping machinery of the plaintiff, and appurtenant thereto, and connected therewith, were iron water mains and pipes extending under certain streets of said defendant, with hydrants and laterals attached, by means of which the plaintiff company carries on its business of supplying the defendant city and its inhabitants with water; that the plaintiff's said real estate, and the buildings and machinery thereon, and the water mains, pipes, laterals, and hydrants, cost and were worth at least \$150,000 at the time of the assessment and the action of the board of review; that the assessors of the city for 1890, in making their assessment, assessed plaintiff's said property, including said water mains, pipes, laterals, and hydrants, at the sum of \$40,000, and the board of review raised it to the sum of \$55,000; that during the session of the board of review the plaintiff appeared before the board, and made a statement of its earnings and expenses, and its treasurer was orally examined by said board in regard to the value of said property for taxation; that the assessment was made by the assessor and raised by the board in good faith, and not fraudulently, or with any intention to place

NOTE.—As to what should be considered as part of the franchise of a corporation for the purpose of taxation, see note to Yellow River Imp. Co. v. Wood County, *post*. —

As to the character of the mains, hydrants, etc.,

of a water company for purposes of taxation, see Oskaloosa Water Co. v. Oskaloosa Board of Equalization (Iowa) 15 L. R. A. 296, and note; Shelbyville Water Co. v. People (Ill.) *ante*, 505.

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an excessive valuation on said plaintiff's said property, and that the action of the board of review in raising the assessment was taken on sufficient evidence; that the full value of the property which could ordinarily be obtained therefor at private sale exceeded the valuation fixed thereon by the board of review, and that the assessment as fixed by said board was not excessive; that the income of the plaintiff from its property for the year 1890 was not less than \$16,000. The city clerk, and *ex officio* clerk of the board of review, testified to the appearance of the treasurer of the plaintiff company before the board of review, and filing with it a communication protesting against any increase of the assessors' valuation for the purposes of taxation of the property of the company, and asking that the assessors' valuation be reduced to correspond with the taxable value fixed on other property in the city somewhat similarly situated. This communication stated that the company has never declared a dividend; that its earnings do not clear its expenses; that it was hoped to make the property valuable; that it was organized with a capital stock of \$200,000, and bonded indebtedness of \$155,000; and its income last year from private sources was less than \$8,000; that its expenses exceed its income; officers' salaries, except superintendent, are not included, not being paid them; that the lots, buildings, and machinery, which were assessed at \$40,000, cost the company only about \$26,500, and insisting that \$15,000 or \$20,000 was a large present valuation of them for taxable purposes. By this communication he offered to submit to inspection the books of the company, and the treasurer offered to be examined under oath as to the truth of his statement. The clerk further testified that there was no proof taken under oath by the board of review in relation to this assessment; that the treasurer was sworn and repeated this statement, and no other proof was taken. On cross-examination he said there was no other record made than that L. Muentner appeared, in response to notice, was duly sworn, and made statement as to increase and expenses of the company, and presented a written document protesting against any increase of the assessors' valuation of the water-works, and requested that the valuation be reduced to correspond with the value of their property; that is all of the record testimony; that he did not remember that any other questions were asked him; that he read some other papers to the board besides those filed; that the assessment did not state the property included, the entry being, "The Fond du Lac Water Company, 48 feet of lot 37, all of 38, 39, 40, 48, 49, 50 of block 26, original plat, valuation by assessors, \$40,000." Question arose at the trial as to what was considered by the board of review as included in said assessment, or what formed the basis on which the board raised it. The court allowed the witness to testify, and other proof to be given, to show that the assessment was intended to cover the real estate, including the hydrants, mains, the plant, and connections generally of the plaintiff. Objection to this testimony

was made on the ground that there was nothing else entered on the roll than the mere description of the lots as a subject for taxation, but the court permitted the testimony to be given. It appeared, among other things, that the company had cast-iron mains and wrought-iron laterals, about four miles of mains through the town, and fifteen miles of pipe; and considerable other testimony was given on the trial tending to show that the entire property of the plaintiff, consisting of pumping works, mains, laterals, hydrants, and plant, was worth much more than \$55,000. The plaintiff put in evidence an ordinance of the city granting to the plaintiff corporation, during the term of its existence, the franchise and privileges stated in the opinion. The plaintiff corporation was organized under the general law of the state. Rev. Stat. chap. 86. The defendant called a member of the board of review to testify, in answer to a question, what property the board considered as pertaining to the lots assessed, in raising the valuation, which was objected to by the plaintiff, and he answered all the hydrants and pipes leading thereto and the plant; that the company had down at that time about fifteen miles and a half of pipe. The court held that the valuation placed by the board on said property was just and proper; and the tax was valid and lawful, and entered judgment dismissing the complaint, and dissolving the injunction theretofore granted. Exceptions were taken to the finding, particularly to that portion that the action of the board of review was taken on sufficient evidence, and that the court did not find that the increase by the board was a mere exercise of arbitrary power, and to the finding that the tax as fixed by the board was not excessive, and the part that the property assessed included water mains, pipes, laterals, and hydrants, etc.

Mr. E. S. Bragg for appellant.

Mr. J. W. Hiner for respondent.

Pinney, J., delivered the opinion of the court:

The corporation plaintiff was organized and exists as such under chapter 86, Rev. Stat., and by section 1780 had the power to make and enter into any contract with the city defendant to supply it with water for fire and other purposes, upon such terms and conditions as might be agreed upon, and might, by the consent of and in the manner agreed upon with its proper authorities, use any street, alley, lane, park, or public grounds for laying water pipes therein, provided no permanent injury should be done thereto and the city might by contract acquire the right to use the water supplied by such corporation, or such portion of it as it might desire, upon such terms and conditions as might be agreed upon by such corporation and the authorities of such city. The corporation plaintiff and the city entered into arrangements as contemplated by the statute, evidenced by an ordinance of fourteen sections, regulating their respective rights and duties. The more important pro-

visions of this ordinance consist of a grant to the plaintiff of the franchise for and during the term of its corporate existence, subject to the right of purchase, and the conditions and the forfeiture therein provided, "to erect, construct, complete, maintain, and operate water-works in said city for supplying it and the inhabitants thereof and its vicinity with water for public and private purposes, and to use, in the present and future limits of the city, subject to the limitations," etc., "therein fixed, the streets, alleys, public ways, and the bridges and beds of Fond du Lac river, and its forks, and of De Neveu creek and other waterways, for the purpose of laying, taking up, and repairing mains, pipes, hydrants, and other apparatus," vesting in the plaintiff all the powers possessed by the city, and which it could lawfully grant for that purpose, under its charter and acts amendatory thereof; and as the inducement for the plaintiff to enter upon the construction of such works, the franchise thereby vested in it was to remain in it during its term of corporate existence, and the city agreed to rent of it 140 hydrants for and during the term of thirty years from the completion of such works.

The company thus acquired, not only the corporate rights and franchises resulting from its organization under the general law, but the valuable and important franchises and rights granted to it by the city, which will doubtless increase in value from year to year as the city becomes more populous and prosperous. These franchises were grants in gross of incorporeal hereditaments, and not grants, appurtenant to any particular land, lots, or estate, in the strict technical sense of the term. They were granted to the plaintiff without reference to its ownership of these or any particular lots, and it was not necessary that it should purchase or own any lots or lands in fee to carry out its enterprise, and make the franchises with which it had been clothed, for important public purposes, available, as it might well secure all it needed as to lots or lands by a lease for a long period of years, with the right of renewal from time to time. The plaintiff corporation, though created primarily for private gain, was a quasi public corporation, clothed with an important public trust; and having secured these valuable rights, proceeded to lay its water mains and pipes to the extent mentioned in the preceding statement; but it built its pumping works and station on the several lots of land purchased by it, herein mentioned, as the subject of the assessment in question. The questions presented by the record are: (1) Whether an assessment of the several lots described in the complaint, on which the pumping works and station of the plaintiff are situated, merely by their numbers and the number of the block in which they are situated, is an assessment of the mains, pipes, hydrants, and the rights and franchises of the plaintiff, or merely of the lots themselves, and, if so, whether it is a valid assessment; (2) whether the action of the board of review in arbitrarily and without evidence raising the valuation of these lots, alleged to be excessive,

from \$40,000 to \$55,000, was void, so that the tax levied thereon should be enjoined.

1. Taxes are to be levied upon all property in this state, except such as is exempted therefrom, (Rev. Stat. § 1034,) and it will be seen that none of the property of the plaintiff hereinbefore mentioned is within the category of property exempt from taxation, (Rev. Stat. § 1038.) Inasmuch as the property of the corporation is not exempt, but is taxable, stock therein is exempt from taxation. Rev. Stat. § 1038, subd. 9. The franchises, rights, and privileges acquired as hereinbefore stated are property, the title to which is vested in the plaintiff, and the mains, pipes, hydrants, and machinery are really of little or no value without the franchises annexed, which render the use of them valuable and productive, and without which they could not be used or operated. In short, the entire plant and works are to this extent, no doubt, an entirety within the rule laid down in *Yellow River Imp. Co. v. Wood County* (Wis.) 51 N. W. Rep. 1004, 1005; and in this sense the lots in question, used with these franchises, mains, pipes, and hydrants, etc., are a part of such entirety, and are all taxable together as such, but not in separate parcels or items. In virtue of the intimate and necessary relation of the lots, and the mains, pipes, and hydrants, which extend to most parts of the city, with the franchises and privileges of the plaintiff, it would seem that, as a subject of taxation as well as of sale under judicial process, they are to be regarded as an entirety; and as the plaintiff is a quasi public corporation, a dismemberment or separation of the entire plant under such proceedings cannot be allowed, for the reasons fully set forth in the opinion of *Mr. Justice Cassoday* in the case above referred to, wherein it is stated that "the cases go upon the theory that the rights, franchises, and plant essential to the continued business and purposes of such corporations are not to be severed, broken up, or destroyed without express legislative authority, but, on the contrary, are to be preserved in their entirety." This rule applies, however, only to property and lots, the use of which is essential to the exercise and enjoyment of the franchises of the corporation. All such property of the corporation must be regarded and entered upon the assessment roll, and treated throughout, for all purposes of taxation, as an entirety, and valued as such. Property not so annexed and necessary or essential to the exercise and enjoyment of the franchises of the corporation may properly be treated and dealt with separately, as in the case of property belonging to a natural person. Within this rule, the assessment and taxation of these particular lots whereon the pumping station and works of the company are situated, separate and apart from the rest of the property, and merely as so many lots, cannot be justified. It is not necessary to do more than refer to the rule so well stated in that case, and abundantly fortified by the best-considered cases on the subject.

The only subject of taxation entered upon

the assessment roll in this case is simply certain specified lots in block 26, without the least reference to the works of the plaintiff, its mains, pipes, and hydrants, or its corporate rights or franchises, either in detail or as a plant or entirety. The proceeding must be regarded and treated as one against the lots only, particularly as it does not appear that the franchises, mains, pipes, etc., are by the grant by which the company holds the title to the lots made appurtenant thereto, nor are the rights, franchises of the plaintiff, etc., made appurtenant to the lots by the grant under which it received them. All that can be reasonably claimed is that the word "appurtenances" will carry with it easements and servitudes used and enjoyed with the lands for the benefit of which they were created. Even an easement will not pass as an appurtenance unless it is necessary to the enjoyment of the thing granted. *Lanthicum v. Ray*, 76 U. S. 9 Wall. 243, 19 L. ed. 657; *Humphreys v. McKissock*, 140 U. S. 813, 314, 85 L. ed. 476, 476. The only union between the subjects mentioned is in their use to enable the plaintiff to carry out the purposes of its corporate existence. It cannot, we think, be contended that a sale of these lots under the tax levied upon this assessment, as thus specified and entered upon the roll, could be followed by a tax deed that would be operative to convey the mains, pipes, hydrants, and franchises and privileges of the plaintiff. If the taxing officers designed to proceed against and assess for taxation this entire property, it was certainly indispensable that it should have been entered upon the roll by some general, yet, apt, words, describing it as embracing the plant, pipes, and franchises, as a subject of assessment, with reasonable certainty.

The assessment of the lots, as such merely, cannot be extended or enlarged by parol proof of intention, nor could the assessors or board of review obviate the defect by receiving proof of the value of property of the plaintiff subject to taxation, but not properly entered on the roll, to sustain or justify an assessment of the specific property entered, at an unjust and excessive valuation for it, as thus entered. It is entirely plain from the evidence that the assessor, as well as the board of review, in valuing the lots included in their valuation the entire value of the mains, pipes, hydrants, etc.,—in short, of the entire plant, works, and franchises of the plaintiff; and their action in thus making such valuation of the lots was attempted to be sustained at the argument. The valuable rights and franchises of the plaintiff would not pass by a mere conveyance of the lots, without further description, and without these rights and franchises the pumping works, mains, pipes, and hydrants, would be of little or no value, and, as we have seen, could not be used or operated at all.

It was contended by the appellant that these rights and franchises are not taxable, and authorities under the New York statute were cited to that effect. *Borel v. New York*, 2 Sandf. 552; *People v. Brooklyn Assessors*, 89 N. Y. 81. If it could be maintained that the franchises and privileges in question

cannot be taxed, and as without them the works of the plaintiff will be of little or no value, then it would be plain that the valuation of the lots is grossly excessive. But we think that our statute is broader in its terms, requiring all property not exempted to be taxed, and that it not only justifies, but requires, that the franchises and privileges of a corporation, which are clearly property of the corporation, should be taxed. By section 1035, Rev. Stat., it is provided that the terms "real property," "real estate," and "land," in the statute relating to taxation, "shall include, not only the land itself, but all buildings, fixtures, improvements, rights, and privileges appertaining thereto;" and this statute, it is urged, warrants the assessment as made in this case. But this statute does not imply that such property as the mains, pipes, and hydrants, with the rights and franchises of the plaintiff by which alone its works are made valuable and productive, can be assessed by a mere description of the lots on which the pumping works are situated, and this, too, without any reference to the water-works in connection with which the lots are used. Indeed, the water-works and franchises of the company are the principal thing, to which the ownership and use of the lots in connection therewith is in a practical point of view rather an incident, instead of being the principal thing, embracing in their description the water-works and franchises of the company. We hold, therefore, that the assessment on the roll returned to the board of review by the assessor was not sufficient to lay any foundation for or to give the board jurisdiction to make a valuation of the entire property, as against these particular lots.

2. It was held by this court, under the Statute in force from 1868 to 1871, (Laws 1868, chap. 180, § 25,) both as to real and personal estate, that the board of review could not arbitrarily increase the valuation of the assessor without any proof being furnished, but could do so only upon the testimony of persons examined under oath, and that all examinations were required to be reduced to writing, and carefully preserved on file in the office of the clerk; that, if the board proceeded without such proof, its act in raising the valuation "would be unauthorized, and impose no obligation upon the property owner to pay the taxes." *Phillips v. Stevens Point*, 26 Wis. 594, 596; *Steele v. Dunham*, 26 Wis. 394; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 452, 9 Am. Rep. 591. In the latter case the court says: "The board arbitrarily affixed values to the property, in utter disregard of the sworn statements of witnesses examined before them. This action of the board was wholly unauthorized, and plainly in excess of their jurisdiction. There was no conflict in the testimony whatever. The board were bound to take these uncontradicted statements of the witnesses under oath as to the value of the property, and should have corrected the assessment accordingly. . . . Where there is a conflict of evidence, and the real facts are in dispute, the decision of the board fixing the valuation might well be held final.

It appeared from all the evidence that the real estate of the company had been valued too high by the assessor, and the law required them to act upon that evidence, and fix a valuation in accordance with it." Such was clearly the law applicable to the proceeding in the present case before the board of review; for although the section referred to was amended by chapter 166, § 1, Laws 1871, by adding a proviso by which the board of review were authorized to increase or diminish the assessors' valuation without hearing witnesses, as explained and held in *McIntyre v. White Creek*, 48 Wis. 620, and *Shore v. Manitowoc*, 57 Wis. 7, yet the section as revised, and now appearing as section 1061, Rev. Stat., is the same in substance, as to the matter here in question, as the Original Act of 1868, with power granted to the board to compel the attendance and examination of witnesses. The board, by Rev. Stat., § 1061, are required, "under their official oaths, to carefully review and examine said roll and statement, and all valuations of real and personal property," and they are required "to hear and examine any person or persons who shall appear before them in relation to the assessment of any property upon said roll; . . . and if it shall appear that any property has been valued by the assessor too high or too low, they shall increase or lessen the same. The board of review shall, when satisfied from the evidence taken that the assessor's valuation is too high or too low, lower the same accordingly, whether the person assessed appear before them or not; . . . but they shall not raise any assessment . . . unless the person assessed, if a resident of the town, city, or village, shall have been duly notified in time to appear and be heard before the board in relation thereto;" and the clerk is required "to keep a careful record of all changes made and valuations determined on by the board, and shall reduce to writing and preserve the examinations and the statements of every person and witness taken by the board."

The claim that the board of review may arbitrarily, and without evidence, raise the valuation of real estate by the assessor, and that the provisions requiring them to act only upon and according to evidence for that purpose apply only to valuations of personal estate, derives no support from the language of the Act, or the decisions of this court made under it. The case of *McIntyre v. White Creek*, 48 Wis. 620, was decided while the proviso of 1871 was in force, and before the section as thus amended was revised and materially changed, requiring the action of the board in all cases to be based on the evidence taken, and that the evidence shall be reduced to writing and preserved. The case of *Shore v. Manitowoc*, 57 Wis. 7, related only to personal estate, and there is nothing in the case to warrant the inference that any different rule applies under the statute as it now stands, in the case of real estate, than in respect to personal estate.

There is no competent evidence to show that any other witness was sworn and examined before the board than Muentner, the treas-

urer of the company, nor that any testimony was given materially controverting his statement. The testimony of the city clerk is positive and decisive on this point, and the statement of the treasurer, uncontradicted, shows that the assessment should have been reduced. It did not appear from any proper evidence adduced before the board that the assessment ought to be raised. The statute regulates the method of proceeding before the board, and any action not in conformity with its warrant was without jurisdiction, and void. The radical departure from the course of proceeding prescribed by the statute, resulting in the arbitrary raising of the valuation without and against the evidence, when it ought to have been lowered upon the showing made, deprive the plaintiff of important rights secured by the law, going to the justice and ground-work of the tax levied on the increased valuation, and entitles the plaintiff to relief just as clearly as if, having paid the taxes under protest or duress of property, it had brought an action for money had and received, which is an equitable action, to recover it back, and in which it would be entitled to recover under the decision in *Phillips v. Stevens Point*, 25 Wis. 596.

For these reasons the judgment of the circuit court must be reversed, and the case remanded for further proceedings according to law.

Orton, J., dissenting:

I fully agree with the decision and opinion in this case on the questions legitimately presented by the record. The complaint is: (1) That the assessor, in valuing the lots and the buildings, reservoirs, and machinery thereon, took into consideration the water mains, lateral pipes, and conduits connected therewith for distributing the water throughout the city, together with the rights, privileges, and franchises of the company under which they were used, as appurtenant thereto, and enhancing the value thereof, and by reason whereof assessed said lots and improvements thereon 100 per cent higher than their true value. (2) That the board of review arbitrarily, and without evidence, raised said assessment \$15,000, notwithstanding the company plaintiff appeared before them, and attempted to show that said assessment was too high, and asked for a reduction thereof. These were the only questions before this court, and the decision is: (1) That the assessment was illegal and void by reason of the assessor so taking into consideration the mains, pipes, etc., and the franchises of the company, as appurtenant to said lots, and as enhancing their value. (2) That the adjudication of the board of review was void, because arbitrary and without evidence. To the decision and opinion, to this extent, I fully assent, and submit and protest that these were the only questions before the court, and the only questions presented or argued by counsel on either side. But the able and learned opinion is carried much further, so as to embrace and decide one of the most important and doubtful questions connected with the subject of taxation, and a question entirely new to this court, and

not presented by the record in this case, or by counsel outside of it, and to establish a principle against the universal practice of the taxing officers of this state, so far as I have been able to ascertain. That question is: Are the franchises of this corporation assessable as its property, separate and distinct from its other property? It is decided in this case that its lots and improvements thereon ought not to have been assessed in connection with the mains, pipes, etc., and the franchise as appurtenant thereto. The lots are the subject of taxation in the list, and the mains, pipes, etc., and franchises are considered only as appurtenances thereto

to enhance their value. There was no assessment of franchises, as separate property in the case. But outside of the case it is decided, also, in the opinion, that the franchises of this corporation are assessable, separate and distinct from its other property. From this part of the opinion I most respectfully dissent. I do so, however, not because I might not have the same opinion if the question should be raised in a proper case, but because the question is not presented in this case. It will be timely to decide such an important question when it is presented, and fully argued, examined, and considered.

SOUTH CAROLINA SUPREME COURT.

Ex Parte Daniel Huger BACOT.

(.....S. C.....)

1. **The condemnation of the right of way for a railroad to be built by a manufacturing company** to connect its manufacturing establishment with another railroad may be authorized by statute under Const., art. 1, § 23, declaring that private property shall not be taken or applied "for public use or for the use of corporations or for private use" without consent of the owner or just compensation, but providing that laws may secure to persons or corporation a right of way for works of internal improvements by payment of just compensation.
2. **The general law upon the subject of highway crossings** by railroads applies to such crossings by a railroad built under the South Carolina statutes merely to connect a manufacturing establishment with another railroad.
3. **The title "An Act to Provide for the Promotion of Certain Corporations under General Laws"** is sufficient to include the powers to be given to such corporations.

(April 12, 1892.)

APPPLICATION for a writ of certiorari to the clerk of the Court of Common Pleas for Colleton County to remove into the Supreme Court certain proceedings which had been instituted to procure a right of way over petitioner's land, and which were alleged to be illegal because of the unconstitutionality of the statute under which they were instituted. *Denied.*

The facts are stated in the opinion.

Mr. Thomas W. Bacot, for petitioner:

The convention which adopted the Constitution when using the words of the 25th section of article 1 of the Constitution had in mind the meaning as well as the principles of "eminent domain."

As to the meaning of "eminent domain," see *Cooley*, Const. Lim. chap. 15, p. 524;

NOTE.—As to the constitutionality of condemnation proceedings to establish a private road, see *Latah County v. Peterson* (Idaho) *ante*, 51, and *note*, 16 L. R. A.

Mills, Em. Dom. § 1, p. 1; *Lewis*, Em. Dom. § 1, p. 1.

The underlying immutable principles of eminent domain have ever been that the purpose for which the right may be exercised must be a public purpose.

Cooley, Const. Lim. chap. 15, p. 530; *Mills*, Em. Dom. chap. 2, § 10; *Lewis*, Em. Dom. chap. 7, § 157; 4 Wait, Act. & Def. p. 621; *Louisville, O. & O. R. Co. v. Chappell*, 1 Rice, L. 383; *State v. Dawson*, 3 Hill, L. 107; *South Carolina R. Co. v. Blake*, 9 Rich. L. 234; *Feldman v. Charleston*, 28 S. C. 57; *Palairé's App.* 67 Pa. 479; *Edgewood R. Co's App.* 79 Pa. 257; *Pinney v. Somerville*, 80 Pa. 59, 6 Am. & Eng. Encyclop. Law. 526, *note* 10, citing *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, 6 Am. & Eng. Encyclop. Law, 609, *note* 10, 515, *notes* 3 and 52; 4 Am. Lead. Cas. Real Prop. 436-443.

The Constitution is not a grant of power to the state but only apportions and imposes restrictions upon the powers which the state inherently possesses and has never been without.

Cooley, Const. Lim. pp. 1, 36, 37.

Constitutional provisions as to taking of property (such as those in our present Constitution) are limitations upon the power of eminent domain as vested in the legislative department of the state, and are neither to be regarded as declaratory of what the law would be without them nor as grants of the power in question to the Legislature.

Lewis, Em. Dom. p. 22, and *note* 4.

If the section means what respondents would have it mean, then the framers would be in the absurd position of having endeavored to contravene a fundamental and absolute right and rule of civilized society and free government which must underlie every Constitution.

See also *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275.

In the case of *Sholl v. German Coal Co.*, 8 West. Rep. 94, 118 Ill. 427, it was distinctly held that land belonging to a private individual is not subject to condemnation for the extension of a tramway belonging to a corporation organized for the purpose of mining.

See also *People v. Pittsburgh R. Co.* 53 Cal. 694.

Mr. W. Perry Murphy, for respondents: The power of the Legislature to provide for

the taking of private property for private use, to wit, a right of way, was fully recognized in *State v. Stackhouse*, 14 S. C. 417.

Before the adoption of our present Constitution, the several Constitutions of this state contained no provisions on the subject; and yet proceedings were constantly instituted in the courts of this state for the purpose of condemning private property for public use and quasi public use.

Lindsay v. Street Commissioners, 2 Bay, 38; *Stark v. McGowan*, 1 Nott & McC. 387; *Patrick v. Charleston Neck Cross Roads Comrs.*, 4 McCord, L. 541; *State v. Dawson*, 3 Hill, L. 100; *Louisville, O. & C. R. Co. v. Chappell*, 1 Rice, L. 583; *State v. Charleston*, 12 Rich. L. 702.

Up to the time of the adoption of the present Constitution, the following points had been fully settled:

That the right of eminent domain existed, and could be exercised as incident to, and as inseparable from, the state's sovereignty.

That private property could be taken for public use, without express grant in the Constitution, and without compensating the owner.

That the state (sovereign) had the power to delegate this authority to a corporation; and therefore, that the provision, in a Constitution, providing for taking private property for public use, on condition that compensation was made to the owner, was not an enabling clause, but one restricting the exercise of the power.

Building up the phosphate industry is a public use.

See *Cooley*, Const. Lim. 659; *Harvey v. Thomas*, 10 Watts, 63, 86 Am. Dec. 141; *Hays v. Risher*, 82 Pa. 169; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 562; *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67; *Biljings v. Hall*, 7 Cal. 22; *Sherman v. Buick*, 32 Cal. 255, 91 Am. Dec. 577; *People v. Gallagher*, 4 Mich. 250; *Sharpless v. Philadelphia*, 21 Pa. 167, 59 Am. Dec. 759; *West Virginia Transp. Co. v. Volcanic O. & C. Co.* 5 W. Va. 382.

If the property taken in any way inure to the public benefit or advantage, it is a public use.

Lewis, Em. Dom. 165; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694; *Norfleet v. Cromwell*, 70 N. C. 684, 16 Am. Rep. 787; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Dayton G. & S. Min. Co. v. Seawell*, 11 Nev. 394.

The state has the right to delegate to a corporation the exercise of the power of eminent domain. Acting under its charter, the company has the right to determine what particular land is necessary and best suited for its purposes, upon which and over which to construct and operate its railroad, and the court has no right to interfere with the exercise of this power.

Louisville, O. & C. R. Co. v. Chappell, 1 Rice, L. 583; *Ex parte South Carolina R. Co.* 2 Rich. L. 434.

Messrs. A. S. Farrow and John D. Edwards also for respondent.

McGowan, J., delivered the opinion of the court:

This is an application to this court, in its original jurisdiction, for a writ of certiorari. The facts are somewhat complicated, 16 L. R. A.

and it will be necessary to make a statement as condensed as possible to be intelligible.

The petition of Daniel H. Bacot, among other things, states that on or about August 20, 1890, a paper was served upon him signed by Howell, Murphy & Farrow, and Edwards, attorneys of the Horseshoe Mining Company, purporting to be a notice that said company required a right of way over a tract of land known as the "William Lowndes Tract," alleged to belong to the petitioner, (the same paper being served also upon others, as to other tracts of land.) That the petitioner served upon said attorney a return in writing, showing that he was not the sole owner of the said tract; that although the legal title was in himself alone, yet the real owners thereof, besides himself, were his mother, Julia A. Bacot, and his brothers and sisters, (naming them,) reserving to himself any objection to said notice, and signifying his refusal of consent to enter upon said lands without previous compensation. Other land-owners also signified their refusal to consent to the entry upon their lands without previous compensation. That thereupon the Horseshoe Mining Company applied by *ex parte* petition to his honor, Judge Aldrich, for an order to impanel a jury to assess the damages or compensation for the right of way required, which order was granted, directed to the clerk of Colleton county, commanding him to impanel a jury for the purpose aforesaid; and the said clerk, in obedience to said order, gave notice to the parties in interest of the time and place appointed for impaneling the jury, etc. Before the day fixed for drawing a jury, upon the suggestion of the petitioner, a rule was issued, requiring the said company to show cause why a writ of prohibition should not issue to prohibit further proceedings in the matter of the right of way, which, after return and argument, Judge Aldrich refused. From this order of refusal, notice of appeal was given; but as we understand it, upon some agreement and by consent of parties, the appeal was "withdrawn without prejudice," and this proceeding for a writ of certiorari was instituted.

The petitioner insists that in a proceeding to acquire such right of way as the said company is said to require an appeal is allowed on the question of compensation only, and that the tribunal constituted by the General Assembly for the subject-matter of conducting proceedings to acquire rights of way by railroad corporations, though having general jurisdiction of the subject, has yet not acquired jurisdiction in the proceedings sought to be instituted on behalf of the said Horseshoe Mining Company, "and said proceedings are an unwarranted invasion of the rights of your petitioner, and the other owners of said lands, and are illegal and void, and also irregular, on the following grounds, and for the following reasons: *First*. Because the Act of December 23, 1886, or rather the 15th section hereof, is unconstitutional, in that it is repugnant to or in violation of article 1, § 23, of the Constitution of the state, and the underlying and immutable principles of so-called 'eminent domain;' the road proposed

to be constructed and operated by the said Horseshoe Mining Company over the aforementioned tract of land being for its own private use and purposes, and other than a right of way by necessity, and not for a public or even quasi public purpose or use. *Second.* Because the said proposed road will cross a public road or highway without authority so to do, and to the serious obstruction thereof to your petitioner and others aforesaid. *Third.* Because the said company is not authorized by its charter or otherwise to construct a railway, canal, turnpike, or other public highway in the state. *Fourth.* Because (a) the said company has given no notice as required by section 1550 of the General Statutes; (b) that said company did not apply by petition to the judge, etc., as required by section 1551, Gen. Stat.; (c) the petition by which application was made to Judge Aldrich did not set forth a description of the lands, in that it did not state where they were situated, nor did it set forth the names of the owners of the said William Lowndes tract, as required by section 1551, Gen. Stat.; (d) the application by petition to Judge Aldrich, and his order thereon, of September 26, 1890, were *ex parte*, and without any notice whatever thereof to the owners of said tracts of land, or any of them, and therefore in violation of the said section 1551, and of article 1, § 14, of the Constitution of the state; (e) and the clerk of the court of common pleas of the county of Colleton did not give notice of the order of Judge Aldrich of September 24, 1890, to your petitioner, or to any of the other owners of said tracts, as required by said section 1551; (f) it is not shown that the proposed road is to connect with some navigable stream, or with some existing railroad, turnpike, or other public highway, and does not exceed ten (10) miles in length. *Fifth.* Because the said proceeding is otherwise irregular, in that (a) the same proceeding for such purpose cannot be had against separate and distinct owners of separate and distinct tracts of land jointly; and (b) such a proceeding should be against all the owners of a tract of land through which right of way is acquired, and cannot be against one of them only for all." Wherefore the petitioner prayed to be relieved, and that said proceedings might be removed to this court, and that a writ of certiorari be directed to the clerk of the said court of common pleas of the county of Colleton, commanding him, without delay, to certify the said proceedings and record, together with all papers thereto appertaining, that such further proceedings may be had as to this honorable court shall seem meet, etc. The Horseshoe Mining Company, having been served with a rule to show cause why the writ should not issue, answered, among other things, as follows: It is a mining company incorporated under and in pursuance of the law of the state, contained in an Act "to Provide for the Formation of Certain Corporations under General Laws," which said Act authorizes the company to construct and operate a railroad for its own use and purposes, to and from its works, with some existing railroad; and

for that purpose the company is authorized and empowered to condemn for the use of such road the right of way in lands over which the road may pass on payment to the owner thereof of "just compensation;" such compensation to be determined in the manner provided by law for railroad corporations. That finding that a railroad was necessary for the purpose of conducting its business, through its attorneys thereunto duly authorized, it caused the notice required by law to be served on the petitioner and others, requiring a right of way over his and their lands, for the purpose of constructing a railroad "from its works to Ashepoo station, and there connecting with an existing railroad, to wit, the Charleston & Savannah Railway; said railroad to be five and one-half miles in length. That about two and one-half miles had been previously constructed, and a temporary landing secured, on leased premises on the Ashepoo river, but the short line was and is wholly inadequate to the business necessities of the company. That the company has erected expensive works, putting in costly machinery, and has expended large sums of money in the development and prosecution of its business, employing many men in its mining operations. The return then goes on to set out in a formal way matters referred to in the petition, as to the notice to the petitioner and others that certain lands were "required" for the purpose aforesaid, their refusal to give consent without previous compensation, and making full exhibits of said answers; and after stating the proceedings by petition to have a jury impaneled to assess the damages, and the application of the petitioner for a writ of prohibition, which was refused, the respondent company prays that the writ may be refused, and for costs. The questions involved in this case have been argued with learning, showing much research on both sides. We have very grave doubts whether this is a proper case for certiorari. The proceeding below is not finished, but is still in progress. We do not understand that the clerk of the court of common pleas of a county is an "inferior court," in the sense of the limit on the authority of this court to issue such a writ. In proceedings to assess damages for a right of way the clerk has certain duties to perform, in impaneling a jury, etc.; but that is rather ministerial in character, done under the orders of the court of common pleas, whose officer he is. What right have we to order the clerk of Colleton, who is not before the court, to certify up the record of certain proceedings of the court of common pleas? And, if we had the power, what record could he certify to this court, except, perhaps, the order made, on which he acted, and his own notice to the parties of the time and place appointed for drawing a jury? The real matter in contention is not the single act of the clerk in giving notice as to the organization of the jury, but it lies further back, as to whether the circuit judge could make the order to assess damages without having first determined the rights of the parties. But as it concerns the correct administration of the law that the question raised by the relator

should have a solution, and as it seems to be conceded that prohibition is not the remedy, and that there has been some agreement between the parties on the subject, we have concluded to consider the case; remarking, however, that it must not be drawn into a precedent, as we make no ruling upon the subject. Upon an application for a writ of certiorari, this court cannot be expected to try the whole case *de novo*, with its numerous parties and details, involving questions of procedure, practice, regularity, etc. We regard it settled, at least in this state, under our Constitution, that the jurisdiction of the supreme court embraces the writ of certiorari only when necessary to exercise a general supervisory control over an inferior court; that is, especially in respect to its jurisdiction and not to determine whether, in the matter complained of, it has committed errors of law or of fact. *Ex parte Childs*, 12 S. C. 111; *State v. Fort*, 24 S. C. 516; *State v. Columbia*, 16 S. C. 413, 17 S. C. 80.

Now, the only question is whether any of the grounds urged for the writ of certiorari are necessary to enable this court to exercise a supervisory control over the court below. Assuming for the present that the Act incorporating the Horseshoe Mining Company is constitutional, the circuit court had jurisdiction of the subject-matter, and the procedure was to be in the manner provided by the general law for railroad corporations. Sections 1550 and 1551, Gen. Stat., provide as follows: "Whenever any person or corporation shall be authorized by charter to construct a railway, canal, turnpike, or other public highway in this state, such person or corporation, before entering upon any lands for the purpose of construction shall give to the owners thereof (if he be *sui juris*) notice in writing that the right of way over said lands 'is required' for such purpose, which notice shall be given at least thirty days before entering upon said lands.

... If the owner of such lands shall signify his refusal of consent to entry upon his lands without previous compensation, the person or corporation requiring such right of way shall apply by petition to the judge of the circuit where such lands are situated for the impaneling of a jury to ascertain the amount which shall be paid as just compensation for the right of way required, in which petition shall be set forth a description of the lands, the names of the owners, the purposes for which the lands are required, and such other facts as are deemed material. On the hearing of such petition the circuit judge shall order the same to be filed in the office of the clerk of the court of common pleas, to impanel a jury," etc.

Having jurisdiction of the subject-matter did the court acquire jurisdiction of the persons of the landowners by following the above directions of the law as to notice, petition for jury, etc.? In reference to the objection embraced in the fifth ground for the writ, we think there is nothing beyond possible irregularity. Whether, in a proceeding to acquire a right of way over land, several landowners may be joined, or whether all the

parties having equitable interest must be served with personal notice, are questions merely of practice, and are certainly in no way jurisdictional. See *Tompkins v. Augusta & K. R. Co.* 21 S. C. 431; *Tutt v. Port Royal & A. R. Co.* 28 S. C. 399. In reference to the numerous objections in the fourth ground for the writ, we would make the same general remark. It might possibly become a jurisdictional question if the court were proceeding to judgment without giving the parties any notice, but we see no reason why the company could not give notice and file the petition by attorney. The parties seem to have been notified, and the objection is rather as to the manner in which it was given. That the parties had notice is shown by their appearing and making return that "they refused consent without previous compensation," and also by the fact that they are here resisting the proceeding. It is true that the parties in their original return did not do more than refuse consent without compensation, and did not in express terms deny the right of the company, as was done in the case of *State v. Columbia & A. R. Co.*, 1 S. C. 50. But it seems to us that it might have been better if the law had required that the petition to the judge to appoint a jury to assess damages should be served on the parties, so that they might, then and there have made the question of right. It is, however, enough for us to say that the law did not require it. As to the alleged description of the land, see *Ex parte Bennett*, 26 S. C. 319.

1. Then as to grounds urged for the writ, alleging that the 15th section of the Act of 1886, under which the Horseshoe Mining Company was incorporated, is unconstitutional and void. We will suppose that question to have been considered by the circuit judge when the *ex parte* application was made to him for the order to impanel a jury to assess the damages, and in granting that order that he assumed its constitutionality. The relator, however, complains that he was not heard on that question, and that he could not now appeal to this court, except as to the amount of damages. Is that a jurisdictional question? The matter is important, and although the relator did not, in the first instance, deny the right, we think he should be heard upon this subject. The Act of December 28, 1886, is entitled "An Act to Provide for the Promotion of Certain Corporations under General Laws," (19 Stat. p. 540,) of which section 15 reads as follows: "Corporations organized under the provisions of this Act, for mining or manufacturing purposes, shall have power to construct and operate a railroad, tramway, turnpike, or canal, for their own use and purposes, to and from their works or place of business, or to connect with some navigable stream or with some existing railroad, turnpike, or other public highway, not to exceed ten miles in length, and shall have the right to condemn for the use of such road the right of way in lands over which the road may pass, on payment to the owner thereof just compensation, such compensation to be determined in the manner now provided by law

for railroad corporations." Under and by authority of this section the secretary of state, J. Q. Marshall, Esq., on March 29, 1889, certified that the Horseshoe Mining Company had been fully and regularly "organized" according to the laws of the state, under the name and for the purposes indicated in their declaration. The question now is whether section 15 of the Act of 1886 is constitutional; for, if so, we may consider it as incorporated into and made part of the certificate or charter. The question is a new one in the state. Having no beds of coal, we have had occasion for very little mining until the phosphate beds were discovered and are being developed. Article 1, § 23, of the Constitution, declares as follows: "Private property shall not be taken or applied for public use, or for the use of corporations or for private use, without the consent of the owner, or a just compensation being made therefor: provided, however, that laws may be made, securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvements, the right to establish depots, stations, turnouts, etc.; but a just compensation shall in all cases be first made to the owner." This court has often had occasion to say that it is no small matter to declare an Act of the Legislature unconstitutional. Mr. Cooley (Const. Lim. § 87) says: "That the constitutionality of a law must be presumed until the violation of the Constitution is proved beyond all reasonable doubt, and a reasonable doubt must be resolved in favor of legislative action, and the Act be sustained." In the light of this safe and sound principle, is the aforesaid section of the Act of 1886 repugnant to the Constitution? Is it beyond doubt in violation of it, either in express terms or in spirit? The provision above quoted of the Constitution, as its terms indicate, was inserted for the double purpose of maintaining the sanctity of private property, and at the same time of promoting internal improvements, especially in respect to rights of way over lands, and in establishing stations, etc., to facilitate transportation. It will be observed that the powers given in section 15 of the Act of 1886 are limited to mining and manufacturing purposes; that the railroad to be constructed and operated must "run to and from the works" of the company, or connect with some navigable stream or some existing railroad and not to exceed ten miles in length. It would seem that a railroad to run to and from the phosphate works of the company, five and one-half miles, to Ashpoo station, on the Charleston & Savannah Railroad, is not repugnant to the aforesaid provision of the Constitution, but on the same plane, and in exact conformity thereto. The objection seems to touch more the Constitution itself than the Act. It is urged, however, that the Horseshoe Mining Company is a "private corporation," and therefore may not condemn lands for a right of way, even after paying a just compensation; that an attempt to do so is an invasion of the proprietary right of the landowner, and in violation of the Constitution. It certainly does not seem to violate the

words of the Constitution, as above cited,— "that laws may be made, securing to persons and corporations the right of way over the lands of either persons or corporations," and for works of internal improvement, to establish depots, etc. Mr Lewis on Eminent Domain, at pages 162 and 238, says: "The necessity or expediency of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy, and belong to the legislative department of the government." The matter is somewhat like the Lateral Railroad Act of Pennsylvania, which was declared constitutional; and, in delivering the judgment of the court, Mr Justice Woodward said: "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use, but for public use,—for clear and definite objects of a public nature, which are of sufficient importance to attract the sanction of the sovereign." We think it unnecessary, however, to say more upon the subject than to quote our own case of *State v. Stackhouse*, 14 S. C. 422, in which it was held that the Act of 1872, which empowers a landowner to secure a right of way over the lands of another, violates none of the provisions of the Constitution of this state. In delivering the judgment in that case the late chief justice construed the provision of the Constitution now under consideration (sec. 23) in connection with section 14 of the first article, and said: "Hence the framers of the Constitution, while recognizing the sanctity of the rights guaranteed in the first section, (14,) thought proper to make provision in the second, (23,) not only in the appropriation of private property for public use, but in the matter of the right-of-way property even for private use; and, to this end, in the second section above will be found an express grant of power to the Legislature to secure by proper laws a right of way both to corporations and to persons over the lands of others upon just compensation being first made to the owners of said lands."

2. As to the proposed railway crossing a public highway. In the view that the company was granted the power to construct and operate the short road to and from its works, we can see no reason why the general law upon the subject of such crossings should not apply to this proposed railroad as well as to others.

3. We have already held that the Horseshoe Mining Company has all the powers embraced in section 15 of the Act of 1886; and, as we understand it, that gives the power to construct and operate the railroad to and from the works of the company, connecting with the Charleston & Savannah Railroad at Ashpoo, and as an incident the right to condemn for the use of the road the right of way over intervening lands, upon paying just compensation. Then as to the supplemental objection in reference to "the title" of the Act of 1886. That Act is what is called a "General Incorporation Act," as its title indicates: "An Act to Provide for the Promotion of Certain Corporations under General Laws." We do not think that it is

contended that the Act, as such, is necessarily unconstitutional and void. In its very nature, various matters were to be considered under it; somewhat like an appropriation Act with a general title covering many particulars. The "subject" was the promotion of certain corporations, and it would seem that the right to form corporations would include the powers to be given to such corporations. How else could they be "formed?" "When an Act of the Legislature expresses in its title the object of the Act,

the title embraces and expresses every lawful means to achieve the object; thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in the title." *San Antonio v. Mehaffy*, 96 U. S. 815, 24 L. ed. 817, cited by *Chief Justice* McIver in our own case of *Connor v. Green Pond W. & B. R. Co.*, 28 S. C. 427, which we regard as conclusive of the matter here.

The writ of certiorari is refused.

McIver, Ch. J., and Pope, J., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Joseph E. STANWOOD

v.

City of MALDEN.

(.....Mass.....)

The discontinuance of part of a street does not entitle a landowner to any damages if his access to the system of public streets remains substantially unimpaired although he finds travel less convenient and his shop has suffered by the diversion of travel.

(June 23, 1892.)

REPORT by the Superior Court for Middlesex County for the opinion of the Supreme Judicial Court of an action brought to recover damages for the discontinuance of a portion of a highway which was alleged to have decreased the value of plaintiff's property, in which a verdict had been directed in defendant's favor. *Judgment on the verdict.*

The facts sufficiently appear in the opinion. *Messrs. Bradley W. Palmer and Moorfield Storey*, for plaintiff:

To recover, the petitioner must show that he "has received particular damage which is not common to all the people,"—"a particular injury different in its character from that which is common to all the citizens,"—"a special damage more than the rest of the king's subjects."

Stetson v. Faxon, 10 Pick. 147, 31 Am. Dec. 128; *Beckett v. Midland R. Co.* L. R. 8 C. P. 82.

Where the petitioner can show that his property has sustained such special damage, he can recover.

Such special damage is done when the access to an estate is made less convenient, when it is left with a front on a less desirable street, when the current of travel is diverted from it, when its market value for sale and hire is reduced, when its availability for any natural and reasonable use is impaired,—when, in a word, the owner by reason of the discontinuance is left with a less valuable piece of property than he had before.

Stetson v. Faxon, *supra*; *Chamberlain v. West End of L. & O. P. R. Co.* 2 Best & S. 605; *Rickett v. Metropolitan R. Co.* L. R. 2 H. L. Cas. 175, *Beckett v. Midland R. Co.* L. R. 8 C. P. 82; *Metropolitan Board of Works v. Mo-*

Curthy, L. R. 7 H. L. Cas. 248; *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259.

The same principle is well established by the decisions of this court in cases where damages are claimed for the laying out of highways and in cases arising under the Betterment Acts, where it has been necessary to determine what are the special and particular benefits which may be offset to damages or considered in assessing betterments.

Allen v. Charlestown, 100 Mass. 248; *Bancroft v. Boston*, 115 Mass. 877; *Hilbourne v. Suffolk County*, 120 Mass. 898, 21 Am. Rep. 522; *Benton v. Brookline*, 151 Mass. 264.

There are, however, certain decisions in Massachusetts which seem to depart from this principle, and to hold that in cases of discontinuance no landowner is entitled to damages unless his estate abuts on the part of the highway discontinued.

Smith v. Boston, 7 Cush. 255; *Castle v. Berkshire*, 11 Gray, 26; *Davis v. Hampshire County Comrs.* 11 L. R. A. 750, 153 Mass. 218.

If the doctrine of these cases is to prevail, the court, while in form adhering to the rule that the landowner whose estate suffers a special and peculiar injury can recover damages, does not permit the inquiry whether such injury has as matter of fact been suffered, but draws an arbitrary geographical line, and decides as matter of law that beyond this line no such injury is possible. It decides that a special and peculiar benefit can be added to an estate wherever, as a matter of fact, it is shown; but it refuses to recognize the converse of the proposition.

It is submitted that in no other class of cases has the court attempted as matter of law to draw such a line, and that these decisions should be reconsidered.

Messrs. A. H. Wellman and J. F. Wiggin, for defendant:

The discontinuance of a part of Summer street upon which the petitioner's land, on account of which he claims damages, does not abut, so long as his land is accessible by other public streets, gives the petitioner no right to claim damages of the city. The damage is contingent, remote, and indefinite.

Smith v. Boston, 7 Cush. 254; *Castle v. Berkshire*, 11 Gray, 26; *Davis v. Hampshire County Comrs.* 11 L. R. A. 750, 153 Mass. 218; *Eames v. New England Worsted Co.* 11 Met. 570; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385; *Boston &*

NOTE.—As to the right to recover damages for the vacation of a street, see *note* to *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370.

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W. R. Corp. v. Old Colony R. Corp. 12 Cush. 606; *Fuller v. Chicopees Mfg. Co.* 16 Gray, 46; *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.* 121 Mass. 124.

The petitioner had no vested rights in that part of Summer street that was discontinued. His interest was one which belonged to him in common with the whole public, and any inconvenience or damage suffered by him is of the same kind sustained by the public generally, and in a greater degree only by all the residents on Summer and Florence streets.

Spaulding v. Nourse, 148 Mass. 490; *Bratnord v. Connecticut River R. Co.* 7 Cush. 506.

Holmes, J., delivered the opinion of the court:

This is a petition to recover damages for the discontinuance of a part of Summer street, in Malden, which runs into Florence street obliquely, just opposite the petitioner's land. The petitioner's means of access to his estate remain ample, but it is possible, if not probable, that its money value is diminished by diverting the stream of travel which formerly flowed towards it over Summer street.

The petitioner begins by asking us to overrule *Smith v. Boston*, 7 Cush. 254, and the cases which have followed it. He cites the English decisions ending with *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. 243, and *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259, which show a tendency to establish a more liberal rule of damages than ours; and he argues further that laying out the discontinued piece of street would have been a benefit for which the petitioner might have been assessed, (*Allen v. Charlestown*, 109 Mass. 243; *Hilbourne v. Suffolk County*, 120 Mass. 893, 21 Am. Rep. 522); and that it follows conversely that it must be a damage for which he should be paid if it is taken away. He might have added that there are Massachusetts decisions or other statutes giving damages which adopt a more liberal test even than the English cases, and give damages for which an action would not have lain had the act been done without authority of statute. *Woodbury v. Beverly*, 153 Mass. 245, 247, 248. See *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. 252.

None of the considerations which have been urged seem to us to warrant our overruling a construction of a statute which has been settled for forty years, seemingly to the satisfaction of the Legislature, and which has been followed elsewhere by courts of the highest respectability. *Smith v. Boston*, *supra*; *Castle v. Berkshire*, 11 Gray, 26; *Davis v. Hampshire County Comrs.* 153 Mass. 218, 11 L. R. A. 780; *Hammond v. Worcester County Comrs.* 154 Mass. 509; *Coster v. Albany*, 48 N. Y. 599, 414; *Fearing v. Irwin*, 55 N. Y. 486; *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649; *McGee's Appeal*, 114 Pa. 470, 6 Cent. Rep. 623; *Gerhard v. Seekonk River Bridge Comrs.* 15 R. I. 334; *Clark v. Providence*, 16 R. I. 337, 1 L. R. A. 725; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Kimball v. Homan*, 74 Mich. 699; *Chicago v. Union Bldg. Assn.* 103 Ill. 879; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Barr v. Oskaloosa*, 45 Iowa, 275; *Dillon*, Mun. Corp. 4th ed. § 666. The authority of cases like *Woodbury v. Beverly* is met by decisions directly in point, and the English de-

cisions, whatever the respect to which they may be entitled, of course are not authority. Moreover, if there is a difference between the law of this state and that of England, probably it goes further than the counsel for the petitioner pointed out, and more cases than were cited might have to be overruled. *Smith v. Boston*, and the cases which followed it, no doubt would have recognized the English test or rule to which we have referred, namely, that those damages can be recovered which could have been recovered at common law had the acts which caused them been done without authority of statute. But our decisions as to when an action by the common law could lie for obstructing a highway probably are less favorable to landowners than the English one. It is not likely that *Harvard College v. Stearns*, 15 Gray, 1, would have been decided the same way in England. But, if that decision was right, *Smith v. Boston* was right, on English principles. We express no opinion as to how we should have decided any of the foregoing cases had they arisen before us for the first time. It is enough to say that *Smith v. Boston* is intelligible, even if, with justice, it might have been more liberal. It would have been intelligible for the Legislature to say that when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away. It will be remembered that there were no betterment laws when the meaning of this Act was settled. It was intelligible for them to say that only the loss of access—the comparatively palpable injury—should be paid for, and not the advantage which the landowner had had the luck to enjoy of being where the crowd was, somewhat in the same way that the common law refuses to recognize the damage, often very great, even as measured with money, caused by cutting off a view.

No doubt there are many cases in which it is left to the jury to fix the difference of degree at which liability begins. Very likely this is one of them in England. But there are also many, and a constantly increasing number, in which the law draws the line. The principles on which it has done so may not have been consistent, because it has acted sporadically, and not always upon a general theory, consciously held. Nevertheless one may doubt whether substantial justice has not been approached most nearly when it has not been a matter of course to leave every nice question of the standards of conduct to the jury.

The petitioner further contends that he brings himself within the principles of *Smith v. Boston*, because, as he says, a small point of land, of which he owns the fee, subject to the public right of way, touches the discontinued part. We do not pause to consider whether the fact is as alleged, because, if it is, it would not affect our decision. The proposition on which *Smith v. Boston* was decided was that, to lay a foundation under our statute for a claim of damages for discontinuing a highway, it is not enough to show that a shop has suffered by the diversion of travel, or that the owner finds travel less convenient at a distance from his place, if the access to the system of public streets remains substantially unimpaired.

Judgment on the verdict.

OREGON SUPREME COURT.

Jane SKOTTOWE, *Resp't.*,

v.

OREGON SHORT LINE & UTAH
NORTHERN R. CO., *Appt.*J. T. MULLEN, Admr., etc., of Nicholas J.
Skottowe, Deceased, *Resp't.*

v.

SAME, *Appt.*

(.....Or.....)

1. Evidence of repairs to a place where an injury occurred is proper when admitted only for the purpose of showing acts of ownership or control over the place and not as an admission of negligence.
2. The fact that an elevated walk to a boat landing is upon a public street does not relieve the carrier which maintains it from liability for injuries caused by its dangerous condition where the street has never been opened as such or used except by the carrier and those doing business with it.
3. A carrier's liability for the unsafe condition of and lack of proper lights on a walk leading to its boat landing,

on account of which persons are injured while on their way to the boat in the evening, is not defeated by the fact that the boat did not start until morning, where passengers were provided with sleeping accommodations on the boat at an extra charge.

4. The court cannot declare it to be contributory negligence for persons to walk off from an elevated walk in the dark, at a place where there is no railing, while they are on their way to a boat landing.
5. A verdict for \$10,000 will not be set aside as excessive, especially if approved by the trial judge, where it is given for injuries by which a woman is made a cripple during life and subjected to much pain and suffering.
6. The earning power of a wealthy man living on his income for which damages on account of his death may be given to his administrator may include his skill in the management of wealth or capacity to manage affairs which would be of advantage to an estate.

(June 18, 1892.)

APPEAL by defendant from judgments of the Circuit Court for Wasco County in favor of plaintiffs in actions brought to recover

NOTE.—*Duty of carrier to maintain safe approaches beyond its own premises.*

The duty of the carrier to maintain the approaches to its station in a safe condition is well established. See *notes to Kelly v. Manhattan R. Co.* (N. Y.) 8 L. R. A. 74; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.), 6 L. R. A. 193; *Walker v. Vicksburg, S. & P. R. Co.* (La. Ann.), 7 L. R. A. 111; and *Pennsylvania Co. v. Marlen* (Ind.), 7 L. R. A. 697.

The language in many of the cases in which such duty is adjudged is broad enough to include the liability to maintain the safe condition of approaches which are in the possession and control of the company and have been established by it for the furtherance of its own business, although it does not actually own the land over which the approaches are constructed.

The Supreme Court of the United States in a case in which the question was not directly involved stated that the companies are liable for injury occasioned by the unsafe condition of the land or its approaches. *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 236.

There seems to be no question but that the company is liable in case there is a continuous platform joining its station with that of another road, which is used and is intended to be used for the transfer of passengers from one road to another, for the safe condition of such platform through its entire length even upon the land owned by the other company. *Louisville, N. A. & C. R. Co. v. Lucas*, 6 L. R. A. 193, 119 L. ed. 533; *Wabash, St. L. & P. R. Co. v. Wolf*, 13 Ill. App. 437.

The company was also held liable where it had constructed a cattle-guard in the highway at a place so near to the pathway leading from the highway to its station that one in attempting to reach the highway fell into the guard and was injured. *Hoffman v. New York Cent. & H. R. R. Co.* 75 N. Y. 606.

In *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 266, the company was held liable for injuries caused by falling through a bridge over a public highway which it kept in repair and which was used as an approach to its trains.

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Where the company constructs its platform in a public highway, it is liable for defects therein although the municipality may also be liable for permitting a nuisance in its streets. *Tobin v. Portland, S. & P. R. Co.* 59 Me. 133, 8 Am. Rep. 415.

Where the company permitted private parties to construct and maintain a stairway leading from the public highway to the station grounds, it was held liable for an injury caused through a defect therein although it maintained another approach to its station which was convenient and safe. *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, 52 N. J. L. 169.

And where an express company maintained a stairway for its own use from the station platform to the public street, and a passenger in attempting to leave the station went down that way and fell from the platform which the express company had constructed for loading and unloading its wagons, the railroad company was held liable, and the court stated that the fact that the bottom of the stairway was beyond the line of ownership of the railroad company neither relieved it from duty nor mitigated its fault. *Beard v. Connecticut & P. R. Co.* 48 Vt. 101.

Where the company stops its train to permit passengers to obtain refreshments at a hotel it is responsible for the safe condition of the passengers leading from the train to the hotel although they are not on its property. *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 777.

The liability of the railroad company ceases, however, in case its approach is over a public highway when the municipality assumes control over the approach and undertakes to keep it in repair. *Quimby v. Boston & M. R. Co.* 69 Me. 512.

In the case of *Eisenberg v. Missouri Pac. R. Co.*, 38 Mo. App. 85, in which the company's liability was denied, it appeared that the road was constructed by some person unknown and formed a convenient way for reaching freight cars upon the defendant's track. The defendant had once improved it but it was not the approach which was maintained and held out by the carrier for the convenience of passengers in reaching trains.

H. P. F.

damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mears. W. W. Cotton, Zera Snow and Wallace McCamant, for appellant:

The court did not caution the jury that the testimony admitted over the objection of the defendant was evidence only of control, and was not to be taken into consideration by them on the question of negligence on the part of the defendant. This was error.

Morse v. Minneapolis & St. L. R. Co. 80 Minn. 465; *Terre Haute & I. R. Co. v. Clem*, 7 L. R. A. 588, 128 Ind. 15; *Nalley v. Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692; *Cramer v. Burlington*, 45 Iowa, 627.

In view of the heavy damages awarded plaintiffs in these cases and the limited amount of evidence going to show negligence on the part of the defendant, the probability is very strong that this error of the court contributed not a little to the injury of the defendant and should cause a reversal.

Baird v. Daly, 68 N. Y. 547; *Salters v. Delaware & H. Canal Co.* 3 Hun, 888; *Terre Haute & I. R. Co. v. Clem*, 7 L. R. A. 588, 128 Ind. 15; *Payne v. Troy & B. R. Co.* 9 Hun, 526; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Isaac v. Southern Pac. Co. (Or.)* 49 Fed. Rep. 797.

The duty of a carrier to provide reasonably safe approaches to a landing place or a station is confined only to the immediate vicinity of its landing or station, and to approaches on its own ground or right of way. Even there the liability is much relaxed from that of the carrier to a passenger actually *en route* on the carrier's train or boat. The duty of the carrier as to approaches, even when it does attach, is no greater than the duty of one who has invited another to call upon him; the duty in the latter case is simply to see that there is no pitfall or trap into which the guest might reasonably be expected to fall between the front gate and door. The duty is one of ordinary care, equal to but no greater than that of the passenger or guest to care for himself.

Pennsylvania Co. v. Marion, 2 West. Rep. 284, 104 Ind. 239; *Moreland v. Boston & P. R. Corp.* 1 New Eng. Rep. 909, 141 Mass. 81; *Indiana Cent. R. Co. v. Hudson*, 18 Ind. 825, 74 Am. Dec. 254; *Kelly v. Manhattan R. Co.* 8 L. R. A. 74, 112 N. Y. 448; *Quimby v. Boston & M. R. Co.* 69 Me. 340; *Robbins v. Jones*, 15 O. B. N. S. 221.

The defendant was not bound to provide a road or way from the business part of the city to its landing place. Indeed, the defendant lacked the power so to do. It had no right to occupy the streets of Dallas City for this purpose.

Fanning v. Osborne, 34 Hun, 121.

Nor could it condemn private property for the purpose of doing so.

Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287.

The act of the defendant by its predecessors in interest, in constructing the bridge in question was a voluntary one. They were under no legal obligation so to do. Not only so, but the repairs they put upon the bridge several 16 L. R. A.

times were put there freely and voluntarily. So far from it being the duty of defendant to make them, it laid itself open to an action for trespass by so doing.

Quimby v. Boston & M. R. Co. and Fanning v. Osborne, supra.

Does the law require an unlawful act of anyone? Was it the duty of this defendant to lay itself open to an action of trespass by repairing the bridge in question? The answer should be "No."

Fisher v. Prosser, 81 L. J. Q. B. 212; *Eisenberg v. Missouri Pac. R. Co.* 38 Mo. App. 85; *Texas & N. O. R. Co. v. Dessommes (Tex.)* March 8, 1891; *Cusick v. Adams*, 115 N. Y. 55.

Can there be any doubt that the facts made a case of clear contributory negligence against plaintiff and deceased? If they carelessly stepped off the bridge at a point where they knew or had reason to know a railing was off, why should they not be held guilty of negligence contributing to their injury?

Reed v. Richmond & A. R. Co. 38 Am. & Eng. R. Cas. 503; *Bedell v. Berkey*, 76 Mich. 486.

Mr. Alfred S. Bennett, for respondents:

While evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury was received was under the control of the defendant.

Readman v. Conway, 126 Mass. 374; *Elliott, Roads & Streets*, 650; *Lafayette v. Weaver*, 92 Ind. 479; *Manderchid v. Dubuque*, 29 Iowa, 78, 4 Am. Rep. 196; *Folsom v. Underhill*, 36 Vt. 580.

A common carrier is liable for negligence in the construction of or failure to repair its station approaches.

Patterson, Railway Accident Law, p. 258; *Quimby v. Boston & M. R. Co.* 69 Me. 340; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Hulbert v. New York Cent. R. Co.* 40 N. Y. 145; *Hartwig v. Chicago & N. W. R. Co.* 49 Wis. 358; *Carleton v. Franconia I. & S. Co.* 99 Mass. 216; *Barrett v. Black*, 56 Me. 496, 96 Am. Dec. 497.

It makes no difference upon whose land such walk was situated. If it was constructed and controlled by the defendant, it is liable.

Tobin v. Portland, S. & P. R. Co. 59 Me. 198, 8 Am. Rep. 415; *Quimby v. Boston & M. R. Co. supra.*

Lord, J., delivered the opinion of the court:

These actions are brought by Jane Skottowe in the one case, and by J. T. Mullen, as administrator of the estate of Nicholas Skottowe, in the other case, against the defendant, to recover damages resulting from a fall by Jane Skottowe and her deceased husband from an elevated way leading from The Dalles City to the defendant's boat landing; which fall caused serious injury to Jane Skottowe, and the death of her husband. The liability of the defendant is predicated on the ground that the defendant was negligent in failing to keep in repair the elevated way or bridge, from which the plaintiff and the deceased fell, and were in-

jured, and in failing to provide such place with proper lights.

The answer of defendant put in issue all the material allegations of the complaint, and further alleged that the elevated way or bridge causing the injury and death was not the property, or in the possession, or under the control, of the defendant, and, as a separate defense, that the plaintiff and her deceased husband were guilty of contributory negligence.

The facts are substantially these: The plaintiff and her deceased husband were citizens of Ireland, traveling in this country with the double purpose of visiting a son who resided in the state of Wyoming, and such places as would interest them or contribute to their pleasure. It would seem that they had secured a round-trip ticket from Portland to The Dalles, and return, and that they had come up to The Dalles, by railroad, with the intention of returning to Portland by the river, on one of the boats of the defendant, for the purpose of obtaining a more complete view of the Columbia river scenery. The boats of the defendant were fitted up with staterooms and other adjuncts for the comfort and accommodation of its passengers. As the hour at which the defendant's boats were accustomed to leave in the morning was early,—7 o'clock,—the company, for its own advantage, and for the convenience of its passengers, allowed them to come on board of its boats at night, and to sleep there. For this accommodation the defendant charged and received a specified consideration, and by reason of it its passengers were saved from the necessity of arising at an inconvenient hour in the morning in order to reach the boat. The plaintiff and her husband reached The Dalles some time about the middle of the day and during the afternoon went down to the wharf-boat, as it would seem, for the purpose of acquainting themselves with the way to the boat's landing, and ascertaining what arrangements were necessary to be made to get on board of the boat. The agent of the defendant informed them at the office that they could come on board of the boat that night, as soon as it came in, and sleep there until morning, so that they would be on the boat at its hour of starting. Concluding to avail themselves of this accommodation, they returned up town, and after getting a meal at a restaurant, and walking and looking around until the time had come for the boat to arrive, they started down to its landing. It was after dark when the defendant's boat came in, but, owing to the fact that it had a barge in tow, it proceeded up the river, under slow bells, past its landing place, to a point on the river about opposite the place where the accident occurred, for the purpose of landing the barge, when it turned back to make its landing. Her lights were lit, and it was while some of these things were occurring that the accident happened. The landing place of the defendant's boat is some distance below the inhabited portion of The Dalles, and is reached by a long elevated incline and narrow roadway which passes over Mill creek by means of a bridge. One

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portion of this roadway, at the point where it leaves the inhabited portion of The Dalles, is occupied by the defendant's railroad tracks and leads to its shops, while the other portion of it gradually inclines, and leads to its wharf or boat landing. These two ways, at the point where the injury occurred, are connected, and rest on the same timbers. The situation is difficult to describe, but it is shown on the photographic exhibits. These different ways were originally built by the Oregon Steam Navigation Company, the defendant's predecessor in interest, for the purposes specified, and since then have been constantly used as a means of access to and from its shops and the landing place of its boats. At different times the company has rebuilt and repaired this roadway, raised and changed it, and exercised various acts of control over it. The place where the accident occurred, and over which the elevated roadway or bridge crosses Mill creek, is a short distance below the last building in the inhabited portion of the city. The land under the bridge was doubtless a public street at the point of the accident, as it seems to have been platted as such, but the city has never opened it as a street, nor exercised any control or ownership over the elevated roadway or bridge.

"There was no evidence," the record says, "in the case tending to show that Dalles City, or any one except the railroad company, and its predecessors in interest, had exercised any control of the bridge at the place where the accident occurred, or had ever operated or repaired the same." The bridge is from twelve to twenty feet from the ground, which is of a rocky and uneven character, and along the bridge there has always been a "rail running," which, a short while before the accident, got loose and came off, and never was replaced until after the injury occurred.

The circumstances of the fall from the bridge are thus related by the plaintiff: "We had passed the town and got to the way leading to the boat, it being then nearly dark. We suddenly fell down a height. The fall rendered me unconscious. I was aroused by my husband's calls for help. I became unconscious again, and then got conscious again, when the men came to carry me up from where I had fallen. Shortly before the accident we remarked to each other on the want of light. We were feeling our way cautiously along, immediately before the accident. My husband's calls for help at the place of the accident were the first thing I knew after the accident, while we were lying on the stones near the river."

The injury to the husband of the plaintiff was of such a character as to cause his death a day or two afterwards. The injury to the plaintiff confined her to bed for many months, and, the evidence indicates, will render her subject perhaps to much suffering, and a cripple for the remainder of her life. From these facts and circumstances it seems evident that the plaintiff and her deceased husband, while passing over the bridge or elevated roadway, seeing the boat out in the river, which was lighted up, and supposing

that they had reached the landing, walked through the opening occasioned by the want of railing, and were precipitated upon the rocks below.

Upon this state of facts, the most vital point of the contention for the defendant is that the duty of a passenger carrier to provide reasonably safe approaches to a landing place or station is confined only to the immediate vicinity of its landing or station, and to approaches on its own ground or right of way, and that, as the facts show that the land over which the bridge was constructed, and where the accident occurred, was a public street, the defendant was under no obligation to keep such bridge in repair or properly lighted. There are other questions connected with this upon which error is alleged, and to which we shall advert at the proper time.

There is, however, a preliminary question upon the evidence, to which an exception was taken, that must be first disposed of. One Mr. Allen was called as a witness for the plaintiff, and testified that he was in the employ of the defendant, and engaged in carpenter work; that about two days after the accident he repaired the bridge, by replacing the missing railing. He was then asked the question, "Under whose direction?" To this question the defendant objected, as incompetent and immaterial; whereupon plaintiff's counsel stated in open court, and in the presence of the jury, that he did not offer the testimony for the purpose of showing negligence, but for the purpose of showing acts of ownership and control over the bridge, and the court ruled that the evidence should be received for that purpose, and that purpose only. The witness then answered that he was instructed by Mr. De Huff, the company's foreman or superintendent at the shops. It is conceded that this evidence is hardly sufficient to show that Mr. De Huff had authority from the railroad company to make the repair in question, but no proper means were taken to get rid of this aspect of it. As already disclosed, this evidence was offered for the purpose of showing that the bridge or place where the injury was received was under the control of the defendant. As applicable to this object, no objection is made, if the evidence shall be restricted exclusively to this purpose. It is not the fact that repairs were actually made by the defendant, or the inference of control or ownership sought to be drawn, to which objection is urged, but that such evidence is inadmissible for that purpose unless the jury were instructed, or expressly cautioned by the court when it was received, that it could not be considered by them on the question of negligence. Hence, it was argued, notwithstanding counsel for the plaintiff stated that the evidence upon objection was only offered to prove the control of the defendant of the place of injury, and not to prove negligence, and the court ruled, in the presence of the jury, that it would only be admitted for the purpose of showing control, that this statement and ruling were not enough to remove the objection for incompetency, unless the court went further when

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the evidence was received, and instructed or cautioned the jury that they could not take it into consideration upon the question of negligence on the part of the defendant; otherwise the jury would be authorized to consider such evidence as proof of negligence or to treat it as a link in the chain of such proof, contrary to the well-established rule that subsequent repairs are not competent for the purpose of proving antecedent negligence. That this rule is now to be regarded as settled law in a proper case is not controverted, as the authorities in support of it fully indicate. *Morse v. Minneapolis & St. L. R. Co.* 80 Minn. 465; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L. R. A. 588; *Nalley v. Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 693.

But the principle seems equally as well established that, while evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury was received was under the control of the defendant, who may require the court, if he chooses, to restrict it to that point by a proper instruction. As the court said, in *Lafayette v. Weaver*, 92 Ind. 479, such evidence "was not admissible to prove negligence on the part of the city, the question as to which was to be determined by what was known before and at the time of the accident; but it was evidence of the city's recognition of the defect in the sidewalk as one which the city was bound to repair, and was admissible for such purpose. . . . By proper request the appellant could, through an instruction, cause the restriction of the evidence to its legitimate effect." See Elliott, *Roads & Streets*, 650, and authorities cited in notes. Independent of these considerations we do not think there was any liability of the jury considering the evidence for any other purpose than showing control or authority over the *locus in quo*, as the circumstances under which it was admitted expressly restricted it to this purpose, and exclude the idea of its being admitted to prove negligence. So that, as the exception stands, while we agree that such evidence is and ought to be regarded under any circumstances as incompetent as an admission of negligence, we do not understand it is incompetent to show authority over the *locus in quo*, or control over the place where the injury occurred. If the evidence was competent for this purpose there was no other defect, except possibly to show the authority of De Huff to order the repairs,—his agency to connect the company with the making of the repairs,—but this was regarded as of no consequence, and merited little attention of counsel, for the reason, doubtless, that there was other evidence, before the accident, indicative of the defendant's control over the place of the injury, or recognition of its duty to keep the bridge in good condition and repair, such as the construction and repair of the bridge, and the exclusive use of it as a means of access to its boat landing. Moreover, as the question was asked, the

answer might have been that the repair of the bridge was directed to be done by the representative of the defendant, so far as the court could know, but if the answer did not sufficiently connect the company—turned out to be improper—it was the duty of the defendant claiming to be injured by it to move to strike it out. Still, if we thought the evidence was incompetent, as the case stands, in view of its importance and liability to arise frequently in the trial court, we should hesitate to excuse the error, solely because no motion was made to strike it out.

The next alleged error is the refusal of the trial court to direct a verdict for the defendant. The contention is that the undisputed evidence shows no liability upon the part of the defendant. This is based upon the assumption that the undisputed evidence shows that the elevated walk or bridge to the boat landing of the defendant is upon a public street, and, as a consequence, neither the defendant nor its predecessors had any right to occupy the street by a bridge for this purpose, and that, even if they did so originally by constructing, and subsequently by keeping it in repair, it was a voluntary act, and placed the defendant under no obligation to keep it in repair, or liability for want of repair.

As the question involved is important and vital as affecting the liability of the defendant, it deserves to receive, despite the pressure of our duties, our best consideration. At the risk, therefore, of some repetition of the facts already stated, but to make more clear, if possible, the relation of the defendant to the *locus in quo*, as a part of its means of approach to its boat landing, and the relation of the city to it, as showing its control over it we quote from the bill of exceptions the following facts: "Plaintiff also called as witnesses John Cates, R. A. Roscoe, and George H. Knaggs, whose evidence tended to show that the bridge in question, from which it is claimed that the fall occurred, was constructed by the Oregon Steam Navigation Company, a transportation company engaged in operating boats and portage roads from The Dalles, on the Columbia river; that the Oregon Railway & Navigation Company succeeded to the Oregon Steam Navigation Company; and further tended to show that the Oregon Railway & Navigation Company continued to operate and control the bridge until their railroad and boat line was leased to the defendant as shown herein; and that the bridge in question was the bridge extending on from Main street, in Dalles City, across a ravine through which Mill creek runs, and leading to the lower boat landing used by the Oregon Railway & Navigation Company as a landing for the boats operated by them on the Columbia river; that it was such bridge, leading to such landing, at the time of the lease, and since then it had been used by the present company in operating boats on said river, as a means of access to and from the town of The Dalles and the boat landing. The evidence further tended to show that the bridge had been raised once or twice by the Oregon Railway & Navigation Company
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and the defendant company, and that the defendant company had exercised acts of control over the bridge in keeping the same up, and preventing it from being floated away by high water, and by its means the route over this bridge was the only route to the lower boat landing; and no other person or persons had anything to do with the control of said bridge, or keeping it in repair, from the time it was built up to the time of the injury to the plaintiff. The evidence of these witnesses also tends to show that there was no business other than that connected with the defendant company's business, west of the bridge in question, which would take persons thereover, and that the bridge was used only by persons having business with the defendant company, and that it was used by such persons in traveling to and from its wharf, for the purpose of traveling over its line, and in shipping and receiving freight. The testimony of these witnesses further tended to show that one side of the bridge in question was a railroad bridge used exclusively by the defendant as a means of access to its shops and round-houses, the other portion of the same being a narrow plank roadway used as a means of access to and from its boat line and wharves, with the two ways separated and deflected from each other some distance west of the place where plaintiff was injured."

In view of these facts, it is important to ascertain the duties of the defendant, as a public carrier, to keep all the approaches to its boat landing or depot, owned by it or constructed by it, and under its control or in its possession, and used in connection therewith, safe and convenient for the use of its patrons, or those who have lawful occasion to use them. Dillon, *Ch. J.*, laid down the rule as founded upon reason and authority, that "railroads are bound to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, all portions of their station ground reasonably near to the platforms, where passengers or those who have purchased tickets with a view to passage on their cars would naturally or ordinarily go." *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 145, 96 Am. Dec. 114.

Such corporations are not only bound to keep their platforms and landing places safe and convenient for all who make use of their cars or boats as a means of conveyance, but they are bound to make the approaches over their own premises, or premises in their possession and used in connection therewith, safe and convenient for passengers. The liability for the nonperformance of this duty by such corporations is founded on the general principle that a person injured without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting, and being in default for the defect. *Barrett v. Black*, 56 Me. 498; *Carleton v. Franconia I. & S. Co.* 99 Mass. 219.

This principle finds its illustration in

Tobin v. Portland S. & P. R. Co., 59 Me. 188, 8 Am. Rep. 415. There a hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform, and was injured; and it was held that the company was liable, and that the liability was the same, notwithstanding the platform was within the limits of the highway. The court, after stating that it was the duty of such corporations to make the approaches to their depots safe and convenient, and likewise to so keep their platforms and landing places not only for those who are passengers, but for all who have rightful occasion to use them, says: "It is objected that the defendant built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have trespassed upon the rights of the public. They have built the platform, and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation, and they are responsible for its condition. It may be that the city of Portland might be liable for a nuisance within the limits of its public highways, erected and maintained by the defendant corporation. But, if so, the city has the right of reclamation against those creating the nuisance. Much more, then, could the party injured maintain his action directly against the corporation causing the injury."

In *Quimby v. Boston & M. R. Co.*, 69 Me. 840, these principles are reasserted, but the fact that the sidewalk where the injury occurred was not in the possession and control of the defendant as one of the approaches to their station defeated a recovery. The court says: "A railroad corporation is bound to keep its depot and the grounds around it, owned by the corporation, or in its possession, and used in connection with it, safe and convenient for persons who have lawful occasion to use them. It is bound to keep all approaches to its depot, constructed by it and under its control, for the use of persons having lawful occasion to use them, to go to or from its depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway. The burden was on the plaintiff to show that the walk where he received his injury was constructed by the defendants, and was in their possession and control as one of the approaches to their station." The court then proceeds to state the facts, showing that the sidewalk was not in the possession of the defendant, but that the city had resumed control of it, and kept it in repair, and, as a consequence, that the defendant corporation was not liable. The court says: "Upon this state of facts, we think it clear that the defendants were under no obligation to keep the sidewalk in repair. It was no part of their bridge. It was a part of the public street, under control of the city. The defendant had no right to enter upon it to make any changes or repairs. Their liability ceased when they restored the condition of the sidewalks to the acceptance of the city." This case is cited by 16 L. R. A.

the defendant, but the principle it declares and recognizes is fatal to its contention.

Mr. Hutchinson says: "It is the duty of the carrier to provide a reasonably safe means of getting to and from the station, and it will be liable for an injury resulting from its failure to do so; and if passengers habitually, naturally, and with the acquiescence of the carrier, adopt a certain route, especially a route pointed out by the customs and methods of the carrier, it is the duty of the latter to take reasonable precautions to so guard and maintain it that passengers will not thereby suffer injury. It is immaterial in this respect whether the carrier furnished the route, or provided or constructed the means of passage, or not. If, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as though it had itself set up and maintained the dangerous way. The same rules apply to carriers by water who are liable for furnishing dangerous gang planks for use by passengers." *Hutchinson*, Carr. 2d ed. § 519; *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 863, 14 West. Rep. 181; *Hoffman v. New York Cent. & H. R. Co.* 75 N. Y. 605; *Green v. Pennsylvania R. Co.* 86 Fed. Rep. 68; *Texas & St. L. R. Co. v. Orr*, 46 Ark. 195; *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. Rep. 818; *Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 390.

Plainly, then, it is the duty of such corporations to provide reasonable accommodations at their stations and landing places, to keep in safe condition all portions of their platform and approaches thereto and furnish safe and proper means of ingress and egress therefrom, even though some part of it may be constructed upon a highway, if the same be in their possession, or under their control, and used in connection with them. This duty and the liability of such corporations for its nonperformance, when an injury occurs in respect to such places, platforms, approaches as well as to furnish lights, is also fully stated, and the cases maintaining it collected, in *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 20 Am. & Eng. R. R. Cas. 555, note; but by this is not meant that such companies are bound to keep their premises absolutely safe, or that they are liable for accidents due to want of ordinary care on the part of the injured person. They are only bound to exercise ordinary care in view of the dangers to be apprehended. The distinction between such liability for an injury to a passenger occurring on their cars or boats, and for an injury occurring on their platforms or approaches to the station or landing places, is well recognized. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 2 West. Rep. 234; *Moreland v. Boston & P. R. Corp.* 141 Mass. 31; *Kelly v. Manhattan R. Co.* 112 N. Y. 448, 8 L. R. A. 74.

Nor is there any claim that the defendant is an insurer, but that it was bound to use ordinary care to keep its approaches to its boat landing safe and convenient, and that to leave a railing off of a bridge of this kind, at such a place, and at such a height

from the ground, for a period of several weeks, was a want of ordinary care, if not gross negligence.

Nor do the cases cited by the defendant conflict with these principles, as declared by the authorities, or support its contention. It will be sufficient to notice those claimed to be most in point. In *Eisenberg v. Missouri Pac. R. Co.*, 88 Mo. App. 91, it did not appear that the road had been built by the defendant, and held out to its patrons as a way to its depot. There was another and safer road, and the exact situation of the defect was known to the plaintiff. The only element in the case is that, prior to the accident, the company had improved it, but, upon the plaintiff's own testimony, the case was void of all elements of negligence upon the part of the defendant. The court says: "In the case at bar, the danger was neither a hidden nor recent danger. The excavation existed before the road was built. The plaintiff knew the exact situation for years. His drivers knew it. This very driver had traveled over the road repeatedly on the day of the accident. He discussed such dangers when they were in full view, in broad daylight, with his fellow servant, and, knowing what risk he undertook, voluntarily assumed it, although he might have used another and safer road." It was a clear case of contributory negligence.

In *Cunick v. Adams*, 115 N. Y. 58, the bridge was built for the convenience of the defendant. The plaintiff was a stranger to him, and to whom he owed no duty. Nor was the plaintiff upon the bridge upon the defendant's invitation, nor to do any business with him, but for the purpose of seeing a shooting match upon an island with which the defendant had no connection whatever.

In *Texas & N. O. R. Co. v. Desormes* (Tex. Sup.) 158. W. Rep. 806, the testimony was so positive and definite that the defendant had nothing whatever to do with the crossing at the place of the injury that the verdict was held contrary to the evidence.

There is no relevancy in these cases or the others cited, to the case at bar; nor is there anything in the fact, if it be admitted, that the land where this bridge was constructed and maintained by the defendant was platted as one of the public streets. It by no means follows that the city was bound to open the same to public travel. As Thayer, *Ch. J.*, after showing that the dedication of streets by maps and plats was irrevocable, and vested them in the public, said: "But it does not follow that the city is under any obligation to open and improve such streets at once; they may be allowed to remain dormant until their use becomes a public necessity." *Meier v. Portland Cable R. Co.*, 16 Or. 500, 1 L. R. A. 856. There is no pretense or evidence to show that the city had opened this street beyond its inhabited portion. The evidence is undisputed that the defendant built the bridge partly upon it for its own purposes, and has ever since used it, exclusively, as a railroad bridge, and as a way to its boats. The city had nothing to do with it. "There was no business other than that connected with the defendant company's 16 L. R. A.

business, west of the bridge in question, which would take persons thereover, and it was used only by persons having business with the defendant company, in traveling to and from its wharf for the purpose of traveling over its line, and in shipping and receiving freight." So runs the record.

Nor do we think there is anything in the contention that the defendant is not liable because the plaintiff and her husband started to go on the boat in the evening, instead of in the morning. It was the custom of the defendant to receive passengers on its boats in the evening, and allow them to sleep there, for which they were charged extra, or "fifty cents for single berths, and six bits for double." Its officers at the wharf boat informed the plaintiff and her husband of the custom, and they were going to the boat to avail themselves of it when the injury occurred. By so doing the defendant invited its patrons to take passage on its boats in the evening instead of in the morning, and was bound to make its approaches safe for the travel of such persons as it was for persons who came on board of the boat in the morning. We think there was no error.

It is next objected that the court erred in declining to instruct the jury that the plating of the ground under the bridge in question as a public street, and selling lots by reference to the same, constituted a dedication of the street. This objection is embraced in five long instructions out of the numerous instructions asked, and are justly subject to the criticism suggested by counsel. The proposition itself was not disputed as a matter of law, nor was the refusal of the court to give the instructions asked in conflict with it. It was the fact that the instructions ignored the distinction between the dedication of a street and the opening of that street as a public highway, by which the defendant sought to excuse liability that caused the court to refuse them; but the view we have taken renders their further consideration unnecessary. The evidence shows that the street was not opened by the city, nor used by it, but that it was exclusively occupied by the defendant with its bridge as a means of access to its boat landing, and under its control at the time of the accident.

It is next objected that the trial court erred in refusing and modifying instruction No. 16, upon the question of contributory negligence. This instruction is objectionable, but instruction No. 39, as given by the court, better states the law as applicable to the facts. There can be no doubt but the bridge was a place where a railing or guard on it was necessary at all times, but especially after dark, when passengers were expected to travel over it to and from the landing place. The plaintiff and her husband were strangers, and the circumstances already stated were not such as the court could declare contributory negligence.

The next objection is that "the court erred in instructing the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of night, regardless of the time set for the departure of its boats." This refers to the court declining

to give certain instructions asked by the defendant, and giving certain others asked by the plaintiff. By the instructions thus given and refused, it is claimed that the court imposed upon the defendant the duty to keep the approaches or bridge constructed by it, and under its control, leading to its steamboat landing, in such order and repair, and so well lighted, as to be reasonably safe at all hours of night. The complaint is that this laid the duty on the defendant regardless of time, and of the fact that the boat did not leave until the next morning. Upon this point the instruction given by the court was: "If the defendant had been in the habit of and accustomed to take passengers on the boat in the evening and permitting them to sleep thereon, then its liabilities as to a passenger passing over its walks and ways in the evening for such purpose would be just the same, and its duties as to keeping its ways to its boat would be just the same, as it would towards a passenger going to the boat at the hour of starting in the morning." The court did not, therefore, instruct the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of the night. The plaintiff and her husband were going down to the boat, as the evidence indicates, between 6 and 8 o'clock in the evening. It was the usual time when the defendant was in the habit of receiving passengers. They were invited to come on board, and they had a right to be there; they were going there to do business with the defendant,—to sleep on board of the boat all night, and pay for the accommodation. The benefit was mutual. It was not a gratuitous privilege for their own special convenience. The boat was just coming into its landing, and the time was in the evening, and appropriate. There is no claim, nor can be on the facts, that it was the duty of the defendant to keep its approaches to its landing safe at all hours of the night, but that it was its duty in the evening, when it was accustomed to receive passengers. Whether it was the duty of the defendant to keep them in that condition at other later hours in the night was a matter with which the plaintiff in this case has no concern. It is next objected that the damages awarded are excessive. The damages

assessed by the jury are large. The evidence tends to indicate that the plaintiff is permanently injured. "I think," says the medical witness, "that if she does regain the use of her limb, and it becomes free from pain, it will be several years. It will take a long time to fully recover, if she ever does. She is unable, now, to stand without support, and altogether unable to walk, and still suffers great physical pain from the injury. The probabilities are that she will be a cripple during her life, and subject to much pain and suffering." In such case different individuals would vary in their estimate of the sum which would be a just pecuniary compensation. "It is one thing," said *Mr. Justice Story*, "for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury because it exceeds that measure." *Thurston v. Martin*, 5 Mason, 497. Nor is the fact to be overlooked that the judge who heard the testimony, in refusing the motion for a new trial, approved the verdict of the jury. In such case, it has not been the practice of this court to interfere, nor, if such was not the practice, are the damages given so excessive as to justify our interference. Many larger verdicts for less injuries have been sustained by the courts.

Thus far, the cases have been considered together; but the point is made in the administrator case that no earning power was proven on the part of the deceased. This is based on the inference that the deceased was a wealthy man, living on his income. Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered. The deprivation of his affection and society cannot be taken into account. This would include skill in the management of wealth, or capacity to manage affairs, which would be of advantage to an estate, and the loss of which would prove a detriment to it.

In view of all the circumstances, we are unable to say there was error, and must affirm the judgments, or judgment, in both cases.

ALABAMA SUPREME COURT.

J. W. HUGHES, Admr., etc., of B. M. Hughes, Deceased, Appt.,

v.

G. M. TORGERSON.

(.....Ala.....)

1. Services by an architect in the preparation of drawings, plans, and specifications for

a building and in superintending its erection are "work or labor upon . . . a building or improvement on land" within the meaning of a statute providing for mechanics' liens.

2. The heirs of the owner of a building who dies before the filing of a lien thereon are necessary parties to a proceeding for its enforcement.

(May 23, 1892.)

NOTE.—Right of architect to a mechanics' lien.

Architects were entitled to a lien under the civil law. Domat, pt. 1, bk. 2, title 1, § 5, art. 9. In this country they are given a lien by statute in several of the states, and where the statute does 16 L. R. A.

not expressly name them the general rule is that there is a lien for furnishing the plans and specifications and superintending the construction of the building. *Arnold v. Gouin*, 22 Grant, Ch. 314; *Knight v. Norris*, 18 Minn. 477.

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in a proceeding instituted to enforce a mechanics' lien. *Reversed.*

The facts are stated in the opinion.

Messrs. Ward & John, for appellant:

The lien is statutory. Its character and extent must be ascertained by the terms of the statute creating and defining it.

Copeland v. Kehoe, 87 Ala. 594.

The Code of 1886, § 8018, the law in force when the work was done, declares: "Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, etc., for any building, etc., under or by virtue of any contract with the owner, etc., shall have a lien.

The architect does not work upon or furnish materials for a building. In those states where the courts have held that architects have a lien the statute provides for a lien in favor of those who perform labor for a building, while in those states where the words of the statute are like § 3018, Code of 1886, the courts have held the architect has no lien.

Price v. Kirk, 90 Pa. 47.

Under a statute giving carpenters and all others performing labor and furnishing materials, etc., a lien, it was held that architects had no lien.

Phillips, Mechanics' Liens, §§ 156, 158, p. 266; *Foushee v. Grigsby*, 12 Bush, 88; *Whitaker v. Smith*, 81 N. C. 340, 81 Am. Rep. 508; *Little v. Hobbs*, 58 N. C. 179, 78 Am. Dec. 275.

The owner of the fee not being a party to

the statement filed and not a party to the suit, no lien attached.

See *Macintosh v. Thurston*, 25 N. J. Eq. 242. Suit for a mechanics' lien cannot be maintained without joining as a party the legal owner of the building or structure upon which the lien is sought to be enforced.

15 Am. & Eng. Encyclop. Law, p. 165.

No proceedings under the Lien Law can be maintained against executors unless it is in proof that title to the property, on which the lien exists passed to them.

15 Am. & Eng. Encyclop. Law, p. 118, ¶ 5, citing *Crystal v. Flannelly*, 2 E. D. Smith, 558.

When the title of the property upon which a lien is claimed is changed between the time of making the contract ordering the work and the time of filing the lien, the person owning the property when the lien is filed is the proper one to be made a party as owner.

15 Am. & Eng. Encyclop. Law, p. 168, note 5, citing *Edwards v. Derrickson*, 28 N. J. L. 39; *Derrickson v. Edwards*, 29 N. J. L. 468, 80 Am. Dec. 220; *Robins v. Bunn*, 34 N. J. L. 322.

Heirs having direct interest in the land are also necessary parties to the suit and are properly joined with the administrator.

Phillips, Mechanics' Liens, § 398, p. 687; *Guerrant v. Dawson*, 34 Miss. 149; *Belcher v. Schaumburg*, 18 Mo. 189.

Where the title of the premises is in the ancestor at the time of his decease, his heirs should be made parties.

Phillips, Mechanics' Liens, § 349, p. 646.

"Every mechanic or other person," etc., in

Performing the work of architect and superintendent is "performing labor" so as to entitle one to a lien. *Taylor v. Gildesdorf*, 74 Ill. 854.

The words "other person" in a statute giving a lien to every mechanic, workman, or other person performing labor, are broad enough to include one performing services as architect and superintendent. *Mulligan v. Mulligan*, 18 La. Ann. 21.

A statute giving a lien for work done for or about the construction or erection of a building is broad enough to include one who devotes his time in making the plans and drawings for the work and in overseeing its execution. *Bank of Pennsylvania v. Gries*, 35 Pa. 425; *St. Clair Coal Co. v. Martz*, 75 Pa. 368.

The one who draws the plans and superintends the building is within the terms of a statute giving a lien to "any person for labor performed for the erection or construction of a building." *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Eq. 397.

A statute giving a lien to "any person who shall perform any labor" in building, altering, or repairing a house, is broad enough to include the services of an architect in superintending such work. *Stryker v. Cassidy*, 76 N. Y. 60, 32 Am. Rep. 222.

Planning and superintending development work upon mines is "performing labor" within the meaning of the mechanics' liens statutes. *Rara Avis G. & S. Min. Co. v. Bouscher*, 9 Colo. 385.

But a statute giving a lien to architects does not include one performing labor as superintending architect of grounds and accessories. *Adler v. World's P. Exposition Co.*, 126 Ill. 377.

In conflict with the above cases it has been held that the architect or superintendent of a building has no lien by reason of his services. *Foushee v. Grigsby*, 12 Bush, 88.

So an architect has no lien for drawing plans and 16 L. R. A.

specifications and giving general directions to the builder under whose special superintendence the building is being constructed. *Raeder v. Bensberg*, 6 Mo. App. 445.

Simply furnishing plans.

In *Bank of Pennsylvania v. Gries*, 35 Pa. 425, it was intimated that merely furnishing plans for approval would not entitle one to a mechanics' lien.

And it was subsequently decided that simply providing the plans and specifications does not entitle to a lien. *Price v. Kirk*, 90 Pa. 47.

The plan of a house or the model of a ship does not enter into the structure and cannot be regarded as within the statutes by which liens are given to materialmen and laborers. *Ames v. Dyer*, 41 Me. 397.

Hence the character of the work must be set out. Merely naming it as "architect's work" is not sufficient. *Rush v. Able*, 60 Pa. 153.

No lien can be acquired by lumping the claim with that for other work. *Nelson v. Withrow*, 14 Mo. App. 277; *Edgar v. Salisbury*, 17 Mo. 271.

Superintending.

On the one side, it is held that a contractor is entitled to a lien for his own services. *Sweet v. James*, 2 R. I. 270.

Overseeing entitles to a lien. *Willamette Falls T. & M. Co. v. Remick*, 1 Or. 169.

On the other side, it is held that the contractor has no right to a lien by reason of his superintendence. *Jones v. Shawhan*, 4 Watts & S. 262; *Blakey v. Blakey*, 27 Mo. 39.

There is no lien for superintending. *Murphy v. Murphy*, 22 Mo. App. 18.

A mere superintendent has no lien unless he performs manual labor himself upon the work. *Griell's App. (Pa.)* 8 Cent. Rep. 388. H. P. F.

whose favor a lien is declared must under the rule *ejusdem generis* be a person of the same class as a mechanic.

See the word "other" in 17 Am. & Eng. Encyclop. Law, p. 278 *et seq.*

Walker, J., delivered the opinion of the court:

A lien is claimed under section 3018 of the Code upon a building and upon the lot of land on which it is erected. By the judgment a lien was declared only on the building, and not on the lot. This could be done under the statute. *Bedsale v. Peters*, 79 Ala. 183. In the statement filed by the plaintiff in the office of the judge of probate a lien was claimed upon the building only, and not upon the lot. Of course, the lien declared could not extend beyond the claim as asserted in the statement.

The first question to be considered is whether the building was sufficiently described. The description is: "A certain three-story brick building situated on rear part of lots 2 and 8, block 122, 20th street, between Ave. A. and B., in the city of Birmingham." This description points out with reasonable certainty a three-story brick building, occupying the hindmost part of two designated lots in a certain named city block,—the part thereof furthest from the street front of the two lots. This description, if followed by a person familiar with the locality, would lead him to the two lots named, and if he found the rear part thereof occupied by a three-story brick building he could identify that building as the only one corresponding with the description. This is sufficient certainty. *Bedsale v. Peters*, 79 Ala. 183; *Kezartee v. Marks*, 15 Or. 529; Phillips, *Mechanics' Liens*, 2d ed. § 378. The statement avers that "the building is the property of one Dr. B. M. Hughes," who was deceased when the claim was filed. This did not render the description insufficient. The statute expressly provides that "no error . . . in name of the owner or proprietor shall affect the lien." Code, § 3022. The plaintiff claims a lien for the amount of the compensation due him for work and labor as an architect in the preparation of drawings, plans, and specifications for the building and in superintending the erection thereof. Are such services by an architect "work or labor upon . . . a building or improvement on land," within the meaning of the Statute? Code, § 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it is equally plain that his services in these particulars could be regarded as properly a part of his work "upon the building," and that compensation therefor might be included in the amount for the security of which he could acquire a lien under the statute. There is nothing in the circumstance that such services were rendered by another person to put them beyond the protection of the statute. Under a New York statute a lien was authorized in favor "of any person who shall perform any labor, or furnish any materials, in building, altering or repair-

ing any house, etc., by virtue of any contract with the owner," etc. "This language," it was said in *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, "is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. . . . The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who super-vises, directs, and applies the labor of others. . . .

The general principle upon which the Lien Laws proceed is that any person who has contributed by his labor or by furnishing materials to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation." The claim of an architect was allowed in that case. What was there said seems eminently sound, and is equally applicable to the Alabama statute. An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as any one who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes. Phillips, *Mechanics' Liens*, 2d ed. § 158.

Dr. Hughes, who was the owner of the building in question, and under a contract with whom, as claimed by the plaintiff, the services were rendered, died intestate before the suit was instituted. The only defendant was the administrator of his estate. On the death of the intestate his heirs became the owners of the property. A lien cannot be declared and enforced in a proceeding to which the owner of the property on which the lien is claimed is not a party. *Roman v. Thorn*, 83 Ala. 443. If the suit had been brought against the intestate in his lifetime it could have been revived and prosecuted against his personal representative alone, without making his heirs parties. The statute expressly provides for that contingency. Code, § 3081. This provision does not apply to suits brought after the death of the owner or proprietor of the property. In such case the general rule applies that he who is, at the time the suit is commenced, the owner of the building or structure upon which the lien is sought to be enforced, is a necessary party defendant, without whose presence the lien cannot be declared or enforced. 15 Am. & Eng. Encyclop. Law, 165; Phillips, *Mechanics' Liens*, § 393. The personal representative of the deceased owner may also be made a party defendant. The prohibition against bringing suits against personal representatives within six months after the grant of letters does not apply to suits for the enforcement of such liens. Code, § 3043. Because of the absence of necessary parties defendant the judgment must be reversed.

Reversed and remanded.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF ILLINOIS.

FARMERS LOAN & TRUST CO.

v.

GRAPE CREEK COAL CO.

(50 Fed. Rep. 481.)

The issuance of receiver's certificates which shall be a first lien on the mortgaged property cannot be authorized by the court in a suit to foreclose a mortgage on the property of a mere private corporation such as a coal mining company.

(May 7, 1892.)

APPPLICATION by Joseph G. English, the receiver appointed in a proceeding to foreclose a mortgage, for permission to issue receiver's certificates which should be a first lien on the property to enable him to raise money to operate the mortgaged property. *Denied.*

The Grape Creek Coal Company is an Illinois corporation, and was the owner and operator of certain coal mines located near Danville, Illinois. Some time ago the company executed to the Farmers' Loan & Trust Company a mortgage to secure an issue of bonds amounting to \$500,000. These bonds were sold on the market, and the mortgage was the usual form of trust mortgages given under such circumstances. The company became insolvent, made default in the payment of its interest, and the Farmers' Loan & Trust Company filed its bill in the United States circuit court for the Southern District of Illinois for a decree of foreclosure. In that proceeding Mr. J. G. English was appointed receiver, and under an order of the court took possession of the

property. The mines were in operation at the time of the appointment.

The receiver presented his petition representing that the mines were in a dilapidated condition; that the same were subject to overflow from water, and required constant operation of pumps to keep them free from water; that the mines were subject to waste by reason of the decay of timbers, and the constant falling in of the roof, etc.; that the mines, in order to preserve them in proper condition, should be worked and operated; that in order to do so it would require that he should make contracts for the sale of coal and employ sufficient force to operate the mines; that coal could only be sold upon terms requiring payments for coal delivered every thirty days; that the statutes of Illinois require payments to be made to miners every week; that this would require the receiver to have a capital on hand sufficient to pay his men weekly, pending the collection from sales; and that to obtain this capital it would be necessary to make temporary loans for that purpose. He asked for instructions in the premises, and for authority to issue receiver's certificates for the purpose of raising funds wherewith to make certain necessary repairs, and to furnish a working capital for the operation of the mines.

A majority of the bond-holders consented that an order might be entered in accordance with the prayer of the petitioner. A minority of the bond-holders, however, appeared and objected to the issue of the certificates asked for.

Mr. W. J. Calhoun for the receiver.

Messrs. Runnells & Burry for Farmers Loan & Trust Co.

Messrs. Hess & Johnson for objecting bond-holders.

NOTE.—Power to permit receiver of private corporations to create liens on its property.

The distinction taken in this case between quasi public and private corporations has not always been observed in practice, although in the cases in which it has been disregarded it seems that no question has been raised as to the power of the court to permit the receivers to charge property in their possession for current expenses.

In *Allison v. Coal Co.*, 87 Tenn. 60, in which a settlement was being made of the affairs of the corporation, the court said that royalty which accrued to owners of the mine operated by the corporation while in the hands of the receiver was the first charge on the funds in his hands, being a receiver's debt.

In *Neafie's App.* (Pa.) 11 Cent. Rep. 186, the controversy was as to the payment of certain certificates which had been issued by a receiver in possession of the property of the American Ship-building Company, and the court said that the power of the court to permit the issuance of such certificates is not questioned, and they were therefore treated as valid so far as issued within the terms of the order authorizing them.

In *Raht v. Attrill*, 42 Hun, 414, the question was as to the validity of receiver's certificates which had been issued to pay the wages due to workmen of the Rockaway Beach Improvement Company, before the property went into the hands of a receiver; the court adjudged them void for the reason that it was not proper for the receiver to issue certificates for wages earned before he took possession of the property.

session of the property, and their validity does not seem to have been questioned on the ground that certificates of such property could not properly be authorized.

In *Karn v. Rorer Iron Co.*, 86 Va. 754, it appeared that a mine and a railroad were operated by the same company in connection with each other, and the court decreed that under those circumstances it was proper to issue certificates which should be a charge upon the whole property, mine as well as railroad.

In *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 377, an order of court had given the receiver of an iron company permission to issue certificates to pay interest, taxes, wages, and freight until the business in his hands should realize sufficient to pay the same, and also for materials necessary in the protection of the business. It was held that orders given workmen upon a merchant for goods did not come within the terms of the order and were void although the power of the court to authorize such certificates is not questioned. See also *Gay v. Brierfield C. & I. Co.*, *ante*, 564.

The question, however, came directly before the court in the case of *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 812, in which it was sought to obtain prior payment out of the funds of a steamship company. The court held that permission to receivers to create liens upon property in their hands had never been granted in any case except that of railroads, and the court refused to enforce the charge in the case before it.

H. P. F.

Gresham, Circuit Judge, delivered the following opinion :

The defendant, a private corporation, whose chief business is mining and selling coal, conveyed to the complainant, in trust, lands and two coal mines in Vermilion county, Ill., to secure an issue of bonds amounting to \$500,000. An installment of interest was allowed to remain due for more than six months, and this bill was filed to foreclose the trust deed. Joseph G. English, who was appointed receiver, asks for an order authorizing him to issue receiver's certificates not exceeding in all \$24,000, which shall be a first lien upon the trust property, to enable him to pay taxes now due, amounting to \$3,428.64, take up outstanding certificates amounting to \$6,400, which were issued under an order of the Vermilion circuit court, in a suit to foreclose the same trust deed, and to continue the operation of the mines. The receiver represents that, with additional working capital, he could operate the mines profitably, and better protect them. The holders of 75 per cent of the bonds and the corporation join in the receiver's request. The holders of the remaining 25 per cent resist the application. The corporation is insolvent. It is not claimed that the receiver is without means to pay taxes, and it is chiefly to enable him to continue the operation of the mines for anticipated profits that he desires authority to issue certificates.

When it becomes necessary for a court of chancery to take possession of property which is the subject of litigation, by placing it in the hands of a receiver, all expenses incident to its safe-keeping and preservation are properly chargeable against it; and, if there be no income, such expenses will be paid out of the proceeds of the *corpus* before distribution to lien or other creditors. It does not follow, however, that because property of a private corporation or a natural person may be thus protected and preserved before sale, that, in order to raise money to operate it for profit, a court may place a charge upon it in advance of existing liens. Pending a suit to foreclose a mortgage executed by a railroad corporation, the road may be operated by a receiver, and debts contracted for labor, supplies, and other necessary purposes before as well as after the appointment of a receiver, may be made a first lien upon income, and, if that is not adequate, upon the *corpus* of the property. In the exercise of this exceptional and extraordinary jurisdiction, which is of comparatively recent origin, courts have entered orders making receiver's certificates first liens on the mortgaged property. This has been done, however, on grounds not applicable to mortgages executed by private corporations. A railroad corporation is a quasi public institution, charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts pending proceedings for the sale of the road will operate it by a receiver, and make the expense incident thereto a first lien. This is done on account of the peculiar character of the property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. 16 L. R. A.

Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. *Foadick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Barton v. Barbour* 104 U. S. 126, 26 L. ed. 672; *Mittenberger v. Loganport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 424, 29 L. ed. 963; *Wood v. Guarantees Trust & S. D. Co.* 123 U. S. 421, 32 L. ed. 472; *Kneeland v. American Loan & Trust Co. of Boston*, 136 U. S. 89, 34 L. ed. 879; *Morgan's L. & T. R. & S. Co. v. Texas Cent. R. Co.* 137 U. S. 171, 34 L. ed. 625.

In *Wood v. Guarantees Trust & S. D. Co.* the court said: "The doctrine of *Foadick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here but only point it out."

In *Kneeland v. American Loan & Trust Co. of Boston*, *supra*, in discussing the jurisdiction of the chancellor to displace the lien of a railroad mortgage, the court said: "Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception,

and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

And further on in the same opinion the court said: "If, at the instance of any party right-fully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might right-fully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself."

In the language above quoted, there is a plain implication that the limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations. The court is not asked

to subvert the lien of the mortgage on the ground that the trustee or bond-holders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bond-holders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages (sometimes with unwarranted freedom), on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Pierre BOURGET
v.
City of CAMBRIDGE.
(.....Mass.....)

A traveler on a highway who stoops to pick up and throw out of the way a loose telephone wire which is hanging so as to endanger travelers is not as matter of law guilty of such negligence as to prevent him from recovering against the city for the injury received from the wire which is charged with electricity on the ground that it is a defect in the highway.

(May 10, 1892.)

EXCEPTION by plaintiff to a ruling of the Superior Court for Middlesex County directing a verdict for defendant in an action brought to recover damages for personal injuries alleged to have resulted from a defect in one of defendant's highways. *Sustained.*

The facts are stated in the opinion.

Massrs. D. E. Ware and J. Hewins, for plaintiff:

Mr. Charles J. McIntire, for defendant: There is no municipal liability to individuals receiving injuries from defects in highways beyond that which is defined by statute.

Hill v. Boston, 122 Mass. 844, 28 Am. Rep. 832, and cases cited.

It is not enough for plaintiff to show he was lawfully in the street, or that there was a defect which might have injured him while traveling. He must show that the defect caused injury to him who at the time of the injury was using the street for the purposes of travel.

Tighe v. Lovell, 119 Mass. 472; *Lyons v. Brookline*, 119 Mass. 491; *Stickney v. Salem*, 8

Allen, 874; *Blodgett v. Boston*, 8 Allen, 287. Compare with *Hunt v. Salem*, 121 Mass. 294.

The plaintiff cannot be considered a traveler, for he was merely engaged in an employment upon a limited territory which included a portion of the street. One who uses the street for the purpose of play is not a traveler. By what rule is he a traveler who appropriates the street for the purpose of work?

Blodgett v. Boston, 8 Allen, 240.

A person may so employ himself while on the highway "as to make it clear that he has ceased to use it as a traveler, and when there is no evidence that plaintiff is using it as a traveler it is the duty of the court to take the case from the jury."

Britton v. Cummington, 107 Mass. 849.

The removal of the wire so that it should not be in the way of other people had no connection with traveling, and the statute does not apply to it.

McDougall v. Salem, 110 Mass. 21.

The wire belonged to the employers of the plaintiff, and was attached to their building on the premises where he was employed. He attempted to remove it off the sidewalk.

This is what he might be expected to do in the interest of his employers and in the scope of his employment.

The master could not recover if he was attempting the same object. What different right has the servant?

Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; *Burt v. Boston*, 122 Mass. 223, and cases cited; *Bartlett v. Boston Gas Light Co.* 117 Mass. 583, 19 Am. Rep. 421.

Holmes, J., delivered the opinion of the court:

The question as presented by the plaintiff's

NOTE.—We find no other adjudication as to the right of a traveler to recover for injuries resulting from an attempt to remove an obstruction from the highway.

from an attempt to remove an obstruction from the highway.

evidence, and the ruling of the court, is whether, if one who is traveling in the highway sees a loose telephone wire hanging so as to endanger travelers, and stoops to pick it up and throw it out of the way, he does by that act lose the protection given to travelers by the statute, so that he cannot recover for a defect in the highway, under Pub. Stat. chap. 52, § 18. It must be assumed that the jury might have found that the plaintiff was using due care, unless the contrary appears as matter of law, and that the wire charged with electricity was a defect. The fact that the wire belonged to the plaintiff's master is immaterial. *Burt v. Boston*, 123 Mass. 223, 227; *Hill v. Winsor*, 118 Mass. 251, 255.

Our decisions have drawn the line of liability rather favorably for towns, and the case at bar comes pretty near the line, but we are of opinion that the plaintiff ought to have been allowed to go to the jury. It is plain that the mere fact that he stopped momentarily, if he did, which is not clear, would not deprive him of his rights as a traveler. *Bliss v. South Hadley*, 145 Mass. 91, 94, 5 New Eng. Rep. 124; *Varney v. Manchester*, 58 N. H. 480; *Duffy v. Dubuque*, 68 Iowa, 171. If he was a traveler, the mode of his coming into contact with the defect is not material, if it was not negligent. The fact that he voluntarily took hold of the wire no more prevents his recovery than his

voluntarily brushing against it or voluntarily walking over a pitfall. It may be said, no doubt, that such voluntary handling of the wire, even if not negligent, is not incident to the use of the highway for purposes of travel; and that, therefore, if harm comes of it, it should not be imputed to the traveler, or give rise to liability, although the cause of the harm was a defect for which the city would have been liable if it had interfered with travel, and had done the damage in that way. We agree that cases of benevolent intermeddling by a volunteer can be put in which he would take the risk of any harm that might befall him; for instance, if a man should come with carts and bricks and mortar to make serious changes and repairs. But it seems to us that to throw on one side, out of the way of travel, either with one's stick or one's hands, a light, movable object, which is an annoyance or a nuisance where it is, is one of those everyday acts of kindly feeling which fairly may be said to be an incident of travel, as it commonly goes on, and to be within the protection of the law. *Baboon v. Rockport*, 101 Mass. 93, 94; *Britton v. Cummington*, 107 Mass. 347; *Gulline v. Lowell*, 144 Mass. 491, 4 New Eng. Rep. 236; *Graham v. Boston* (Mass.) 80 N. E. Rep. 170.

Exceptions sustained.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
Henry BRADLEY *et al.*, *Respts.*,

v.

Thomas G. SHAW *et al.*, Board of Canvassers
of Minerva Township, *Appls.*

(..... N. Y.)

1. The lack of any nomination does not prevent voting for a person under a provision that "the voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office."
2. The fact that paster ballots placed on ballots for town officers contain also the names of candidates for excise commissioners that cannot lawfully be voted for on that ticket will not justify the inspectors in refusing to count and declare them in stating the result where these paster ballots were a part of those printed at private expense by candidates of an independent meeting or caucus, all of which were alike.

(June 17, 1892.)

APPEAL by defendants from an order of the General Term of the Supreme Court, Third Department, affirming an order of a Special Term of said court which was filed in the office of the clerk of Essex county which required the Board of Canvassers of Minerva Township to reassemble, and recount the ballots cast at an election held March 1, 1892,

NOTE.—For note on marks and devices to distinguish ballots, see *Rutledge v. Crawford* (Cal.) 18 L. R. A. 761.

16 L. R. A.

including certain paster ballots, and declare the result of such recount. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Houghton, with **Mr. John H. Cunningham**, for appellants:

A peremptory writ will not issue except in a case of clear and unquestioned legal right, and should not be granted on a disputed claim or where its validity is controverted.

People v. Chenango County Supra, 11 N. Y. 563; *People v. Greene County Supra*, 64 N. Y. 600; *People v. Wendell*, 71 N. Y. 171.

The relators having failed to receive a proper nomination and file a certificate thereof as required by the Ballot Reform Law, were not legally candidates and were not entitled to be voted for and were not eligible to office at the said town meeting, and the paster ballots voted for them were void and of no effect.

The provisions of the Ballot Reform Act are held by this court to be mandatory and a disregard of them upon any pretense whatever constitutes a violation of the law.

People v. Onondaga County Canvassers, 14 L. R. A. 624, 129 N. Y. 420.

No voter shall place any mark upon his ballot or do any other act in connection with a ballot with the intent that it may be identified as the one voted by him; no person shall place any mark upon or do any other act in connection with a paster ballot with intent that it may afterwards be identified as having been voted by any particular person.

Ballot Reform Law, § 88.

When a ballot has been deposited in a ballot box, upon which or upon a paster affixed

thereto a writing or mark of any kind has been placed by the voter, or by any other person to his knowledge, with the intent that such ballot shall afterwards be identified as the one voted by him, the same shall be void and of no effect.

Ballot Reform Law, § 35; Laws 1891, chap. 286.

The ballots should differ internally only in the names of the candidates for office.

Opinion of Judge Gray in *People v. Onondaga County Canvassers*, *supra*.

Messrs. Foley & Wing for respondents.

Gray, J., delivered the opinion of the court:

These appellants composed the board of town canvassers for the town of Minerva, and, in proceedings instituted upon the application of these relators, a peremptory writ of mandamus issued, requiring them to reassemble, and to declare the result of a town meeting, allowing to the several relators the number of votes cast for them as stated in the moving affidavits, and called "paster ballots," and directing the board to issue a certificate of election to the candidates having the greatest number of ballots cast for them, including such "paster ballots."

The first objection—that the relators, having failed to receive a proper nomination by a political party which at the last election before the holding of the convention or primary meeting polled at least 1 per centum of the entire vote cast in that political division of the state for which the nomination is made—is wholly unsound, and without force. The plan contained in sections 1, 2 and 3 of the Ballot Reform Act was a provision for the printing of an official ballot at the public expense; a feature well designed to secure the desired secrecy and independence of the ballot. But that it was in no wise intended to prevent the voter to vote for any candidate whom he chose is evident from the further provisions of the law (sec. 25) that "the voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office." Indeed, to hold otherwise would be to disfranchise, or to disqualify, the citizen, as a voter or a candidate, and, in my opinion, to affect the law quite unnecessarily with the taint of unconstitutionality in such respects.

The interesting and more important question in the case relates to the effect which the presence upon the paster ballot of the name of the office of excise commissioner, and of the name of the candidate therefor, had upon the ballots cast for the relators. Being upon the ballot officially indorsed and to be cast for town officers other than excise commissioners, who, under the Ballot Law, are to be voted for upon a separate ballot, and in a separate box, of course they could not be counted as votes for the candidate for excise commissioner; but it was argued that the effect upon the ballot was to mark or identify it, and to subject it to the condemnation of the law. The relators, who

were nominated for the several town offices at an independent meeting or caucus, were obliged to have paster ballots printed at their own expense, for use at the polls. All of these paster ballots had printed upon them the name of the candidate for the office of excise commissioner; and, if that was a fact which made the ballot a marked one, within the meaning of the Ballot Law, then every one of the ballots printed for this independent ticket and for the use of its supporters was vitiated. The effect of this appearance upon the paster ballots, however, was not for consideration in this proceeding, otherwise than as to whether it constituted any reason for rejecting them in counting the votes and declaring the result.

The case, upon the affidavits presented, quite warranted the issuance of the writ in question. Aside from the grounds stated in the opposing affidavits for defeating the relators' application, which concerned the legality of the mode by which the relators were put in nomination, all that was urged against the "paster ballots" cast for them was that they were defective, "in that they contained the name of an office, and a candidate therefor, that was not upon the official ballots, and could not be properly on the same ticket with the other town officers," etc. That was, in substance, a claim that these paster ballots were illegal, and could not be counted. There was no conflict as to the number or description of these paster ballots, and each bore the proper official indorsement entitling it to be deposited. The protest which was filed by the appellants, and which appears in the case, was upon the sole ground that no names for any office should be counted unless they were such as had received a legal nomination, properly certified to the clerk. We think that by a proper reading and construction of the Ballot Law it was the duty of the inspectors to have counted the ballots in declaring the result of the election, and that any objection to them upon the ground that they were marked ballots within the meaning of the Act could not be determined in this proceeding. The question before the court upon the application of these relators was purely one of law on a conceded state of facts, and one which it was competent and proper for the court to decide upon the hearing. It went solely to the right of the relators to have the paster ballots counted and declared by the board of canvassers in stating the result of the town election. The particular feature objected to in these paster ballots suggested no ground for their rejection under the Election Law, and there was no other question properly before the court in this proceeding. These ballots should therefore have been counted by the board, and, because of their rejection, the peremptory writ of mandamus was properly ordered to be issued.

No other questions call for any review by us, and the order appealed from should be affirmed, with costs.

All concur, except *Finch, J.*, not voting.

TEXAS SUPREME COURT.

William HOEFLING & Son, *Appts.*,
v.
City of SAN ANTONIO.

(.....Tex.....)

1. The constitutional equality and uniformity of occupation taxes is violated by an ordinance which is fair on its face imposing a tax upon those who sell meat, but which is collected only from those who sell in their own shops while there is a persistent failure to collect it from those who rent stalls from the city and who pay only the rental value thereof.
2. A city cannot levy an occupation tax on persons not similarly taxed by the state under Const., art. 8, § 1, providing that such taxes by any county, city, or town "shall not exceed one half of the tax levied by the state for the same period on such profession or business."
3. An occupation tax paid under coercion of criminal proceedings may be recovered back where the ordinance imposing it was unconstitutional although fair on its face because of the persistent failure to enforce it against part of the persons to whom it applied.

(June 10, 1892.)

APPEAL by plaintiffs from a judgment of the District Court for Bexar County rendered upon an agreed case on appeal from a justice's court, in favor of defendant in an action brought to recover back money which had been exacted from plaintiffs as an occupation tax. *Reversed.*

The facts are stated in the opinion.

Messrs. George C. Altgelt and Henry E. Vernon, for appellants:

The ordinance of the city of San Antonio imposing an annual occupation tax upon butchers establishing private stalls for vending meats within the city is not equal and uniform, and is therefore void; and appellants having paid such tax under protest duly entered, should have been awarded judgment against appellee for the amount paid with interest and costs.

Const. art. 8, §§ 1, 2; *Pullman Palace Car Co. v. State*, 64 Tex. 274; 2 *Desty, Taxn. p.* 1897; *St. Louis v. Spiegel*, 75 Mo. 145.

The ordinance of the city of San Antonio levying a tax of \$75 per annum upon individuals for the right of establishing stalls for vending of meats, is without authority of law because the state levies no occupation tax upon said business or calling, and such tax levied by the city is therefore forbidden by the Constitution of the state.

W. & W. Civil Const. § 989; 2 *Cooley, Taxn. pp.* 209, 387; 2 *Desty, Taxn. p.* 1384; *Burroughs, Taxn. p.* 892; *Dillon, Mun. Corp. §§* 357, 740, 763, 764.

NOTE.—As to the right of municipalities to impose occupation taxes, see *note* to *Richmond & D. R. Co. v. Reidsville (N. C.)* 2 L. R. A. 284.

As to municipal licenses, see *note* to *Magenau v. Fremont (Neb.)* 9 L. R. A. 786.

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Messrs. Upson & Bergstrom, for appellee:

The ordinance of the city of San Antonio, imposing a tax of \$75 upon butchers who establish stalls for vending meats within the city, being a tax imposed upon all persons alike, so establishing such stalls, irrespective of the locality within the city limits where established, is not obnoxious to the criticism of being unequal and ununiform, and is therefore valid and enforceable.

By section 76 of the charter of the city of San Antonio, the city council is authorized to license, tax and regulate all trades, professions, occupations, and callings, the taxing of which is not prohibited by the Constitution of the state, and there being no constitutional inhibition against taxing individuals for establishing stalls in any part of the state for vending meat, the ordinance in question is valid.

City Charter of San Antonio, § 76, approved April 18, 1870; *Hirshfield v. Dallas*, 29 Tex. App. 243.

Stanton, Ch. J., delivered the opinion of the court:

This case originated in justice's court, and on appeal to the district court judgment was rendered against appellants upon the following agreed case: "*First.* That plaintiffs, Wm. Hoeftling, Sr., and Wm. Hoeftling, Jr., are and were partners in business under the firm name of Wm. Hoeftling & Son, doing business as butchers in the city of San Antonio, Bexar county, Texas, at two separate establishments or private markets, upon their own property, and not in the market house of the city of San Antonio. *Second.* That said plaintiffs opened said private markets upon their own property with the consent and approval of the city council of the city of San Antonio, under the provisions of the city ordinance, hereinafter set out. *Third.* That the city of San Antonio maintains, and for many years has had, a public market, with stalls that are rented to individuals at certain rentals, with prices according to location, and values fixed by the city council of San Antonio; but the market master does not collect said amount of \$75 from butchers occupying stalls in said public market in addition to such stall rents. *Fourth.* That the following ordinance, passed by the city council of the city of San Antonio, is the only ordinance by virtue of which the sum of money herein sued for was collected from plaintiffs, and paid by them under protest, to wit: 'Sec. 20. The city council may grant to individuals the right of establishing in any designated locality within the city stalls for the vending of meat, granting general market privileges. Each person or firm granted such right shall pay therefor to the market master, for the use of the city, seventy-five dollars per annum, quarterly in advance, and shall post the receipts in a conspicuous place in said stall. The city council may revoke any grants made hereunder, at any time deemed necessary.' *Fifth.* That heretofore, to wit, on the 1st day of April, 1891, plaintiffs were required by the market master named in said ordinance to pay

to said city the sum of thirty-seven dollars and fifty cents, (\$37.50) being eighteen dollars and seventy-five cents (\$18.75) on each one of said meat stands, for three months' license tax from April 1, 1891, to June 30, 1891. *Sixth.* That plaintiffs paid said tax under protest, and after the institution of criminal proceedings in the recorder's court in the city of San Antonio, and before making said payment, duly notified the authorities of the said city of San Antonio that said payment of thirty-seven dollars and fifty cents was made under protest, and that suit would be brought for money so paid under protest. *Seventh.* That there is no question before the court as to sufficiency of the protest, or as to the amount paid by plaintiffs, but that the only question before the court is the validity or invalidity of the ordinance aforesaid. *Eighth.* That there is no other ordinance of the city of San Antonio imposing any occupation tax or license tax upon butchers except the one embodied in this agreement. *Twelfth.* That the sole question for the determination of the court is the validity of the aforesaid city ordinance, so that, if the same is held valid, judgment should be rendered for defendant, and if the same is held invalid judgment should be rendered for plaintiffs."

The charter of the city, enacted on August 13, 1870, provides that the mayor and council shall have power "to license, tax, and regulate merchants, commission merchants, hotels, and boarding-house keepers, restaurants, drinking houses or saloons, bar-rooms, beer saloons, and all places or establishments where intoxicating or fermented liquors are sold, brokers, pawnbrokers, money brokers, real-estate agents, insurance brokers, insurance agents, and auctioneers, and all other trades, professions, occupations, and callings, the taxation of which is not prohibited by the Constitution of the state, which tax shall not be construed to be a tax on property." Sp. Laws 1870, p. 253. Section 175 of the charter provides that the city council "shall have power to levy and collect taxes, commonly known as 'licenses,' upon trades, professions, callings, and other business carried on," and, after enumerating many things and occupations that may be thus taxed, but not embracing butchers, it declares that "this enumeration shall not be construed to deprive the city council of the right and power to levy and collect other license taxes, and from other persons and firms, under the general authority herein granted." Another section provides "that, if any person shall engage in any business, calling, avocation, or occupation which by ordinance is subject to a license tax, without first having obtained such license, he, she, or they shall be liable to imprisonment and fine of ten dollars for each day said violation of said ordinance shall continue." Section 173. Another section provides that the city council shall have power "to make such rules and regulations in relation to butchers as they may deem necessary and proper." Section 67. Other sections give power to make regulations to secure the health of the city, and to keep cleanly and in good order all places where offensive matter is liable to accumulate, and to enforce such regulations by fine and imprisonment. Sections 49,

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54, 62, 91. Section 76 of the charter gives the power to license, tax, and regulate all occupations, trades, and professions; but it is evident that the power given to license such occupations is not the same as the power to tax them, nor are either of these powers the same as the power given to regulate them.

In a general sense, "a license is an official permit to carry on a business or trade or perform other acts which are forbidden by law except to persons obtaining such permit." Abbott. This, however, is not the sense in which the word is used in the charter of the city of San Antonio, for there was no law in force in this state which prohibited the following of many of the occupations contemplated by the charter, or of that of a butcher engaged in vending meats, unless a license was first obtained. There are occupations, however, which, on account of their character, may prove hurtful to the public unless properly conducted, and, although they are not prohibited by the common law nor by statute, it has been seen that the public welfare requires that they should to some extent be kept under some restraint; and to this end it has become usual to grant a permit to follow such occupations, and usually, to insure proper conduct of the business, an obligation to conduct it properly is required to be executed before this permit is issued; but this is not always the case, and when not, if the business be not one to the conduct of which a privilege is necessary, the permit serves but little purpose other than to give information to the public authorities of the persons engaged in a given occupation, their places of business, and other like matters, which will enable them the more readily to exercise over them such control as the law permits. The power to license, however, does not confer a power to tax, by which we understand to be meant the power to take from the citizen a sum for the support of the government, whether that be national, state, or municipal. It is usual, however, to exact a fee for the issuance of the permit, and it has sometimes been said that a further sum might be demanded for a license, to be used to meet the necessary expenses of inspection and regulation of the business to be conducted under the license; but it seems to us that money exacted for the latter purpose has much the semblance of a tax. It is said by Mr. Cooley that, "as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given the intentment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated. If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised. . . . Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the

regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers." Cooley, *Taxn.* 597.

The fact that the charter does not in terms provide for the exaction of a license fee, and the further fact that throughout it provides for the enforcement of all public regulations by fine and imprisonment, are strongly persuasive that it was not intended the city should exact for license the sum demanded and received of appellants as a condition on which they might vend meats on their own premises, and that the sum demanded was demanded and received by the city under its power expressly given to levy and collect taxes upon occupations. In fact, looking to the whole charter, it is apparent that the taxes, other than taxes on property, which the city is authorized to levy and collect, are occupation taxes, within the meaning of the Constitution. It is said that, "concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation, with a view to revenue, but a reasonable fee for the license and labor attending its issue may be charged." Dillon, *Mun. Corp.* 357. Whether legislation authorizing the demand and reception of license fees for the grant of a permit to pursue a useful and lawful occupation ought not to be deemed included within the provisions of the Constitution now in force in this state regulating the collection of occupation taxes may be a question on which there would be difference of opinion; but, looking to the charter of the city of San Antonio, we are of opinion that the money demanded and received from appellants was demanded and received under the power given to collect taxes on occupations. The Constitution provides that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limit of the authority levying the tax." Const. art. 8, § 2. This is as binding in case of occupation taxes levied by a municipal corporation as in such taxation levied by the state. The agreement makes it clear that butchers who vend meats in stalls rented from the city do not pay the tax imposed on appellants, who conduct the same kind of a business at stalls on their own premises; and that the former pay only what is deemed a proper rental for the stall owned by and rented to them by the city, this varying with the location of the stall and its rental value.

It seems to be conceded by counsel for appellee that the ordinance under which the tax was demanded and received from appellants applies to butchers who vend meats at the public market in stalls rented to them by the city as well as to butchers who vend meats at stalls owned by themselves, and they seek to avoid the proposition that the tax levied on appellants is in violation of that part of the Constitution above quoted, by the following propositions: "The intent of the city council is clearly expressed, and imposes a tax upon all persons who pursue the avocation of vending meat at a stall used for that purpose anywhere

within the city limits, and it nowhere appears in the ordinance that any individual pursuing the occupation of vending meat in a stall established for that purpose is exempted from paying the tax imposed. The fact that the market master of the city has not collected such tax from those persons having stalls within the city market house cannot avail the appellants in their effort to have the ordinance declared invalid, for, though the market master may have supposed, in acting as he did, that he was placing the proper construction upon the ordinance, yet neither this court nor the appellee is bound by any such construction. The ordinance imposes a tax upon all persons within the city having stalls for vending meat, and if the city official charged with the duty of collecting the tax, and thus carrying into effect the law of the city, fails in his duty, the proper remedy for appellants will be to apply to the courts of the county to compel the official to discharge his sworn duty." From the agreement we understand that the city has not asserted the right to collect the occupation tax received from appellants from persons who pursue the same occupation in stalls rented from the city, and, if the ordinance was intended to impose the same tax upon them as upon persons doing business as were appellants, then, in view of the broad powers conferred on the city to enforce the collection of all taxes it may lawfully levy, to hold that it may lawfully collect occupation taxes from some persons, while others pursuing the same occupation were continuously permitted to escape such a tax by failure of the city to compel the proper officer to collect it, would be to hold that the city might accomplish by wrongful nonaction what it could not lawfully do by an ordinance declaring that the tax should be collected only from some persons engaged in the particular business. Such persistent failure on the part of the city to cause the tax to be collected from those who sold meats in the public markets would evidence as fully an intention not to subject them to the tax as would an ordinance expressly exempting them from it. The Constitution requires that occupation taxes shall be equal and uniform, and this applies to the collection of such taxes as well as to the levy, and its command cannot be evaded by an ordinance imposing the tax on all persons engaged in a given occupation, if there be no intention or effort to enforce it against a class designated by the place where they do business or in any other manner. An ordinance intended so to operate, or permitted by the city so to operate, would be an invasion of the letter and spirit of the Constitution, which requires such taxes to be equal and uniform, not only in the sense imposed as a tax upon a given occupation, but in its collection also. The mere failure of the tax collector to collect a tax from some persons pursuing the taxed occupation from whom it might be collected would not invalidate the tax as to others; but, if a city intentionally fails to compel its collector to collect from all who pursue such occupation, while it enforces collections from some, then this ought to be held to be unequal taxation, and the city held liable to respond.

This is not a case in which the citizen is attempting to restrain the collection of a tax, but

is a case in which plaintiffs paid the sum claimed, under such coercion as is conceded to have been sufficient to entitle them to recover it if the tax was illegal; nor is it a case in which it can be claimed that those doing business in the stalls rented from the city were paying an occupation tax based on any classification, either legal or illegal. If, however, the ordinance applies, and was intended to apply, only to those who might vend meats in stalls established on their own premises, which is probably what was intended, then the ordinance and tax collected under it were illegal, because in direct conflict with the Constitution, which would require the taxing of all persons in the city who pursued the same occupation, without reference to the place where the business was conducted, or would otherwise deny the right to tax any person engaged in that business.

It is claimed by appellants that, as the state has never required an occupation tax of persons engaged in the business on account of which the tax was demanded and received by the city from appellants, the city had no power to impose such a tax. This proposition is based on the last paragraph of section 1, art. 8, of the Constitution, which provides that "the occupation tax levied by any county, city, or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the state for the same period on such profession or business." The charter of the city, created prior to the adoption of the Constitution now in force, is broad enough to sustain such a tax; but, if in conflict with the Constitution, must be held to be in so far repealed, or to stand in subordination to the requirements of that instrument. The purpose of so much of the Constitution as is quoted was evidently to place a limitation on the power of municipal corporations to levy and collect occupation taxes; to deny to them the unrestricted power to tax any occupation. Under the Constitution, the sum a municipal corporation may collect as a tax on a given occupation cannot "exceed one half of the tax levied by the state for the same period on such profession or business," and this necessarily involves the proposition that the Legislature must determine that the occupation shall be taxed for the benefit of the state before a municipal corporation can tax it at all. When the Legislature has declared that a

named occupation shall be taxed, and has fixed the amount of the tax, then, and not before, has a county, city, or town the power to tax that occupation; for the Constitution does not require occupations to be taxed, and only permits it when the Legislature deems it proper. Its failure to require such taxation for the benefit of the state is, in effect, a declaration that it is neither necessary nor proper for the use of municipal corporations. The measure of a municipal corporation's right to tax an occupation is made dependent on the sum the state may levy on the same occupation; and when the state has not taxed it at all, is it to be believed that it was the purpose of the people in such case to give to municipal corporations the power to tax the occupation as in the discretion of a municipal council might seem proper, while a limitation was placed on the amount such a corporation might levy in all cases in which the Legislature had declared it proper and necessary that the occupation should be taxed for the benefit of the state? It was not intended to confer on a municipal corporation the power to tax an occupation not taxed by the state. If the state levies no tax on the occupation, a municipal corporation cannot levy or collect a tax, unless the proposition that the half of nothing is something can be maintained. The Constitution wisely leaves it to the Legislature to determine what, if any, occupations shall be taxed, and this power is not so likely to be misused by the representatives of the people of the entire state as by the council of a single municipality. In the case of *Hirshfield v. Dallas*, 29 Tex. App. 242, it seems to have been held that a municipal corporation might tax an occupation not taxed by the state [p. 244], but it seems to us that due effect was not given in the case to the provision of the Constitution before noticed, and the authorities cited in support of the opinion do not consider such a question.

If appellants had voluntarily paid the sum claimed as a tax, then they would not be entitled to recover it; but they paid it upon coercion, after the institution of criminal proceedings against them, and under the agreement of the parties are entitled to recover the sum so paid, together with costs incurred in all the courts.

Judgment of the court below will be reversed, and here rendered in favor of appellants as above indicated.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* ATTORNEY-GENERAL,
v.

FIDELITY & CASUALTY INSURANCE
CO. of New York.

(.....Ohio St.....)

*1. A foreign insurance company, exercising in this state franchises and privileges with-

*Head notes by the COURT.

out authority of law, may be ousted therefrom by a proceeding in quo warranto.

2. The issuing of a license to a foreign insurance company to do business in this state by the superintendent of insurance is a ministerial, and not a judicial, act, and is therefore not a bar to a proceeding in quo warranto, where it is charged with exercising franchises and privileges without authority of law.

3. The provisions of section 282, Rev. Stat., imposing on insurance companies of another state or nation, doing

NOTE.—For note on the subject of retaliatory legislation affecting insurance companies, see State 16 L. R. A.

v. Western Union Mut. L. & Acc. Soc. (Ohio) 8 L. R. A. 129.

business in this state, the same obligations and prohibitions that are imposed in such other state or nation upon Ohio companies doing business therein, are retaliatory in character, and must, therefore, be confined to such cases as fairly fall within the letter of the statute.

4. To make a case for the application of the retaliatory provisions of section 282, Rev. Stat., against an insurance company of another state, doing business in this state, it must be made to appear that an Ohio company has been formed in this state to do substantially the same kind and lines of insurance, and would, by the laws of that state, be precluded from transacting the same therein, or be subjected to burdens not imposed by the laws of this state on such foreign company.

5. The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No company exists, within the meaning of the statute, until the requisite stock has been subscribed and paid in, and the directors chosen.

(June 24, 1892.)

PROCEEDINGS in quo warranto to oust defendant from the privilege of doing certain lines of business in the state. *Dismissed.*

The facts are stated in the opinion.

Messrs. David K. Watson, Atty-Gen., and Harrison, Olds & Henderson for relator.

Mr. W. J. Gilmore for defendant.

Minshall, J., delivered the opinion of the court:

1. The defendant is a fidelity and casualty insurance company, organized under the laws of the state of New York, and doing, in this state, what, by the laws of New York, is authorized and known as four lines of such insurance, to wit: *First*, against injury, disablement, or death of persons resulting from traveling or general accidents by land or water; *second*, guaranteeing the fidelity of persons holding places of public or private trust; *third*, upon plate glass against breakage; *fourth*, upon steam boilers against explosion, and against loss or damage to life or property resulting therefrom. Its right to do more than one of such lines of business in this state is challenged by the attorney-general on the ground that, by the laws of New York, no company incorporated in this state can transact in that state more than one of such lines of insurance; and therefore, under the provisions of section 282, Rev. Stat. of this state, it has no right to make in this state more than one of the lines of insurance it is doing. That section reads as follows: "When, by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within this state, and upon their agents here."

16 L. R. A.

A demurrer to the petition, objecting to the jurisdiction of the court as well as to the sufficiency of the pleading, having been overruled, the defendant, as a third defense to the petition, answered: "That under the laws of New York it is legally authorized and empowered to do, and is now doing, the four lines of insurance in that state, which the petition charges it with illegally doing in Ohio; and that, under the laws of Ohio, a corporation could be legally incorporated and organized with power to do the same four lines of insurance, or any one or more of them, therein, but that no such company has yet been organized to do said four lines of insurance in Ohio, and hence no such company has yet made or could make, application to the proper officers in New York for a license to do said four lines of insurance in the state of New York." A demurrer to this defense having been overruled, the plaintiff asked leave to reply in substance as follows: That on January 13, 1887, the requisite number of persons, citizens of Cuyahoga county, "subscribed and acknowledged articles of incorporation," stating therein the name, place of business, and capital stock of the proposed corporation, and its object, to wit, under paragraph 2, § 8641, Rev. Stat., to do the four kinds of insurance now being done by the defendant in this state; and the same, having been approved by the attorney-general as in conformity to the laws of the state, were then filed and recorded in the office of the secretary of state of Ohio, "whereby," it is averred, "an Ohio corporation was duly and legally formed for the purpose of doing the lines of insurance mentioned in the articles of incorporation." As no report has heretofore been made of any of the rulings of the court in the progress of the case, it is proper that two of them should be noticed before passing on the application for leave to reply; that is to say, (1) the jurisdiction of the court, and (2) the sufficiency of the third defense.

1. It is claimed that, as the defendant is a foreign corporation, it cannot be affected by a proceeding in quo warranto in the courts of this state. That it cannot be ousted of the right to be a corporation, or of any of the franchises conferred on it by the laws of New York, is not doubted; but as to such franchises and privileges as are derived from the laws of the state of Ohio it is as much amenable to the courts of this state as an Ohio corporation, and, when found exercising such franchises without authority of law it may be ousted therefrom, as held in *State v. Western Union Mut. L. Ins. Co.*, 47 Ohio St. 167, 8 L. R. A. 129, decided since the commencement of this action.

2. Upon the facts stated in the third defense it is claimed that the defendant is not affected by the provisions of section 282, Rev. Stat., on which the demand of the state is based. The character of this section is relative to its construction. It is claimed to be reciprocal in character, and should therefore be liberally construed. A little reflection will, we think, show that it is not of this nature, but, upon the other hand, retaliatory, and should therefore be strictly construed; or, in other words, not applied to a case that does not fairly fall within its letter. Reciprocity expresses the act of

an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavours for disfavours. Accurately speaking, we reciprocate favors and retaliate disfavours. This, then, is a retaliatory statute. It treats the companies of other states as Ohio companies are treated in them; but the moment it is made to appear that Ohio companies are not treated with the same favor in another state that companies of that state are treated in Ohio, a case is made for the application of its provisions, and retaliation follows as a result. It is true that the ultimate object of the statute is to secure reciprocity; but what we have now to do with is not its ultimate, but its immediate, object, and that is to retaliate on the companies of a given state disfavours shown to Ohio companies in the same state.

The question, then, arises, The averments of the third defense being admitted, is a case made for the application of the provisions of the statute to the defendant? We think not. It is admitted that Ohio companies may be, but it is averred that none have been, formed to do the four lines of insurance which the defendant is doing in this state. Hence no case is made for the application of the statute, the language being: "When by the laws of any other state . . . any . . . prohibitions are imposed upon insurance companies of this state doing business in such state, . . . so long as such laws continue in force, . . . the same prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business in this state." To bring a case within the statute, there must at least be an Ohio company formed to which the prohibitions of the New York statute would apply, should it attempt to enter and do business in that state. It is said that the very reason that there are no such Ohio companies may be the existence of this New York statute. This is a very remote conjecture, yet, admitting its possibility, it does not vary the language of our statute. If it should be deemed desirable to foster the formation of such Ohio companies to do business in other states, it can easily be accomplished by the Legislature making the statute apply where Ohio companies may be, as well as where they are, formed to do such business in other states. We do not believe that any lawyer would affirm that an indictment drawn upon such a statute as this would be good that failed to aver the existence of an Ohio company to which the discriminating features of the statute of the other state might apply. And there is no reason why a different rule of construction should be adopted in this proceeding. The consequences to the defendant are of a penal nature. If found guilty as charged, it must not only abandon the business it has established, but cease to do more than one of its lines of business in the state, so long as the legislation of the two states remains unchanged.

In construing this statute according to its letter, we have, as we believe, given expression to the intention of the Legislature. It is a just compliment to human nature to say that, as a general rule, every man would prefer to have his favors construed largely and his disfavours narrowly; in other words, no one would delib-

erately do more injury to another than is required by his own interests, and would regard it as an honor to be as generous as he could; and that such are the sentiments of the civilized man is apparent from all writers upon public law. Decisions in some of the other states have been cited which, it is claimed, sustain the construction placed on our statute by the relator. We have examined these decisions, and find none of them upon statutes worded as our own. The case of *State v. Fidelity & C. Co.*, 77 Iowa, 648 (being the same company defendant in this case), is relied on as in point. By the language of the statute in that state (Iowa) it is put into operation "when by the laws of any other state, any . . . prohibitions are imposed or would be imposed on insurance companies of this state doing or that might seek to do business in such other state." It was there held that through the language of their statute, just quoted, the existence of the law in another state is sufficient to put the law in Iowa in force, without showing that the state of New York has ever actually enforced its law against an Iowa company. But we submit that this is so by reason of language found in the Iowa statute, and which is not found in our statute; and to give to our statute the same construction would require us to read into its language found only in the Iowa statute. The following cases are also cited as authority: *Home Ins. Co. of New York v. Welch*, 29 Kan. 672; *State v. Fidelity & C. Ins. Co.* 39 Minn. 539; *Home Ins. Co. v. Swigert*, 104 Ill. 655; *Talbott v. Fidelity & C. Co. (Md.)* 19 Wash. L. Rep. 546. The wording of the statute in each case, as before stated, differs from our own; but if it were otherwise, we should require more cogent reasons than any that have been suggested to induce us to depart from well-recognized principles of construction by reading into a statute of this character words not found in its text, for the purpose of giving it a construction in conformity to its supposed policy.

3. The next question is, Should leave be given to file the proposed reply to the third defense? We think not, for the reason that it does not show that an Ohio company has been formed to do the four lines of insurance in which the defendant is engaged. It will be observed that it does not aver that any officers or directors have been chosen, or that any of the stock has been subscribed, or that any organization whatever has been effected. It is simply that "articles of incorporation" have been made and filed and recorded in the office of the secretary of state. Articles of incorporation do not make an incorporated company; they are simply authority to do so.

Before disposing of the case, it may be well enough to notice another defense relied on in the answer, and to which a demurrer has been sustained; and that is, the license granted the defendant to do business in this state by the superintendent of insurance. We are all of the opinion that the issuing of a license to a foreign insurance company to do business in this state is a ministerial and not a judicial act, and, while it will protect the company in the transaction of its business during its continuance, is not a bar to a proceeding against it in quo warranto where it is found to be exer-

cising any of the franchises of the state without authority of law. *State v. Fidelity & O. Ins. Co.* 39 Minn. 588, and cases cited in brief of counsel for relator.

Application for leave to reply to the third defense of the answer overruled, and *petition dismissed.*

WASHINGTON SUPREME COURT.

James MORGAN *et al.*, *Repts.*,

v.

William BELL, *Appt.*

(.....Wash.....)

1. An action to enforce specific performance of a contract for the sale of land need not be brought in the county in which the land is situated under a statute which requires actions to be so brought which are for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the titles, or for any injuries to, real property.

2. Equity will not take jurisdiction of a suit seeking specific performance of a contract or damages for its breach when to the knowledge of plaintiff at the time of the commencement of the action and without fault of defendant, specific performance could not be enforced and there is no other ground for equitable interference.

3. It is impossible for a man to perform a speculative contract to convey

land which was community property after the death of his wife and the descent of her interest to an infant four or five years old.

4. Mistake as to the extent of his right under the community law to property which a man contracts to convey is not a mistake of law from which equity will refuse to grant relief.

5. The maxim that ignorance of law is no excuse for nonperformance of a contract has no application where the mistake is as to the laws of a state of the Union other than that of the contractor's domicile.

6. The measure of damages in case one believing that he has a right to convey real estate contracts in good faith to do so but is prevented from fulfilling his contract by failure of title, is the amount of the advance payment with interest, and not the alleged profit which would have accrued from the purchase.

(Hoyt, Ch. J., dissents from proposition 1.)

(January 20, 1902.)

A PPEAL by defendant from a judgment of the Superior Court for Jefferson County

NOTE.—Effect of defendant's inability to specifically perform upon the jurisdiction of chancery over the suit.

The above heading refers to total disability to perform or to such disability as amounts to total failure so that no decree for performance will be passed, and the note is not intended to cover cases of compensation for the amount which cannot be performed after performance of a portion.

Equity will not take jurisdiction of a case merely to assess damages. *Carroll v. Wilson*, 22 Ark. 82; *Zeringue v. Texas & P. R. Co.* 34 Fed. Rep. 289; *Richards v. Lake Shore & M. S. R. Co.* 25 Ill. App. 344; *Peeler v. Levy*, 25 N. J. Eq. 380; *Welsh v. Bayaud*, 21 N. J. Eq. 168.

To justify it in doing so there must be some special equity. *Sims v. McEwen*, 27 Ala. 192.

Of course even in cases brought for specific performance which cannot be decreed there are frequently circumstances present which bring the case clearly within other branches of equitable jurisdiction, and such cases will be retained and relief will be granted, but such cases are not properly treated as cases of specific performance; and in some cases a recovery of damages is permitted without any discussion of the jurisdictional question. See *O'Meara v. North American Min. Co.* 2 Nev. 112.

But the general rule is as stated above, that it is only under very special circumstances that equity will retain possession of a suit for the purpose of awarding damages. *Hatch v. Cobb*, 4 Johns. Ch. 559, 1 L. ed. 938.

So where the ground of a controversy is the mere pecuniary value of the lands in dispute equity will not retain the suit to award damages. *Curtis v. Blair*, 26 Miss. 327, 59 Am. Dec. 257.

So when the court ascertains that specific performance cannot be decreed because it was never

in defendant's power to perform, the bill should be dismissed. *Lewis v. Yale*, 4 Fla. 428.

When plaintiff knows that performance cannot be enforced.

When the defendant had disabled himself before the filing of the bill and plaintiff knew of that fact, the case is reduced to one of a bill filed for the sole purpose of assessing damages for the breach of contract, and is not within equitable jurisdiction. *Kempshall v. Stone*, 5 Johns. Ch. 193, 1 L. ed. 1054.

Where plaintiff knows at the time of filing his bill that specific performance cannot be enforced, the bill will be dismissed. *Doan v. Mauzey*, 33 Ill. 227.

Where the plaintiff had knowledge when he filed the bill that the land covered by the contract which he sought to have specifically enforced had no existence, the court will not retain the case to award damages. *Moras v. Elmendorf*, 11 Paige, 277, 5 L. ed. 135.

Where at the commencement of a suit to compel the conveyance of land the vendor was without title, to the knowledge of the vendee, the only decree which can be rendered is a dismissal of the suit. *Adair v. Adair* (Or.) March 7, 1892.

Where the contract was to procure for plaintiff a deed for property which to plaintiff's knowledge defendant did not own, in case he failed to do so equity will not retain a bill for specific performance in order to award damages. *Hill v. Flake*, 38 Me. 520.

Where before suit brought the land had been conveyed away to the knowledge of plaintiff equity will not retain the suit to give damages. *McQueen v. Chouteau*, 20 Mo. 223, 64 Am. Dec. 178; *Gupton v. Gupton*, 47 Mo. 37.

Where it appears at the trial that the defendant

in favor of plaintiffs in a suit brought to enforce specific performance of a contract to convey land or to recover damages for its breach. *Reversed.*

The facts are stated in the opinion.

Messrs. Hughes & Hastings and R. H. & R. A. Ballinger for appellant.

Messrs. Hays & Plumley for respondents.

Dunbar, J., delivered the opinion of the court:

A correct understanding of this case will necessitate a presentation of the material allegations in the pleadings. The first allegation in the complaint is: "That on the 10th day of December, 1889, the plaintiffs and defendant entered into an agreement in writing, of which the following is a copy: 'Contract made and entered into this 10th day of December, 1889, by and between William Bell, of Toledo, Ohio, and James Morgan, of Port Townsend, Jefferson county, Washington, witnesseth: The said William Bell, being the owner in fee simple of the premises hereinafter described, has agreed and does hereby agree to sell and convey the said premises to the said James Morgan upon the following conditions, to wit: The said William Bell has agreed and does hereby agree, in consideration of the sum of twenty thousand dollars, to be paid to him by the said James Morgan, five hundred dollars thereof to be paid cash in hands, the receipt of which is hereby acknowledged, and the sum of nineteen thousand five hundred dollars thereof to be paid on or before four months from the date hereof; and the said

William Bell has agreed and does hereby agree, upon receipt of the full sum of said twenty thousand dollars, that he will execute and deliver to the said James Morgan a sufficient warranty deed conveying to him a fee simple title to the following described premises: [Description omitted.] And it is further agreed by and between said parties that, should the said James Morgan fail to pay said sum of nineteen thousand five hundred dollars on or before four months from the date hereof, then the said sum of five hundred dollars this day paid by him shall be forfeited to the said William Bell.'" (Duly signed, sealed, and witnessed by William Bell and James Morgan.) The second allegation is to the effect that it was agreed upon by the plaintiffs that Morgan should act for them jointly in the purchase of the land, and that they were all jointly interested in the purchase of said land and in the proceeds of said agreement. "(8) That on the 10th day of April, 1890, the plaintiffs demanded the conveyance of the said property from the defendant, and tendered nineteen thousand five hundred dollars to the defendant, and were ready and willing at all times, under the terms of said agreement, to accept and pay for said lands, and to duly and fully perform their said agreement under the said covenants upon the like performance by the defendant; but the defendant failed and refused to make said conveyance, or to perform his portion of said agreement at said date, or at any other time, and still refuses to so perform, or in any way make proper restitution for such failure and refusal. (4) That since

had not and never had the title to the property which he contracted to convey, and that the plaintiff knew these facts, the action should be dismissed. *Stevenson v. Buxton*, 37 Barb. 13.

Where the right of a lessee to assign the lease is made to depend on the written consent of the lessor, a person who contracts with the lessee for such assignment with full knowledge of the inability of the latter to perform his agreement without such consent will have no right to have damages in lieu of specific performance in case the lessor's consent is not obtained. *Hurlbut v. Kantzier*, 112 Ill. 432.

An action to enforce specific performance of a contract to repair the foundations of a building cannot be retained when it appears that complainant has already made the repairs. *Holy Communion Church v. Paterson Extension R. Co.* 46 N. J. Eq. 372, 43 Am. & Eng. R. R. Cas. 654.

Where defendant disables himself pending action.

In an early English case, brought to compel specific performance of a contract, the defendant stated in his answer that he had sold the house which was the subject of the contract to a third person and the court referred the case to a master to determine the plaintiff's damages. *Denton v. Stewart*, 1 Cox, Ch. 253.

And this case was followed in *Greenaway v. Adams*, 12 Ves. Jr. 400, where the conveyance to the third person appears to have been before suit brought.

But where the bill stated that defendant could not make a good title damages were refused. *Gwillim v. Stone*, 14 Ves. Jr. 123.

In *Todd v. Gee*, 17 Ves. Jr. 279, *Denton v. Stewart*, *supra*, was limited to a case in which the property was conveyed to a third person pending suit.

And in *Sainsbury v. Jones*, 5 Myl. & C. 1, which was not a case for specific performance, *Denton v. 16 L. R. A.*

Stewart is stated to have been expressly overruled and the same statement is in effect made in *Jenkins v. Parkinson*, 2 Myl. & K. 5.

But the doctrine of it had become well established and is recognized as good law by numbers of decisions, and it is held that where during the pendency of the action defendant in any way renders specific performance impracticable, damages may be assessed. *Head v. Meloney*, 1 Cent. Rep. 853, 111 Pa. 99.

When defendant has at any time rendered himself incapable of performing.

There is a dictum in *Woodcock v. Bennett*, 1 Cow. 711, 13 Am. Dec. 563, that where defendant has put it out of his power to perform the contract, the bill will be retained to assess damages, and in *Woodward v. Harris*, 2 Barb. 442, that rule is stated to have been well settled by that case.

General jurisdiction over damages.

There is a dictum in *Fisher v. Kay*, 2 Bibb, 436, that there is no principle better settled than that the obligee in a bond for title may resort to equity for specific performance and in the event of the obligors being unable to convey, for damages, and the court being possessed of the whole case may award damages, if that is the most equitable relief. And in *Slaughter v. Tindle*, 1 Litt. 353, in which the bill suggested a doubt as to whether or not a good title could be made, the court held that it was proper to retain the case to award damages.

The tendency of the modern cases, however, is to make the awarding of damages depend not so much on the acts of defendant as upon the good faith of plaintiff.

It has been stated that the question whether or not the court will award damages depends upon the good faith of the complainant in bringing the

the date of said agreement, to-wit, December 10, 1889, and prior to the expiration of the four months mentioned in said agreement of sale, said lands had greatly increased in value above the said agreed purchase price of twenty thousand dollars, and were worth at the date or time provided in said agreement for the conveyance and sale of said lands, upon the market in the vicinity of said land, one thousand dollars per acre, or of the aggregate value of one hundred and fifty-four thousand five hundred and fifty dollars, and of the cash value of one hundred and thirty-four thousand five hundred and fifty dollars over and above the said nineteen thousand five hundred dollars agreed by said plaintiff to be paid at said time to said defendant. (5) That the plaintiffs are still ready and will-

ing to pay the purchase money of the said property to the defendant. Wherefore plaintiffs demand judgment (1) that the defendant execute to the plaintiffs a sufficient warranty deed, conveying to them a fee simple title to all of said lands described and set forth in said contract, and recited in this complaint; (2) for the sum of one hundred and thirty-four thousand five hundred and fifty dollars, with ten per cent interest thereon since the 10th day of April, 1890, and their costs and disbursements."

To this complaint defendant interposed a demurrer on the grounds "(1) that the said complaint does not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties plaintiff, in that there is shown

suit. If it was brought in the honest hope and expectation that it would succeed in getting specific performance the court will award the damages in case of failure, but if at the start there was an expectation of failure and that the only relief to be had was a compensation, the court will not award it. *Borden v. Curtis* (N. J.) March 12, 1891.

If the fact of inability to comply with the contract is unknown to the complainant when his bill is filed he may have his damages assessed. *Wiswall v. McGowan*, Hoffm. Ch. 125, 6 L. ed. 1087.

Where plaintiff brought his suit without knowledge of the disability, in good faith supposing and having reason to suppose himself entitled to specific performance, the court will award damages in all cases where a defect in title, right, or capacity in the defendant to fulfill his contract is developed in his answer or in the course of the hearing or after an order of fulfillment. *Milkman v. Ordway*, 108 Mass. 238.

Under this rule it is immaterial that the defendant conveyed to a third person before the suit was brought. *Andrews v. Brown*, 3 Cush. 180.

So where after the contract and prior to the suit defendant had sold the land to a third person damages were decreed. *Gibbs v. Champion*, 8 Ohio 335.

In a case to enforce specific performance of an agreement as to improvements contained in a lease, where the lease had expired before suit was brought the court stated that the case was for compensation and damages only, but it awarded the relief sought on the ground of inadequate remedy at law. *Berry v. Van Winkle*, 2 N. J. Eq. 269.

The effect of modern legislation.

In England an Act was passed in 21 and 22 Victoria, known as the Cairns Act, which gave equity the power to assess damages in certain cases when the equitable relief prayed for was not given. That Act has been construed as follows:

In a case in which before the Cairns Act the court would not have interfered it will not since that Act assess damages. *Scott v. Rayment*, L. R. 7 Eq. 112.

The Act did not apply to cases where specific performance could not have been given. *Lavery v. Pursell*, L. R. 39 Ch. Div. 509.

Where the suit is brought to compel the specific performance of a resolution to allot shares of stock, or if that could not be done to recover damages, and all the shares had been allotted when the bill was brought, the damages cannot be awarded under the Cairns Act. *Ferguson v. Wilson*, L. R. 2 Ch. App. 77.

Where a mortgagor had contracted to grant a lease but the mortgagee refused to ratify it and a suit was brought for specific performance, the court said that the Cairns Act was not meant to transfer the jurisdiction from law to equity, and 16 L. R. A.

that if the contractee knew that specific performance could not be had he had no right to come into equity merely for damages; but the court awarded the relief in that case for special reasons. *Howe v. Hunt*, 81 Beav. 480.

After a defendant has failed to comply with a decree of specific performance and a motion is made for rescission of the contract and damages, the court will not order both rescission and a reference to ascertain the damages. *Henty v. Schroeder*, L. R. 12 Ch. Div. 666.

Where the action was to enforce specific performance of an agreement to grant a lease for two months, and pending the suit the two months expired, the court awarded damages. *Oakley v. Ramsey*, 37 L. T. N. S. 745.

But see *Debrassac v. Martyn*, 11 Week. Rep. 1020, where the specified term of the lease expired pending suit and the court refused to award damages on the ground of plaintiff's laches.

The effect of the Code provisions.

In *Hall v. Delaplaine*, 5 Wis. 217, 68 Am. Dec. 57, the court said, since the Code of Procedure went into effect it has become impossible to send a party from a court of equity to a court of law, and there seems to be no reason for not retaining a case brought for specific performance to give damages if performance cannot be enforced.

Under the Code of Civil Procedure the action will not be dismissed when the impossibility of enforcing specific performance appears, but the court will go on and assess the damages. *Sternberger v. McGovern*, 56 N. Y. 12; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 420, overruling 4 Daly, 450, in which there is a very full review of the cases upon the subject.

Since the union of legal and equitable jurisdiction in the same court it has ceased to be necessary to dismiss the complaint. *Genet v. Howland*, 30 How. Pr. 373.

Where a bill provides for specific performance of a contract to build a fence and for other relief a demurrer was held to be properly overruled for the reason that though the case was not a proper one for specific performance it might be retained for damages. *Cincinnati & O. R. Co. v. Washburn*, 25 Ind. 259.

There are recent cases in which damages are assessed upon failure of the equitable relief, in which it is difficult to determine whether that course was pursued because of failure to question the jurisdiction, because the court regarded it as proper equity practice or because of statutory provisions. See *American Land Co. v. Grady*, 38 Ark. 534.

There are also cases cited above which were decided in code states in which the action was dismissed and the case sent back for a jury trial.

H. F. F.

upon the face of the complaint that there is no privity of contract between any of the plaintiffs herein except the plaintiff James Morgan."

The demurrer was overruled, and the defendant answered. A demurrer to the answer was sustained, and an amended answer was filed, in which defendant admitted the execution of the written instrument set out in paragraph 1 of the complaint, but denied the other allegations in paragraph 1, and denied each and every the allegations in paragraphs 2, 3, and 4 of the complaint, and for an affirmative defense alleged, substantially, that he acquired the land in question by purchase on the 28th day of January, 1888, while he was a married man, the husband of one Elva E. Bell, who died intestate on the 1st day of March, 1888, leaving as her sole heir-at-law Elva Elain Bell, as the fruit of the marital relations between her and the defendant, and that the said Elva Elain Bell was still an infant, of the age of five years, and that the money used in purchasing said land was not owned by him at the time of marriage, or acquired after marriage by gift, devise, bequest, or descent. That at the time said agreement was entered into he was, and for a long time previous thereto had been, a resident of Toledo, in the state of Ohio, and was wholly unacquainted with the laws of the state of Washington, providing for the community interests of the wife with her husband in real estate acquired by him by purchase during the existence of the marital relation, and fully believed that he was the sole owner of said land, having full power of alienation thereof; and averred that plaintiffs were, and for a long time previous thereto had been, residents of the state of Washington. That the said agreement was entered into between this defendant and the said plaintiff James Morgan at the instance and request of the said plaintiff, and upon his express representation to this defendant, either fraudulently and willfully, to mislead this defendant, or ignorantly, believing the same to be true, that this defendant was the sole owner in fee simple of the real estate described in said agreement, with full power of alienation thereof; he, the said plaintiff, well knowing at the time that this defendant acquired the said land by purchase as aforesaid during the lifetime of said wife, and that his said wife was then deceased, and that she had died intestate, leaving as her sole heir-at-law one Elva Elain Bell, her child by this defendant, and that said child was still living, and of the age of about four years, and no more; and that he, this defendant, relying upon said representations of said plaintiff Morgan, and fully believing said representations to be true, executed said agreement, and delivered it to said plaintiff. That afterwards, on or about the 8th day of July, 1890, and before the institution of this action, this defendant discovered, and avers the same to be a fact, that he was not the sole owner in fee simple of said real estate, but was the owner of the undivided one half of the same, the remaining one half being the property of the said Elva Elain Bell as the heir-at-law of the said Elva E. Bell, deceased, who during her lifetime was, by operation of law, the owner of a community interest in said real estate with this

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defendant. That immediately upon the discovery by him that he was not the sole owner of the said real estate as aforesaid, this defendant executed to said plaintiff James Morgan, without any knowledge that the coplaintiffs of said Morgan held or claimed any interest in said agreement or the subject thereof, his deed of conveyance, with covenants of warranty, for his undivided one half of said real estate, and tendered the same to said plaintiff, demanding of him a proportionate amount of the consideration agreed by said plaintiff to be paid, less the amount already paid thereon, to wit, \$9,500, which said deed of conveyance he, the said plaintiff, then and there and ever afterwards declined and refused, and still declines and refuses, to accept, and which proportionate amount of said consideration he, the said plaintiff, then and there, and ever afterwards, still declines and refuses to pay. That upon such refusal by plaintiff the defendant tendered to plaintiff the amount paid by plaintiff as a cash payment on said agreed consideration, to wit, \$500, together with interest at the rate of 10 per cent per annum from the date of said payment until the time of said tender, and offered to rescind said agreement, and that said plaintiff then refused, and ever afterwards has and still refuses, to rescind said agreement. Alleges that he has ever since said tender been, and still is, ready to convey his undivided one half interest for a proportionate part of said agreed price, less the amount already paid him, or to refund said money paid, with interest on the same at the rate of 10 per cent per annum, and that ever since said tender of \$500 and interest, as aforesaid, he has been and still is ready and willing to pay the same to plaintiffs. The third affirmative defense, in addition to the matters alleged in the second, is that plaintiff Morgan, who was at the time of the execution of the contract a resident of the state of Washington, and well acquainted with the value of land, and who was on terms of social and business intimacy and friendship with the defendant, came to defendant's house in Toledo, Ohio, and, well knowing his want of information as to the value of said lands, and fraudulently taking advantage thereof, falsely represented to him that the said land was not worth more than the sum of \$20,000, and that defendant, relying upon said representations, and having full faith and confidence in the truthfulness of said representations, executed said agreement. Alleges that afterwards, to wit, about the 8th day of July, 1890, he discovered, and avers it to be a fact, that the lands were of far more value than \$20,000, which fact was well known to plaintiff Morgan at the time. And demands judgment—*First*, that said agreement is void; *second*, that the plaintiff produce said agreement, and deliver it up for cancellation; and, *third*, for costs of action and general relief.

Plaintiffs' demurrer to all that portion of defendant's amended answer in the second and third alleged affirmative defenses and the allegations of new matter was sustained. On the issues left, the cause was tried, and the court found, among other things, that the value of the land in question at the time of the commencement of the action was \$46,215, and,

as a conclusion of law, that plaintiffs were entitled to recover as damages the difference between the price agreed upon in the contract, to wit, \$20,000, less the amount paid by plaintiff at the date of the contract, \$500, equaling \$19,500, and the value of said land on the 10th day of April, 1890, the date for the fulfillment of the agreement for the conveyance of said lands, to wit, the sum of \$46,215, which said difference is \$26,715. Or, in other words, the measure of damages allowed by the court was the difference in the value of the land at the time of the breach and the value of the land at the date of the contract; and judgment was entered accordingly.

The first point argued by the appellant is that this is an action affecting the title to real estate, and should have been brought in Clallam county, where the land is situated, by virtue of section 47 of the Code, which provides that actions for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on or for the determination of all questions affecting the titles, or for any injuries to real property, shall be commenced in the county or district in which the subject of action, or some part thereof, is situated. We do not think this is the character of case, contemplated by the statute. The title to this land was not in dispute, and could not be affected by the decree of the court, under the pleadings. It is true that the court could decree a specific performance of the contract under the allegations of the complaint, but it would be a decree affecting the parties to the action personally. It would not determine any question affecting the title, in the sense in which the word "title" is evidently employed in the statute. We do not think that anything was decided in *McLeod v. Ellis*, 2 Wash. 117, having any application to this kind of a case.

The second point raised by appellant is that specific performance could not be decreed in this case, and that consequently the action should not have been maintained, as no damages could be warranted. While it is true that the complaint does not disclose the fact that specific performance could not be enforced, it is plain from the testimony, both of defendant and plaintiffs, that such is the fact, and that such fact was known to plaintiffs at the time of the commencement of the action. In fact, there can be no dispute that the recognized and acknowledged inability of the defendant to perform the contract was the direct and only cause of the action; for the defendant had tendered a warranty deed, which had been refused by the plaintiffs because he was powerless to convey. This proposition is not disputed at all, but is rendered certain by the testimony of plaintiffs' attorney Hays. Page 117 of the transcript. In answer to a question as to the identity of the deed the witness said: "I cannot say that. There was, as I stated before, a paper writing purporting to be a warranty deed upon its face; but having examined the title to the land prior to this date or that date, as attorney for the company, I had discovered that the defendant had not the power to make a warranty deed." And the witness then proceeds to give the reasons for his conclusions, viz., that the land was community property, and that upon the death of the wife, under the

community laws of this state, one half of the property descended to the heirs of the wife, and that, the wife leaving one heir of her body, one fourth went to the heir, the wife having died intestate. (While it is not material to this cause, yet, not wishing to be understood as indorsing the theory of construction of the community law advanced by respondent, "that the surviving spouse is the heir with the child of the deceased spouse in the community estate," we will notice the statute. It is true that section 3803 of the Code provides that when any person shall die seized of any lands, etc., it shall descend as follows: If the decedent leaves a surviving husband or wife, and only one child or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. But it is evident that it is the decedent's separate property that is spoken of in this section; for section 2412, which occurs in the chapter devoted to community property, provides that "in case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies.") In this case, it appears that the defendant had offered to deed to plaintiffs his undivided one-half interest in the land, which offer had been refused, so that it does not fall within the class of cases where part performance can be enforced, and damages given for the balance. It seems well established by the authorities, and is most certainly in strict harmony with common sense, that the court will not do a useless thing, or make a nugatory decree. It is plain that the court could not in this case decree a specific performance, and that the plaintiffs knew that it could not when they brought their action. Then the question arises whether the jurisdiction of a court of equity can be so extended that it will entertain a case and give relief which is not incidental to the main relief sought, or auxiliary to the relief asked which gave the court jurisdiction of the case, or granted for the purpose of making such relief complete, but a purely independent relief. Or, in other words, will a court of equity, in an action asking for an enforcement of specific performance as a basis of a complaint, award damages for the violation of the contract, when it conclusively appears that, at the time of the commencement of the action, specific performance could not be decreed; or shall the plaintiffs be relegated to their remedy at law for the violation of the contract? And this is a question, the investigation of which is not coveted by this court, in view of the fact that the authorities are conflicting, and that many decisions have been made by the courts as to the class of cases in which this independent relief can be given.

It is the fundamental principle regulating the exercise of this equitable jurisdiction that, whenever the legal remedy of damage is sufficient, equity will not interfere, and the specific performance will be refused. Pom. Cont. § 47. We take it that the fair corollary to this proposition would be that, where the legal remedy of damages is all that can be decreed, equity will not exercise jurisdiction, and the original proposition applies more forcibly

where the fact is determined that legal damages are all that is actually sought; and in this case the plaintiffs must have brought their action on the theory that a compensation in damages would furnish a complete and satisfactory remedy, for they knew that no other remedy could be decreed. The presumption that the award of damages will not be an adequate remedy is the very foundation for the jurisdiction to decree specific performance; and it philosophically and logically follows that jurisdiction will not attach when the inadequate remedy is all that can be enforced. Any other construction renders inharmonious the operations of law, and confuses the principles upon which the jurisdiction is based. Under the authorities, however, where something inequitable is shown in the transactions of the party who is trying to avoid the specific performance, or where there are inequitable circumstances surrounding the case, courts of equity, notwithstanding they cannot decree the performance of a contract, will grant relief in damages; and, whether or not such an exception to the general rule can be justified on the ground of reason, the doctrine seems to be so well established by the decisions of the courts that it cannot with safety be disregarded. So the rule is announced that if the defendant has by his own act incapacitated himself from performance the court of equity may, instead of dismissing the plaintiff's suit, award him the legal remedy of damages. *Id.* § 294. The plain inference is that, if the reverse be true, damages cannot be awarded; and the following proposition is announced in Mr. Waterman's work on Specific Performance (sec. 515:) "As a general rule, compensation is regarded as an incident only, unless there is a special equity authorizing the court to give relief, and jurisdiction will not be exercised for the sole purpose of assessing the damages for a breach of contract. If the jurisdiction attaches, except as ancillary to a specific performance or to some other relief, it must be under very special circumstances and upon peculiar equities, as, for instance, in cases of fraud, or in cases where a party has disabled himself by matters *ex post facto* from the specific performance, or in a case where there is no adequate remedy at law." We think that all the cases holding that damages can be awarded where it was known to the plaintiff that specific performance could not be decreed are decided on the ground mentioned in the text above quoted, or based on some other decision holding that ground, though possibly not always distinguished by the indorsing court. In *Woodman v. Freeman*, 25 Me. 583, the court exhaustively reviews the leading decisions on this question, and decides that the jurisdiction of the court to give relief in equity by compensation in damages where the facts do not authorize the court to give any other relief attaches only in the following cases: (1) In cases of fraud and mistake, where there does not appear to be a plain and adequate remedy at law. (2) When relief against a forfeiture or penalty is sought and obtained. 3. When a contract or conveyance is properly set aside or rescinded under circumstances requiring that some compensation should be made to one of the parties to adjust the equities and do complete justice. (4)

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When specific performance is sought and decreed in whole or in part. (5) When specific performance ought to have been and could have been decreed upon the state of facts existing when the bill was filed, but cannot be decreed upon a hearing of the cause, because the defendant, pending the suit, has voluntarily disabled himself to make a conveyance. (6) When, by a bill of discovery and relief, the discovery sought is obtained, the court, having acquired jurisdiction of the case for the discovery, will retain it and give relief; and, if necessary, by an assessment of damages. (7) When necessary to adjust the accounts, claims and equities between a *cestui que trust* and a trustee chargeable for delinquency or unfaithfulness. (8) When necessary for the adjustment of equities between mortgagor and mortgagee. (9) When necessary for the liquidation and settlement of the concerns of a partnership, when one of the partners is chargeable for misconduct or fraud. (10) When necessary to give complete relief in a case of nuisance. And by an examination of the cases reviewed by the court, but which it is not necessary to cite here, it will be found, as it was found by that court, that, in nearly all cases of this character, where a court of equity assumes to award damages as an independent remedy, the circumstances of the case brought it within the provisions of one of the classes of cases announced above. That was a case where the court found that specific performance could not be enforced, and the court in conclusion, says: "After this examination, suited to exhaust the patience both of reader and writer, the conclusion is irresistible, both upon principle and upon authority, that the jurisdiction of a court of equity to give relief by the assessment of damages in the matter before stated cannot be sustained." Some of the courts have referred to *Woodcock v. Bennet*, 1 Cow. 711, 18 Am. Dec. 568, as supporting the doctrine that the court will assess damages where specific performance could not be enforced; but an examination of that case shows that it was not properly distinguished, and it only needs a short quotation to show upon what ground the court stood. Said the court: "It seems to be well settled that the court of chancery will not, except under very particular circumstances, if the party be not entitled to a specific performance, direct an issue of *quantum damnificatus*, or a reference to the master to ascertain the damages. If a party elect that remedy, he must resort to law; but where the defendant has put it out of his power to perform the contract the bill will be retained, and it will be referred to the master to assess the damages.

The leading case holding this doctrine is *Denton v. Stewart*, 1 Cox, Ch. 258, and it was followed by *Greenaway v. Adams*, 12 Ves. Jr. 395. It seems to be with some hesitation, however, that the court in that case extended the jurisdiction. The court says: "The party injured by the non-performance of a contract has the choice to resort either to a court of law for damages, or to a court of equity for specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed either way, I should have thought there was

equally an end of its jurisdiction; for in the one case the court does not see reason to exercise the jurisdiction; in the other, the court finds no room for the exercise of it. It seems that the consequence ought to be that the party must seek his remedy at law." Notwithstanding these cogent reasons, however, the judge goes on to say that, *Lord Kenyon* having decided the other way in *Denton v. Stewart*, he felt constrained to follow that decision. In *Todd v. Gee*, 17 Ves. Jr. 274, after deciding that, except in very special cases, it is not the course of proceeding in equity to file a bill for a specific performance of an agreement praying in the alternative, if it cannot be performed, for damages, the lord chancellor says: "In *Denton v. Stewart* the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it is not to be supported upon that distinction, is not according to the principles of the court." In that case the specific performance was possible at the time the action was commenced, and when it was commenced the court had rightful jurisdiction of the case; and, once having obtained jurisdiction, it would not allow itself to be divested of that jurisdiction by the wrongful act of the defendant. But, whatever we may think of the soundness of the law announced in those cases, the principles upon which they were based can have no application to the case at bar. Here there are no inequitable circumstances of any kind surrounding this case, and no suspicion of any on the part of the defendant. It is conceded that at the time the contract was made the title was not in Bell, and that he could not convey, and that the same condition of things existed and was known to the plaintiffs when the action was commenced. There is no suspicion of fraud. He did not seek the purchasers, but they sought him, and it was at their request that the agreement was made. He was simply mistaken as to his authority to sell, and the testimony shows that he made every effort to comply with his contract, and to place the plaintiffs *in statu quo*; that he offered to settle the matter in an equitable manner. So that there is not a circumstance surrounding the case, or connected with it, that tends in the least to make it an exception to the general rule that where specific performance cannot be enforced the court of equity will not award damages for violation of the contract.

The proposition of the respondents that defendant was in a position to perform his contract, and avoid his principal liability for its non-performance, cannot be maintained. This land is absolutely beyond his control. It can only be sold by order of the probate court at public auction, and such order can only be obtained upon an affidavit that such sale is necessary for the payment of the debts of the estate, or the maintenance of the family or heirs, and that must also be a showing satisfactory to the judge. It is not within the contemplation of the law that the lands of minors will be ordered sold in aid of real-estate speculations by outside parties, whether relatives or strangers. Without any fault of his own, Bell was legally incapacitated from performing the contract, and plaintiffs knew this when they commenced the action, and the court never had

rightful jurisdiction of the case; but as the appellant did not object to the jurisdiction at the trial, and treated it as an equity case, he can not raise the question here.

The third contention of the appellant is that the court erred in granting alternative relief, and that such relief can only be granted, in an action for specific performance, when the plaintiff has shown a performance of all the conditions of the contract on his part, and the inability of the court to compel the performance is due to the fault of the defendant. This involves substantially the propositions that were discussed under the second point.

We think the fourth point of appellant, that the court erred in sustaining the demurrer to the second and third causes of defense pleaded in defendant's amended answer, must be sustained. The answer not only alleges the impossibility of the performance without fault of defendant, but that such impossibility was known to plaintiffs before action was brought, which fact, if proven, would have been sufficient, under all the authorities, to defeat the decree for specific performance, and was consequently a good and sufficient defense to an action for specific performance; but it also alleges a mistake of law on the part of the defendant, by reason of his residence in another state, and by fraudulent representations on the part of plaintiffs; that the agreement was entered into at the solicitation and request of plaintiff Morgan; and that, after he discovered his inability to convey as per agreement, he tried to make an equitable settlement with the plaintiffs, and offered to pay them back the money advanced, with interest thereon. The matters and things set up in the amended answer went to show that there were none of those inequitable circumstances of fraudulent acts surrounding this case which justify a court of equity in awarding damages, or take it out of the general rule that courts of equity will not award damages except as ancillary to some other relief decreed. The plaintiffs had invoked the aid of a court of equity. This was an equitable defense, and the defendant was entitled to it. Suppose the plaintiffs had alleged in their complaint that, at the time Bell made the contract, he could not legally convey the land; that the title was not in him; and that he entered into the contract through an honest mistake of the laws of Washington, he being at the time a resident of the state of Ohio,—and, at the time the action was commenced, plaintiffs were aware of such facts, together with other affirmative averments in regard to the misrepresentation and fraud on the part of plaintiffs. It would certainly have appeared on its face that the court of equity could not decree specific performance; and, if that be true, it is apparent that if the answer sets up the identical, same matter, it would be a good defense to such a complaint.

Respondents rely upon the application of the maxim, *ignorantia legis non excusat*; and there can be no contention concerning the general rule, even in its application to courts of equity, that the simple mistake by a party as to the legal effect of an agreement which he executes, or the legal result of an act which he performs, is no ground for either defensive or affirmative relief, for reasons which are obvious, and have

been so frequently decided that it would be idle to repeat them here. But it is equally true that there are some exceptions to this rule; for as Mr. Pomeroy, in his *Equity Jurisprudence*, (sec. 842), says: "Equity does sometimes exercise its jurisdiction on occasion of mistakes of law. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud. It is not necessary that the misconception of law was the result of, or even aided or accompanied by, incorrect or misleading statements of facts by the other party." The material question here is, Does this case fall within the rule or the exception? And in the outset, in discussing this interesting question, to avoid the discussion of unnecessary propositions, it is well to keep in mind a well-defined distinction between ignorance of an antecedent existing right, which is to be affected by the agreement, and the legal import of the agreement itself. Thus, in this case, if Bell's defense was that he did not know the legal effect of the agreement which he entered into, in the absence of fraud or inequitable conduct on the part of plaintiffs, it would not be a defense to the action; but this is not the defense which he offers, but it is that he was mistaken about his right to enter into such a contract. "Mistakes, therefore," says Mr. Pomeroy, "of a person, with respect to his own personal private rights and liabilities, may properly be regarded, as in great measure they are, and may be dealt with, as mistakes of facts. Courts have constantly felt and acted upon this view, though not always avowedly." But there is nothing in the proposition announced by *Judge Story*, as cited by respondent, that conflicts with this proposition. Many instances are there given where the courts refuse to relieve from a mistake of law, but they are all cases where the party was asking relief from the consequences flowing from a misunderstanding of the legal effect of the contract. Indeed, *Judge Story*, in section 180 of his work on *Equity Jurisprudence*, indorses the same distinction: "Sec. 180. There may be a solid ground for a distinction between cases where the party acts or agrees in ignorance of any title in him, or upon a supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between parties as to their respective rights. In the former cases, (as has been already suggested,) the party seems to labor, in some sort, under a mistake of fact as well as law. He supposes, as a matter of fact, he has no title, and that the other party has title." The principle in the case at bar is the same, though the facts are reversed. Bell supposed, as a matter of fact, that he had the title. He did not intend to convey land which he did not possess, but proceeded upon the supposition that it was his to convey. It was not a mistake in calculation as to the legal consequences of his agreement, but purely and simply a mistake of an existing antecedent right affecting his title.

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An investigation of the cases cited by respondents shows that these decisions will in no wise militate against the position taken above, but simply go towards establishing the general rule, which, as we have before observed, cannot be disturbed. In *Bank of United States v. Daniel*, 87 U. S. 12 Pet. 32, 9 L. ed. 989, the controversy was over the legal effect of the instrument; and the court repeated the text, that mere mistakes are not remedial, and repeats the language used in *Hunt v. Rhodes*, 26 U. S. 1 Pet. 2, 7 L. ed. 27, 21 U. S. 8 Wheat. 174, 5 L. ed. 76, that, whatever exceptions there may be to the rule, they will be found few in number, and to have some peculiarity in their character, and to involve other elements of decision. *Jacobs v. Morange*, 47 N. Y. 57, is a case where the parties mistook the proper court of appeals, and plaintiff sought relief because he did not know the law; and the court of appeals there asserted the general doctrine, and stated that there are no circumstances of any description which add anything to the ground of relief. In *Champlin v. Laytin*, 18 Wend 407, 81 Am. Dec. 382, the court found that the mistake complained of as error was mistake of fact and not of law, and the discussion on the other question was clearly outside of the case. *Justice Bronson*, however, giving his personal views, may be fairly said to have undertaken to maintain the position contended for by appellant. The very able concurring opinion of *Senator Paige* takes exactly the opposite view. All the 27 members of the court voted for the reversal of the decree; but, in view of the two opinions expressed, it is impossible to tell on what grounds. *Wood v. Price*, 46 Ill. 439, was a case where relief was claimed on a misapprehension of the legality of the terms employed in the contract. It is conceded by all the authorities that no relief can be given in this kind of a case where there are no inequitable circumstances surrounding it, and there were none claimed in this case. *Hoover v. Reilly*, 2 Abb. (U. S.) 471, is a case where the party claims to have misapprehended the legal effect of his agreement. *Goltra v. Sarasack*, 58 Ill. 458, involves the same principle. It was a mistake of the legal effect of a deed. Several of the cases cited by respondent, and nearly all of the American cases which have adopted the harsher rule, have drawn their inspiration from *Hunt v. Rhodes*, 26 U. S. 1 Pet. 2, 7 L. ed. 27, 21 U. S. 8 Wheat. 174, 5 L. ed. 76, which may be regarded as the leading case maintaining that view. So that it becomes necessary to give this case a careful scrutiny; and from such scrutiny it will be found that while the judge who rendered the opinion indulged in a good many general observations, which have been caught up by other courts and quoted as the decision, without discriminating the case under consideration which called forth the remarks, yet when we come to examine what was really decided in that case, and what was before the court for determination, we find that this case is no authority against the doctrine sought to be maintained. This was a case where the party accepted a power of attorney as security from his debtor instead of a mortgage. It afterwards eventuated that they had made a mistake as to the

efficacy of the power of attorney, and he asked to have his power of attorney reformed, and declared a specific lien on two certain vessels, as it was alleged that it was the intention of the parties that the power of attorney should be a lien on the vessels. So that it will be seen that there was no mistake of law here concerning an ancillary or existing right of anyone, but that, like all the other cases, it was a misconception of the legal effect of the instrument executed. And, as showing just what was decreed in that case, we quote: "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against the plain mistake arising from ignorance of law. But we mean to say that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under the misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event,—not foreseen, perhaps, or thought of,—direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon." Again, equities of other creditors was the determining influence in this decision, for the opinion concludes with this remark: "If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them." Indeed, it will be seen by reference to the history of this case that the consideration of the last proposition was all that was before the court; for the case had been before the court before in 1823, (reported in 8 Wheat. 174), and the court there decided (*Chief Justice Marshall* handing down the opinion) that the demurrer to plaintiff's bill could not be sustained, and reversed the judgment of the lower court on that ground. Said the court: "We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief. The decree of the circuit court is reversed; and, as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer in favor of the plaintiff, directs the cause to be remanded that the circuit court may permit the defendants to withdraw their demurrer and answer the bill." And as the result of such order the case in due course of time was brought up again, with the result as reported in 1 Pet. So that it will be seen that as between the parties to the transaction, even in a case where the mistake was a mistake as to the effect of the instrument executed, the supreme court of the United States has decided that a court of equity can grant relief, while, as between one of the contracting parties and the creditors of the other, such relief will not be granted when the effect of granting the relief will be to establish a lien on the property which would be otherwise subject to execution

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by the creditors. But the questions involved in this case are not decided there at all. *Lansdown v. Lansdown*, Mos. 364, is a case holding in favor of equitable relief in this kind of a case. There the plaintiff had a dispute with his uncle concerning the respective rights to inherit the land of the plaintiff's deceased father; the plaintiff being the only son of an older brother of the defendant, who agreed to leave the matter to a school-master, who examined some law-books and informed them that the land went to the younger brother, the plaintiff's uncle. Upon this opinion they agreed to share the land between them, and conveyances were executed accordingly. Plaintiff afterwards ascertained that the school-master had given him erroneous advice, and that, through a mistake of law, he had deeded away property which clearly belonged to him, and filed a bill to be relieved. And it is held that the maxim, *ignorantia legis non excusat*, did not apply to that kind of a case. *Blakeman v. Blakeman*, 39 Conn. 320, is also a case exactly in point. There a right of way had become extinguished, and the grantor conveyed the land, warranting its privileges and appurtenances. Both the grantor and grantee supposed that the right of way still attached to the land; and the court said the respondent sold and the defendant bought an extinct thing, both supposing it to be existing, and both ignorant that from the nature of the case, and as matters of law, the object could not exist. There was not here a mistake as to the legal effect of the deed, but a mistake as to the existence of the subject-matter; nor was there a mistake as to the nature and operation of any known or contemplated principle of law. There was simply added to the mistake of fact a mistake of a principle of law, which, if known and contemplated, would have prevented the mistake under which the parties acted. So in the case at bar. If the principles of the community law, as they are now interpreted by the courts, had been known and contemplated, this contract never would have been entered into. See *Bingham v. Bingham*, 1 Ves. Sr. 126; *Cooper v. Phibbs*, L. R. 2 H. L. 149; 2 Pom. Eq. Jur. § 849.

But there is another principle of law which is conclusive in this case. The demurrer admits the fact that Bell was not a resident of the state of Washington, but of the state of Ohio, when this contract was made, and his mistake of the laws of this state is held to be a mistake of fact. Nor does the maxim that "ignorance of law is no excuse of the breach or nonperformance of an agreement" apply to foreign laws, or laws of other states of the Union. Ignorance of those laws is deemed to be ignorance of fact. *King v. Doolittle*, 1 Head, 77. Ignorance of law signifies ignorance of the law of one's own country, not ignorance of the laws of a foreign country. In this respect the laws of other states in the Union are foreign laws. *Haven v. Foster*, 9 Pick. 111, 19 Am. Dec. 353. To the same effect are *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218; *Raynham v. Canton*, 3 Pick. 293; *Bank of Chillicothe v. Dodge*, 8 Barb. 233.

But notwithstanding the rigid rule laid down by some courts, under all the circumstances surrounding this case as shown by the answer,

considering the fact that the nonresident defendant, who was ignorant of the situation of the land, both as to its value and its legal standing, was sought out by the resident plaintiff, who made a trip of thousands of miles to induce him to enter into this agreement, a man sufficiently wide awake and well versed in the land speculation business to be intrusted by a syndicate of business men, one of whom at least was a practicing lawyer of the state, as the manager and agent of the business, who perfectly understood the history of the land, and of the circumstances surrounding it, and who by his representations to defendant persuaded and induced him to enter into this contract, and considering the earnest and unavailing efforts of the defendant to fulfill his contract, there cannot be a case found that will support the judgment in this case; and, if a court of equity cannot find circumstances surrounding it which will warrant it in granting relief, then the time-honored and universally accepted definition of Blackstone, that equity is the correction of that wherein the law, by reason of its universality is deficient, has lost its meaning, and has become as "sounding brass or a tinkling cymbal." It is not claimed that plaintiffs entered into possession under this agreement, or made valuable improvements, or expended any money in any way, by reason of the contract, whereby they could claim any equities. No damages were proven in any way, except the loss of their bargain. They simply have an investment of \$500, and have refused the defendant's offer to place them *in statu quo*.

Appellant's fifth point is also well taken; and the answer, if for no other reason, should have been sustained, as furnishing a basis for the introduction of proof of *bona fides* in mitigation of damages. And this brings us to the consideration of the important proposition on which it must be confessed there is a lamentable conflict of authority, though so far as the adoption of rules applicable to the principles involved in this particular case is concerned the conflict is more limited. The question here is, couched in homely phrase, Shall the vendee be allowed the benefit of his bargain where the vendor contracted to convey in good faith, believing that he had the right to convey, and is prevented from doing so? The leading case holding the negative of this proposition is *Flureau v. Thornhill*, 2 W. Bl. 1078, where Chief Justice De Grey, in rendering the opinion of the court, said: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Justice Blackstone added: "These contracts are merely upon condition, frequently expressed but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and the costs, is all that can be expected." And while the doctrine announced in this case by such eminent authority as Lord Blackstone has received some criticism, as being an exception to the rule of law that a vendor who, from whatever cause, fails to perform his contract, is bound to place the purchaser, so far as money will

do it, in the position he would have been in if the contract had been performed, yet it has received the sanction of the great majority of the English courts, as being an exception that is founded in common justice and right, and is acknowledged to be the English rule to-day; and what criticisms have been made on this decision do not reach the case at bar. But the principal criticism is that the rule is too broad, and does not distinguish between the cases where the vendor contracted under the honest belief that he had the title, and where he contracted with a view of afterwards obtaining the title for the purpose of conveying it, and failed to so obtain it; and, so far as the last proposition is concerned, that case has been modified by some of the courts, if such a case could fairly be presumed to have fallen within the rule laid down. Nor do we understand that it is asserted by Mr. Sedgwick, in his work on Damages, that such is not the prevailing doctrine, although he is inclined to criticize its consistency. It is conceded by the respondent that the rule contended for by the appellant is the rule adopted by the English courts, so that a further analysis or citation of English authorities is unnecessary; but it is contended that the weight of authority in the United States is that the measure of damages is the difference between the contract price and the value of the land at the time of the breach, and a decision of the United States Supreme Court, to wit, *Hopkins v. Lee*, 19 U. S. 6 Wheat. 109, 5 L. ed. 49, is cited as sustaining that view. But while the court in that case laid down the general rule that the measure of damages is not the price stipulated in the contract, but the value at the time of the breach, no question was before the court as to the incapacity of the grantor to convey, and there is no indication as to what rule the court would lay down in that kind of a case; and the court expressly states that it is not prescribing a rule of damages in case of eviction. The case of *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677, cited by respondents, is strictly in point in favor of respondents' contention; and it is there squarely decided that the measure of damages is the same whether the vendor acted in good or bad faith. But in *Kirkpatrick v. Downing*, 58 Mo. 82, 17 Am. Rep. 678, also cited by respondents, the court decided that where the vendor in a contract for the sale of land knew at the time the contract was entered into that he has no title, or if, having the title, the sale is prevented because he changes his mind, or because he neglects to take the proper steps to put the purchaser in possession, the purchaser may, in an action for breach of such contract, recover, beyond his expenses, damages for the loss of his bargain. The court found that the defendant had disabled himself, and the opinion distinguished that case from cases where the vendor acted in good faith, and was prevented from making title. Nor can we agree with the respondents that *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 469; *Baldwin v. Munn*, 2 Wend. 899, 20 Am. Dec. 627, and *Tracy v. Gunn*, 29 Kan. 508,—show that, in states where the liberal rule is recognized, it is continually questioned and modified. In *Pumpelly v. Phelps*, *supra*, the de-

cision of the court was that the rule that the vendor who contracts to sell and convey real property in good faith, believing he had a good title, but who discovered it to be defective, and for that reason refuses or is unable to fulfill his contract, is, in an action against him by the vendee for the breach, liable only for nominal damages, could not be extended to cases where the party contracts to sell lands which he knows at the time he has not the power to sell and convey. So that, while the court was opposed to extending the rule, the rule itself was in no way questioned. In *Baldwin v. Munn*, *supra*, the court, after very emphatically announcing the rule laid down in *Flureau v. Thornhill*, proceeded to say that "if the vendor acts in bad faith, and refuses to convey because the property has increased in value, and with a view of putting the enhanced value in his own pocket, it becomes a case of fraud, and plaintiff would clearly be entitled either to compel a specific performance in equity, or to recover by way of damages the difference between the contract price and the enhanced value when the conveyance should have been made." In *Tracy v. Gunn*, *supra*, the court, speaking through Judge Brewer, says: "In breaches of contracts to convey real estate a peculiar distinction as to the measure of damages runs through the cases, and that founded upon the motive with which the vendor acts. If he acts in good faith, it is held that the contract price becomes the measure of damages, while if he acts *malà fide* the vendee may recover the actual damages,"— and cites Sedgwick on Damages (page 206), where that author, in distinguishing these kinds of cases, says: "In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case the plaintiff can only recover whatever money has been paid by him, with interest and expenses; in the latter, he is entitled to damages resulting from the loss of his bargain. This exception cannot, I think, be distinguished or explained on principle, but it is well settled in practice." The rule is thus laid down by Mr. Field in his work on Damages, 2d ed. § 481: "In an action for the breach of contract, the commonly received doctrine, both in England and in this country, is that, where the consideration has been paid on a contract to convey lands at a future time, if there is a breach on the part of the seller, and he has acted in good faith, and the failure arises from no intentional fault or wrong of his own, the purchaser can only recover the consideration paid and interest; and where, under similar circumstances, no consideration has been advanced, the purchaser can recover nothing, or only nominal damages." In *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254, Chief Justice Kent, in delivering the opinion of the court in support of this doctrine, says that no prudent man would venture to sell his property if there was no limit to the damages for which he would be responsible in the event of the failure of his title. He asks who, for the sake of £100, would assume the hazard of re-aying as many thousands, to which value the property might arise by causes not foreseen by either party, and says the supposed

general rule is to limit the recovery, as much as possible, to an indemnity for the actual injury sustained, without regard to profits which the plaintiff has failed to make, and the rule is laid down accordingly.

The case at bar aptly illustrates the injustice which the eminent justice sought to prevent. If plaintiff's allegations are true, the contract was for sale of lands which in December were worth \$20,000 and in April following were worth \$150,500; and the result is that for the pitiful sum of \$500, the defendant, who was acting in perfect good faith, is called upon to yield up \$184,500 in response to plaintiff's investment of \$500 for four months. If such a rule were adopted in this western country, where what is cheap agricultural or farming land one year is valuable city property the next, and where the laws, by reason of the formative condition of the state, are unsettled and unadjudicated, a conveyance of land would be a perilous transaction, which a prudent man might well hesitate to engage in. It must be conceded that no rule can be laid down that will provide against all hardships, but the one that commends itself to this court is the one which will most evenly adjust the equities between the contracting parties. Hence we decide that in this case the measure of damages is the amount paid, with legal interest thereon from the date of payment; and this, it seems, was tendered by the defendant before the commencement of the action. An investigation of this subject has convinced us that even in the United States the great weight of authority sustains the rule announced. The extreme length of this opinion will prevent any further review of the cases; but we will cite, as supporting the rule: *Sawyer v. Warner*, 36 Iowa, 383; *Cockcroft v. New York & H. R. Co.* 69 N. Y. 201; *Sudem v. Steele*, 5 Iowa, 352; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Thompson v. Guthrie*, 9 Leigh, 101, 33 Am. Dec. 225; *Conger v. Weaver*, 30 N. Y. 144; *Drake v. Baker*, 34 N. J. L. 358; *Peters v. McKeon*, 4 Denio, 548; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *McNair v. Comp-ton*, 35 Pa. 23; *Leggett v. New York Mut. L. Ins. Co.* 58 N. Y. 394; *Herndon v. Harrison*, 34 Miss. 496, 69 Am. Dec. 399.

It was asserted by the respondents' attorney, in the argument of this case, that this court had already passed upon this question, in opposition to the rule here laid down, in *Hanson v. Tompkins*, 2 Wash. 508. We have examined that case, and find that it was decided there that where a party makes a misrepresentation of a material fact, and the other party acts on it, the first party is liable for any damages which the second party sustains by reason of such misrepresentation, whether the party making them knew them to be false or not. The case then under consideration, and the authorities cited, show conclusively that there was no question of mistake of law in the case.

For the reasons given the judgment is reversed, and the cause remanded to the lower court, with instructions to dismiss the same, with costs for defendant.

Anders, Ch. J., and Scott and Stiles, JJ., concur.

Hoyt, J.: I concur in the result, but not in holding the action transitory.

VIRGINIA SUPREME COURT OF APPEALS.

Melvin J. MOORE, *Plff. in Err.*,
v.

W. S. ROLIN.

(.....Va.....)

1. The malicious filing by a subcontractor of a mechanics' lien without authority of law, with intent to injure the business of the contractor, constitutes an actionable libel where it results in damage by loss of credit and customers.
2. A declaration for libel by filing a mechanics' lien need not aver that the lien has been ended in favor of the plaintiff.

(June 16, 1892.)

ERROR to the Circuit Court for the City of Richmond to review a judgment in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Messrs. Courtney & Patterson, for plaintiff in error:

No mechanic, whether a general or a sub-contractor, is entitled to take out a lien until and except the work be "done," "completed," "terminated," according to contract. Statutory liens are strictly construed; no right but what is expressly given can be legally claimed; there is no "inchoate lien" given by statute.

Quimby v. Sloan, 2 Abb. Pr. 98; *Phillips' Mechanics' Liens*, § 215; *Cumming v. Wight*, 72 Ga. 767; *Franklin St. Church Trustees v. Davis*, 85 Va. 198. See also *Lansdale v. Daniels*, 100 U. S. 115, 25 L. ed. 588; *Phillips' Mechanics' Liens*, § 187, citing *Luter v. Cobb*, 1 Coldw. 525.

The lien is not good if premature.

Malbon v. Birney, 11 Wis. 107; *McLagan v. Brown*, 11 Ill. 519; *McCullough v. Caldwell*, 8 Ark. 231; *Catlin v. Douglass*, 88 Fed. Rep. 569; *Davis v. Bullard*, 82 Kan. 234; *Seaton v. Chamberlain*, Id. 239.

Instead of pursuing the careful course, the defendant chose to proclaim through the public records and daily papers that he believed petitioner to be financially embarrassed or morally bankrupt.

Phillips' Mechanics' Liens, § 120.

On special damage, see—

Newell, Defamation, Slander & Libel, pp. 634, 635; *Collins v. Whitehead*, 84 Fed. Rep. 121.

If a wanton attack upon the honesty and solvency of a business man, blasting in one moment a reputation it has taken years to secure, and destroying his trade which a lifetime will not suffice to reconstruct,—if such conduct be not actionable, then common law is no longer common sense, nor courts of law the abiding place of justice. Petitioner's declaration should have been sustained. His action was in the nature of a suit for libel,—a libel upon plaintiff's character, and a libel upon his business. Such cases are frequent.

Haney Mfg. Co. v. Perkins, 78 Mich. 1; *Price v. Conway*, 8 L. R. A. 198, 184 Pa. 840; *Williams v. Davenport*, 42 Minn. 893; *Cruikshank v. Gordon*, 118 N. Y. 178; *Newell, Defamation, Slander & Libel*, p. 94, § 14.

Mr. L. O. Wendenburg, for appellee:

The declaration seems to be in the nature of an action for slander of title, or for a malicious prosecution or proceeding in a civil matter or suit. If this were not so, the action could not be maintained at all.

Marshall v. Bussard, Gilm. (Va.) 9.

In *Young v. Gregorie*, 3 Call, 451, *Judge Roane* says: "Tribunals of justice being instituted for the convenience and benefit of the people, it is a claim of right to prosecute a civil action or proceeding, whatever the ultimate decision on it may be. It then only becomes culpable and actionable when the party has instituted such proceedings from a corrupt motive, and without any ground or cause therefor."

Prof. Minor says in 4 Minor, Inst. pt. 1, p. 401: "In civil proceedings the party's reputation is, in general, not affected; and as to the expense of defending himself against such proceeding, he is supposed to be reimbursed by the costs which he recovers."

"Three things are necessary to maintain an action for slander of property or title: (1) the words must be false; (2) they must be maliciously published; (3) they must result in a pecuniary loss or injury to the plaintiff."

Newell, Defamation, Slander & Libel, 204; *Green v. Button*, 2 Crompt. M. & R. 715.

The facts set out in the declaration show that the appellee has asserted a bona fide claim of a lien for the work actually done, and this

NOTE.—Libel by filing lien.

The law is well settled that it is actionable to publish words tending to injure a person in his business (*notes to Morey v. Morning Journal Asso.* (N. Y.) 9 L. R. A. 622; *Price v. Conway* (Pa.) 8 L. R. A. 198), or to impute insolvency or want of credit to a business man. *Note to Hayes v. Press Co.* (Pa.) 5 L. R. A. 643.

The above case is a novel application of the doctrine, and a careful search has failed to reveal any case analogous to it, and owing to the peculiar circumstances which gave rise to it few cases like it will be likely to occur. See, however, the recent case of *May v. Jones* (Ga.) 15 L. R. A. 637, holding that the false and malicious protest of a business man's paper is actionable.

Cases of slander of title because of the wrongful

and malicious filing of a lien may, however, be not uncommon.

Where a false claim to a lien was maliciously asserted against personal property, which prevented its being delivered to its owner and he thereby lost the use of it in his business, the action was held to be maintainable. *Green v. Button*, 2 Crompt. M. & R. 707.

Evidence that one is prevented from selling land by reason of another's filing against it a claim to have it conveyed to himself will sustain a verdict for substantial damages in favor of the owner, without further proof of special damage. *Collins v. Whitehead*, 84 Fed. Rep. 121.

Registering a chancery order which prevented a defendant from disposing of lands is not actionable in the absence of malice. *Gibbs v. Pike*, 1 Dowl. N. S. 409.

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alone disproves malice and is sufficient to defeat the action.

Pitt v. Donovan, 1 Maule & S. 639, 648; *Smith v. Spooner*, 8 Taunt. 248, 254; *Walkley v. Bostwick*, 49 Mich. 874; *Thompson v. White*, 70 Cal. 135; *Like v. McKinstry*, 3 Abb. App. Dec. 62, 66, 67; *Pater v. Baker*, 3 C. B. 831, 868; *Wilson v. Dubois*, 35 Minn. 471, 59 Am. Rep. 835.

The declaration shows on its face that the appellee had a sufficient probable cause for believing he had the right to file the lien; and the best evidence of this is the fact that one of the most learned of the circuit court judges of this state has so decided by sustaining the demurrer on this ground.

Jones v. Finch, 84 Va. 207; *Bailey v. Dean*, 5 Barb. 301.

To sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause.

Starkie, Slander & Libel, 202-206; *Smith v. Spooner*, 8 Taunt. 248; 2 Greenl. Ev. § 428; *Hargrave v. Le Breton*, 4 Burr. 2422; *Brittidge's Case*, 4 Coke, 18; Newell, *Defamation, Slander & Libel*, 207.

The declaration did not allege that the lien had been ended in favor of the appellant; this was fatal.

4 Minor, Inst. pt. 1, p. 898; *Thompson v. White*, 70 Cal. 135; *Brook v. Raul*, 4 Exch. 524; *Bailey v. Dean*, 5 Barb. 300; *Starkie, Slander & Libel*, 158, 159, 323; Newell, *Defamation, Slander & Libel*, 209.

Lewis, P., delivered the opinion of the court:

This was an action in the circuit court of the city of Richmond for a libel. The declaration states, in substance, that the plaintiff, who is the plaintiff in error here, was, in the fall of the year 1890, a carpenter and builder, of good name, fame, and credit; that about that time he was employed by the Virginia Land & Loan Company to build certain houses in the city of Richmond; that in the execution of this contract the plaintiff employed the defendant, as a subcontractor, to do the brick work, at a certain price, to be paid for at a certain time; that before the work was done, and before anything was due by the plaintiff to the defendant, the latter maliciously and without probable cause, intending to injure the plaintiff in his business, placed upon record in the clerk's office of the chancery court of the city of Richmond a mechanics' lien against the property of the said Virginia Land & Loan Company, for the improvement of which the plaintiff had contracted as aforesaid; that the defendant also notified the company not to pay anything to the plaintiff on account of the said improvement without the defendant's direction or approval; the meaning of all which, it is averred, was to charge publicly that the plaintiff was either unwilling, because dishonest, or unable, because insolvent, to pay whatever was justly due by him to the defendant on account of said work. It is also averred that in consequence of the said wrongful acts of the defendant the land and loan company did for a long time, and against the consent of the plaintiff, retain

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the price of said improvements, notwithstanding a large sum was due the plaintiff on account thereof, during all which time the plaintiff was deprived of the use of the money so due him as aforesaid, to the great injury of his name and credit, involving loss of customers in his business, etc.

There was a demurrer to the declaration, which was sustained by the judgment complained of; and the question thus presented is the single question to be determined. That the lien was prematurely filed by the defendant is clear. The lien of a subcontractor in such cases is given by section 2475 of the Code; and by section 2477, it is provided that any subcontractor, in order to perfect the lien so given him, shall comply with the provisions of section 2476. He must also give notice in writing to the owner of the property, or his agent, of the amount and character of his claim. It is essential, therefore, to the validity of the lien, that it be perfected according to the provisions of section 2476, and that section enacts as follows: "A general contractor, in order to perfect the lien given him by the preceding section, shall at any time after the work is done or materials furnished by him, and before the expiration of thirty days from the time such building or structure is completed, or the work thereon otherwise terminated, file in the clerk's office of the county or corporation court of each county or corporation in which the building or structure or any part thereof is, or in the clerk's office of the chancery court of the city of Richmond, if the said building or structure is within the corporate limits of the said city, an account showing the amount and character of the work done or material furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached, declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims the lien." It is also provided that such account and statement shall be recorded by the clerk in a book to be kept for the purpose, called the "Mechanics' Lien Record," and that, from the time of such filing, all persons shall be deemed to have notice thereof. It is apparent from the language of this section, which must be strictly construed, that no lien can be perfected in a case like the present before the work for which the subcontractor engages is done, i. e., before his contract is completed. The statutes of the several states on this subject are not uniform. In some of the states a lien is given from the commencement of the work, and others, from the time notice of an intention to claim a lien is filed in the proper office; while in others, as in Virginia, no claim can be perfected until the work is done. It is conceded by the defendant that this was the law in Virginia before the adoption of the new Code, and if the Legislature had intended to change it,—that is, to give a right to claim a lien or liens for fragments of the work as it progresses,—such intention would no doubt have been expressed in clear and unmistakable terms. *Franklin St. Church Trustees v. Davis*, 85 Va.

193. This view is strengthened by the provisions of section 2479 of the Code, which, as a protection to the subcontractor, gives him the right to notify the owner or his agent in writing before the work is performed, stating the probable value thereof, and which also makes the owner personally liable if, after the work has been performed, and within thirty days after the completion of the building or structure, a correct account, etc., is furnished, as prescribed by that section; the owner, however, not to be so liable in a sum exceeding the amount of his indebtedness to the general contractor at the time notice is given. In the present case, therefore, not only was the lien in question filed and recorded without authority of law, but the declaration avers, and the demurrer consequently admits, that the defendant recorded it maliciously, without probable cause, and with intent to injure the plaintiff in his business; and both general and special damage are alleged in the declaration. There is no principle, then upon which the demurrer can be sustained. It is a settled rule of the common law that every publication of language that naturally and necessarily tends to injure another in his office, trade, or employment is, if without justification, libelous or slanderous, as the case may be, and actionable *per se*. Thus, to speak or write of a trader that he is insolvent, or of an innkeeper that his house is infected with a contagious disease, or to impute dishonesty or incapacity to one in his business, is actionable without any averment or proof of special damage, since in all such cases the law implies damage from the nature of the language used. *Hodge, Slander & Libel*, 30; 2 Rob. Pr. (New) 633; *Whitaker v. Bradley*, 7 Dowl. & R. 649; *Newbold v. Bradstreet*, 57 Md. 88; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Price v. Conway*, 134 Pa. 840, 8 L. R. A. 193; *Haney Mfg. Co. v. Perkins*, 78 Mich. 1; *Orr v. Skiffeld*, 56 Me. 483. Where, however, the language does not import such defamation as will of course be injurious, and is therefore actionable only because it occasions special damage to the plaintiff, *i. e.*, damage which, though the natural and immediate, is yet not the necessary, result of the language used, there the damage must be both alleged and proved. 2 Greenl. Ev. § 420; 4 Minor, Inst. 381; *Townshend, Slander & Libel*, § 146 *et seq.* In

the present case it would, no doubt, be going too far to say that the wrong complained of falls within the first of these rules; that is to say, that, in contemplation of law, damage necessarily results to the plaintiff in such case. In other words, the filing of a mechanics' lien by a subcontractor for an alleged indebtedness to him by the general contractor, cannot be taken, as a matter of law, as imputing insolvency or dishonesty to the general contractor, nor as necessarily tending to injure him in his business. *Newbold v. Bradstreet*, 57 Md. 88. The declaration, however, alleges special damage, resulting from the tying up in the owner's hands of the money due the plaintiff, and the consequent loss of credit and customers, though the names of such customers are not specified in the declaration. The rule, however, that in an action for slander or libel, by which the plaintiff has lost his customers, he cannot give in evidence the loss of any whose names are not specified in the declaration, is not inconsistent with the admission of evidence of general loss. 2 Starkie, Slander & Libel, 68; *Evans v. Harries*, 33 Eng. L. & Eq. 347.

It has been argued in support of the demurrer that the declaration is bad because it does not aver that the asserted lien has been ended in favor of the plaintiff, either by the limitation prescribed by the Code, or by a decree of the chancery court. But this was not necessary. The want of analogy between the present case and *Young v. Gregorie*, 8 Call, 446, and other similar cases, holding that in an action for malicious prosecution in suing out an attachment without cause the declaration must aver that the attachment has been ended, is obvious. The case much more nearly resembles that of *Grainger v. Hill*, 4 Bing. N. C. 212, in which case it was ruled that in an action for abusing the process of the court in order to effect an object not within the scope of the writ, as to compel the defendant illegally to give up his property, it is not necessary to aver and prove that the action in which the process was improperly employed has been determined, or that the process was sued out without probable cause.

The judgment must therefore be reversed, the demurrer overruled, and the case remanded for further proceedings.

MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL R. CO., *Appt.*,
v.
A. F. MINOR.

(.....Miss.....)

1. An appeal on a special bill of exceptions will not be dismissed for lack of a

general bill which could not be considered for any purpose whatever.

2. A common carrier is required to protect a passenger from an unprovoked assault of a fellow passenger, if the conductor knew that it was threatened and could have prevented it with the assistance of employes and willing passengers.

NOTE.—Duty of carrier to protect passenger from assault by fellow passenger.

In *New Orleans, St. L. & C. R. Co. v. Burke*, 58 Miss. 200, 24 Am. Rep. 689, referred to in the above opinion, plaintiff's hat was taken from him and he

went in search of the conductor, who returned with him to the car where his tormentors were and requested them to return the hat, immediately after which they began an assault on the complaining passenger. The conductor remonstrated and

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3. The defense that a passenger who was injured by riotous conduct of fellow passengers voluntarily placed himself in danger thereof, cannot be raised for the first time on appeal.
4. The court cannot instruct the jury that their verdict must not exceed a certain sum although two former verdicts on the same evidence have been set aside as excessive and the verdict on a third trial is made conclusive by statute.
5. The constitutionality of a statute making the third verdict conclusive as to the amount of damages cannot be attacked for the first time on appeal.
6. An instruction that a railroad company is bound to exercise very great vigilance and care in maintaining order and guarding passengers against violence will require a reversal against such a company for lack of care, although other instructions correctly require a lower degree of care.

(May 23, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Panola County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been received by plaintiff while a passenger on defendant's train, in consequence of an assault from another passenger. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Moyes & Harris* for appellant. *Messrs. Shands & Johnson* and *W. D. Miller* for appellee.

Woods, J., delivered the opinion of the court:

The motion of the appellee to dismiss the

appeal, and to affirm the judgment of the court below, must be denied. If the appellant had made its motion in the court below to set aside the third verdict, and the same had been overruled, two former verdicts for the appellee having already been set aside for errors not of law, and the appellant had excepted, and had then brought his appeal to this court on a general bill of exceptions to this action of the trial court, we could not have considered it for any purpose whatever, as has been repeatedly held in this state. See *Strickland v. Hudson*, 55 Miss. 285, and *Bowers v. Ross*, 55 Miss. 212, and the earlier cases therein cited. What reason can be assigned, then, for requiring the appellant to do this vain and fruitless thing? That the proper course was pursued in excepting to the action of the trial court in giving and refusing instructions, and in presenting the appeal on a special bill of exceptions, is not open to controversy. See *Ray v. McCary*, 26 Miss. 404; *Thornton v. Feliciana R. Co.* 29 Miss. 143; *Garnett v. Kirkman*, 38 Miss. 389; *Parham v. Stith*, 61 Miss. 199; and the cases already cited in 55 Miss. *supra*.

1. The action of the court in refusing the peremptory instruction prayed by the appellant is the error first assigned; and this assignment is elaborately and strongly supported on three grounds, viz.: (a) That no cause of action was presented by the declaration, nor was any made out by the evidence, a carrier not being required to protect a passenger from the assault of his fellow passenger; (b) that the evidence fails to show that the injury complained of was inflicted by a fellow passenger, or by any one on the

left the car followed by the assaulted passenger and his assailants. The conductor rendered little if any more assistance and the passenger was somewhat injured. The court, after discussing the question, continued, "We conclude that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains and if necessary for this purpose to eject therefrom disorderly persons, carries with it the absolute duty to exercise this power when called upon to do so in a proper case by the other passengers; a failure to discharge this duty stands to some extent upon the same footing as the omission to perform any other official duty and renders the company liable." As limitations the court says it may be necessary in each case to bring home to the conductor knowledge or an opportunity to know that the injuries were threatened and to show that he could have prevented or mitigated them; and that he cannot be expected to accomplish more than he can with train hands and willing passengers. That decision was questioned in *Koyston v. Illinois Cent. R. Co.*, 37 Miss. 374, in which it was decided that the conductor was absent in another part of the train, not knowing of the assault or that it was threatened.

In the leading case of *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 517, the rule adopted seems to be that the conductor must do all in his power to protect a passenger, and if he fails to do that the company will be held liable; and that case was followed in *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. 511.

The carrier will be held liable when by the exercise of proper care the acts of violence might have been foreseen and prevented. *Britton v. Atlanta & C. A. L. R. Co.* 38 N. C. 544.

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It is the duty of the conductor to use the utmost vigilance and carefulness in maintaining order and protecting passengers from the violence of others; but he must have knowledge of the threatened danger. *Spohn v. Missouri Pac. R. Co.* 37 Mo. 30; *Jackson v. Missouri Pac. R. Co.* 104 Mo. 432.

The carrier is bound to see that no harm comes to a passenger from a fellow passenger whose condition and conduct clearly show that he is a dangerous person; when train hands are changed the new ones must be informed as to passengers who need watching. *King v. Ohio & M. R. Co. (Ind.)* 18 Am. & Eng. R. R. Cas. 386.

It is its duty to provide ready help sufficient to protect passengers against assaults from every quarter from which they might reasonably be expected to occur under the circumstances of the case and the condition of the parties. *Britton v. Atlanta & C. A. L. R. Co. supra*.

Where a conductor when appealed to for aid, instead of granting protection, insulted and left a passenger to his fate, exemplary damages against the company were held proper. *Flannery v. Baltimore & O. R. Co.* 4 Mackey, 111.

The carrier is liable for injuries inflicted on a civilian passenger by the discharge of a gun dropped on the deck of the steamer by a soldier who was engaged in a struggle with another soldier. *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554.

If a person employed by a conductor to expel a passenger from a train strikes him unjustifiably in expelling him, the company will be liable although the blows were struck against the conductor's orders. *Coleman v. New York & N. H. R. Co.* 103 Mass. 160.

train, or by any person under the control of the servants of the railroad company in charge of the train, and (c) that, if the liability of the carrier to a passenger for injury inflicted by a fellow passenger be conceded, then this case does not fall within that rule, because Minor voluntarily placed himself in a position of exceptional danger, consented to the disorder, and did not claim the protection of the carrier or its servants.

On the first contention, we have to say that while the rule announced and applied in the case of *New Orleans, St. L. & O. R. Co. v. Burke*, 58 Miss. 200, does not command the concurrence of our judgment, yet we are not to be understood as denying all responsibility on the part of railroad companies for injuries suffered by one passenger at the hands of his fellow passenger. Our dissatisfaction arises out of the application, mistakenly made, as we conceive, to the facts of that case. The case, as it seems to us, involves the making of a bad precedent to meet a hard case. But the decision has stood unassailed for sixteen years, and the doctrine, with the limitations put upon it by the court in its opinion, has been accepted and acted upon as the rule of the passenger's rights and of the railway's responsibility, through this long period; and, as intimated in *Royston v. Illinois Cent. R. Co.*, 87 Miss. 876, we "feel constrained to yield to that decision as authority for the rule it announces." But, as was declared by us in *Royston's Case*, "we shall certainly not extend the doctrine so as to embrace any other than a case clearly falling within it." The

Burke Case has been carefully reviewed by us, and its doctrine protractedly and repeatedly examined, and we decline to overrule the case and repudiate the rule.

The second contention under the assignment we cannot consider. In the peculiar attitude in which the appeal is presented to us, we can only look to the evidence contained in the special bill of exceptions for the purpose of passing upon the alleged errors of law said to have been committed by the trial court. Of course, if it appeared that there was absolutely no evidence showing or tending to show that Minor's injury was inflicted by a fellow passenger, the peremptory instruction should have been given; but the record discloses much testimony tending to show that the hurt was done by a fellow passenger, and this disputed question of fact has, by three successive verdicts, been found in Minor's favor.

The third contention under this first assignment, to the effect that Minor voluntarily placed himself in a position of exceptional danger, consented to the risks of the riotous conduct of his fellow passengers, and did not claim protection of the company, strongly impresses us, and, if supported by evidence, would seem to put this case without the general rule that imposes liability upon the railroad company for injuries inflicted upon one passenger by his fellow passenger. If Minor in fact voluntarily put himself in a position of known, apparent, exceptional danger, and took the chances of hurt from his drunken and disorderly fellow passengers, on a Sunday excursion train of negroes

The corporation was held liable where a drunken and indecent person was knowingly admitted to a street-car and subsequently assaulted a passenger riding in the car. *Hendricks v. Sixth Ave. R. Co.* 12 Jones & S. 8.

The company was held liable where it permitted a riot to occur on its cars in consequence of which a passenger was injured. *Holly v. Atlanta St. R. Co.* 61 Ga. 215, 84 Am. Rep. 97.

The general doctrine was recognized in *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 180, but held not to apply to the facts of that case, the conductor not being aware of the intended assault.

For neglect of this duty the liability is no more extensive than in case of the negligence from which an injury comes to the person or property of the passenger from other causes; the liability is limited to such damages as are within the contemplation of the contract between the carrier and the passenger or within the scope of the former's duty. *Weeks v. New York, N. H. & H. R. Co.* 72 N. Y. 50.

Where there was nothing to show circumstances calculated to warn the railroad employees of the possibility of the assault, the company was held not liable. *Felton v. Chicago, R. I. & P. R. Co.* 60 Iowa, 580.

There is no liability where there is no proof that the officials did not sufficiently protect the passenger and they testify that they did all they could to prevent the assault. *McGuinn v. Forbes*, 37 Fed. Rep. 639.

Where the assault was sudden and the conductor had no reason to anticipate it and interfered as soon as he could the company was held not liable. *Mullan v. Wisconsin Cent. R. Co.* 46 Minn. 474.

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The company is not liable for an injury inflicted on a passenger by a mob if it was without power to prevent them. *Chicago & A. R. Co. v. Pillsbury* (Ill.) 6 West. Rep. 790.

But it may be negligence to carry non-union working men to work for an employer against whom there is an organized strike and stop the train to let them off at a place not the regular station, if such course will be likely to subject passengers to assault from the strikers. *Chicago & A. R. Co. v. Pillsbury*, 11 West. Rep. 757, 123 Ill. 10.

In England it seems that if the company does not know of the passenger's danger when it sells him his ticket, and there is nothing about his fellow passengers to cause the company to think they are dangerous, it is not bound to protect him from assaults although the trainmen have knowledge of such assaults. *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385.

In that case the plaintiff had incurred the ill-will of certain pit-men and they took passage in the same carriage with him and embraced the opportunity to assault him.

This doctrine is comparatively modern and in several cases is characterized as novel and a disposition is manifested to repudiate it, but in *Winnegar v. Central Pass. R. Co.*, 85 Ky. 568, in which the assault was made by a servant of the company, the court said: "It is now well settled that the law implies a contract for the protection of the party carried from insults and wanton interference of strangers, fellow passengers, the carrier himself, and his servants. See also *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 98; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Chicago & R. R. Co. v. Flexman*, 103 Ill. 550, 42 Am. Rep. 38.

H. F. F.

mainly, and if he continued, from Memphis to Love's station, to retain his position, in the face of great apparent danger, without any effort to avoid the same, and without any complaint to the railroad company's servants, we would be inclined to the opinion that his case is exceptional, and not embraced in the rule announced in the *Case of Burke*. But no such question was presented to the court below, nor was any such issue tried by the jury. To say now that the peremptory instruction should have been given for the railroad company, in view of the theory we are considering, on the principle *volenti non fit injuria*, would be to permit a new case to be made here, and the controversy to be determined on an issue never raised or tried below. This we cannot do, much as we are impressed by the view now advanced by counsel in this court.

2. We come next to consider the contentions numbered 5 and 6 in the abstract of counsel for appellant. These may be properly examined together, and thus looked at the contention is this: that the third instruction given for the plaintiff was erroneous, in that it informed the jury that they were the judges of the amount of damages to be assessed, and that they should be governed by the evidence disclosing the circumstances of the case, without adding thereto the qualification that, under the peculiar attitude of the case, they could not exceed the sum of \$5,000, or a sum not materially in excess of that awarded by the former verdict. The argument in support of this proposition is that the trial court, in the exercise of the power confided to it to prevent the gross injustice of unconscionable verdicts by juries, resulting from passion or prejudice, had twice set aside verdicts, one for \$8,000, and the other for \$10,000, on the sole ground that they were excessive, and, the third trial having been had on the evidence produced on the former trials, the court should have interposed its power to prevent a repetition of the imposition of damages in the amount already held by the court to be excessive,—the product of passion or prejudice. In other words, as we understand it, the court, by the addition of the qualification named, should have prevented the jury from passing the bound twice determined by the court, on the same testimony, to be proper. But we submit that this course on the part of the learned court, while professedly taken in vindication of the essential prerogatives and powers of a court of justice, would have been really a finding by the court, and would have been an invasion of the constitutional right of the appellee to have a finding by the jury. Say the counsel, in weighty words: "Under the constitution of our judicial system, the power is committed to the judge, in the exercise of a sound discretion, to check the imposition of unconscionable verdicts, the results of passion or of prejudice. It would be idle, and, we respectfully submit, a judicial farce, to concede such a power, if it is to be not merely nullified, but even, as in this case, made to act as a sort of boomerang, simply by the persistence of successive juries. It

would then be no power. Its only practical result would be to punish the defendant for an effort by the court to shield him within reasonable limits. The greatness, itself, of the passion, the very invincibility of prejudice, will lead inevitably to the result attained here,—that on the subsequent trial the verdict will be increased by the action of the court, striving within the limits of its authority for the reverse; and on the third trial, when the court and the defendant are run into the *cul-de-sac* of the statute," the defendant will be without any protection from the passion or prejudice of the jury. If the appellant had pressed the views impugning the strength and validity of our statute, which is thus indirectly assailed, upon the attention of the trial court, in support of a motion for a new trial, and had pressed them here on us, a new trial having been denied below, we should consider and pronounce upon their weight; but, as the statute was not assailed on the trial below, it is impossible for us to intimate any opinion now, nor are we to be understood as making any intimation whatever touching the constitutionality of the statute complained of.

8. Having thus failed to agree with the counsel for appellant, we come now at last to consider the remaining error complained of, to which we think it necessary to advert. It is asserted that the first and second instructions given for the appellee were erroneous, and in conflict with the charges of the appellant. The first instruction complained of is objectionable because of its abstract character. It is a long compilation of mere abstract propositions, and contains no sort of reference or application of its statements of law to the case in hand. But it is not alone objectionable on account of this very prevalent vice of indoctrinating a jury by the statement of legal abstractions. The opening statement, the initial legal abstraction, is palpably incorrect, and was doubtless misleading. This instruction informs the jury that "railroad companies are bound to exercise very great vigilance and care in maintaining order, guarding passengers against violence, from whatever source arising," etc. If this is correct, the jury was told that the highest degree of vigilance and care was the test to be applied to the conduct of the railroad's servants in guarding Minor and other passengers. Or to put it in another way, for the purpose of exposing its unsoundness, if the conductor and servants of the railroad company were in the slightest degree wanting in vigilance and care, then Minor was entitled to a recovery. Stated in any form the proposition is not true. Nor do we understand the learned counsel of the appellee to so contend. Their position seems to be that, even if this charge be erroneous in this particular, yet its hurtfulness is cured in other instructions given, in which the jury was told that reasonable care and diligence was the measure of the appellant's accountability. In the face of the irreconcilable conflict in the instructions touching the measure of care and diligence on the part of the railroad company, can it be affirmed that the first in-

struction for appellee, which informed the jury that very great vigilance and care was the measure of appellant's duty, may not have tended to produce the result arrived at? Can it be said that in the absence of this erroneous instruction the jury would have

rendered the same verdict? We feel constrained to answer negatively. Wherefore, for this error of law, committed by the court below in giving the first instruction for the appellee, *the judgment is reversed, a venire de novo* awarded, and the cause remanded.

FLORIDA SUPREME COURT.

FLORIDA SOUTHERN R. CO., *Appt.*,

Walter J. HIRST.

(.....Fla.....)

*1. A negligent act done prior to the Statute of June 7, 1887, § 2845, Rev. Stat., and resulting in injury to another, will not sustain an action for damages if negligence upon the part of the person injured was contributory to his incurring such injury. *Louisville & N. R. Co. v. Yntestra*, 21 Fla. 700, affirmed.

2. The law requires of railroad companies the exercise of the highest degree of care for the safety of passengers traveling upon their trains; and it authorizes such companies to make, and requires passengers to observe, all rules reasonably necessary for the safety of the latter. A rule of a railroad company requiring that passengers shall remain in the cars provided for them, and, consequently, that they shall not ride in an express car, or

*Head notes by RANNEY, Ch. J.

NOTE.—Passenger's riding in baggage or express car as contributory negligence.

Where there is a statute providing that in case a passenger is injured while riding in a baggage car contrary to the rules of the company there can be no recovery, such statute is conclusive and no suit for recovery can prevail. *Higgins v. Hannibal & St. J. R. Co.* 36 Mo. 424.

Where there is no rule on the subject it seems that it would be immaterial that the passenger was riding in the baggage car unless perhaps in case he had been forbidden to do so by a servant of the company. *Washburn v. Nashville & O. R. Co.* 8 Head, 642, 75 Am. Dec. 784.

So where a postal clerk is returning to his run and takes his place in the postal car, he is not guilty of such contributory negligence as will defeat his recovery in case he is injured, if there is no rule of the company forbidding him to do so. *Baltimore & O. R. Co. v. State*, 6 L. R. A. 708, 72 Md. 36.

Violation of rules.

Where there are rules of the company which prohibit a passenger from riding in a baggage car, and the passenger with knowledge of such rule deliberately violates it and takes his place in such car, he cannot recover damages if he is injured while there. *Pennsylvania R. Co. v. Langdon*, 23 Pa. 21, 37 Am. Rep. 651.

So where the passenger knows that the rules of the company prohibit his being in the baggage car, and he goes there without necessity, even though with the knowledge of the conductor, and is injured by a wreck of the train, he cannot recover if he would not have been injured had he remained in the passenger car. *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799.

But being in the baggage car without knowledge of the rule forbidding it is not negligence. *Jacobus* 16 L. R. A.

other place of increased danger set apart for another purpose, is reasonable.

3. It is contributory negligence for a passenger to ride in an express car in violation of a known rule of the company, even with the permission, connivance or knowledge of the conductor of the train, or without his protestation against it, when the conductor is cognizant of the rule and of its infraction, if by such violation of the rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart, and affording space, for his accommodation.

4. It is the duty of the conductor of a railroad train to enforce a rule of the company requiring passengers to ride in the passenger cars, but the obligation upon passengers and the protection to the company, of a rule of this kind, is not dependent upon the fidelity of the conductor or other agent charged with its enforcement.

5. Where a passenger who knows of a rule requiring him to ride in the pas-

bus v. St. Paul & O. R. Co. 20 Minn. 184, 18 Am. Rep. 360.

Where the company was guilty of gross negligence and the conductor had apparently acquiesced in the passenger's being in the express car, he was held entitled to recover. *Watson v. Northern R. Co.* 24 U. C. Q. B. 102.

Where riding in such car did not contribute to accident.

There is a strong tendency in some of the cases to inquire whether or not by being in the baggage car the passenger increased the risk of injury (see *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799; *New York, L. E. & W. R. Co. v. Ball* (N. J.) June 1, 1891; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 167, 42 Am. Rep. 208; *Carroll v. New York & N. H. R. Co.* 1 Duer, 580; and in one case where it appeared that he probably escaped death by being there the court held that a charge that the jury should determine whether plaintiff by being in that car contributed to the injury and that if he did he could not recover was as favorable to defendant as he could ask. *Webster v. Rome, W. & O. R. Co.* 23 N. Y. S. R. 778.

It is immaterial that the passenger was in the baggage car if his being there was not the proximate cause of the injury. *Jacobus v. St. Paul & O. R. Co.* 20 Minn. 128, 18 Am. Rep. 360.

Where the accident consisted of the overturning of the baggage car the court held that the passenger's going into the baggage car to get some article of baggage was such a plain act of negligence that he could not recover for injuries received while there by reason of such accident. *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 449.

Power of conductor to waive rule.

Whether or not the conductor can waive a rule

senger cars, rides in an express car or other place on the train which cannot be regarded as intended for accommodation of passengers, but naturally suggests that it was not intended for them, the burden is upon him to prove that he was justified in riding in such prohibited place.

6. If a railway company which has a rule prohibiting passengers from riding in the express car, or in other cars than the passenger cars, habitually permits passengers to ride in the express car, it will incur the same responsibility to passengers for injuries received by them, through the company's negligence, when riding in the express car as if they were in a passenger car.
7. Though a passenger, who riding in an express car receives an injury, knows at the time that there is a reasonable rule of the company prohibiting his riding there, cannot invoke the mere delinquency of the conductor in enforcing the rule as a bar to the company's claiming the protection of the rule, still a company may by its conduct abandon the rule, or preclude itself from protection thereunder. It may, by its conduct, have held out its employees in control of its trains, as authorized, notwithstanding such a rule, to consent to plaintiff's riding in an express car; or its employees may have been accustomed to allow passengers to ride in the express car so generally and constantly that the officers of the company must be held to have known of and acquiesced in the violation of the rule; or there may have been such continued and habitual disregard of the rule by the employees as must have reasonably produced the belief that the company had practically abandoned its rule. There must be such conduct as in effect establishes the concurrence of the company in the disregard of the regulation.
8. It is error to submit a case to a jury upon the theory that the virtue or efficiency of

a rule prohibiting passengers from riding in express cars is entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement.

9. Where a party has inflicted an injury intentionally, or where it has been done through negligence and hence unintentionally and his conduct in doing it has been wanton or reckless of its injurious consequences, the contributory negligence of the person injured is not a defense to an action brought by him for such injury.
10. The use of the expression "gross negligence" in a charge to a jury does not of itself define, nor does it include only, that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain, and cannot be held as having been intended to submit the case to a jury for consideration as one of that character, and particularly so where other charges have recognized contributory negligence as a defense to the action.
11. Exemplary damages can be allowed in cases of negligence, only where the negligence is of a gross and flagrant character evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness, or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. As "gross negligence" is not confined to this extreme degree of negligence, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages.
12. The actual payment of fare is not

of the company prohibiting passengers from riding in the baggage car seems to be a question on which there is some conflict. It seems that it is the passenger's duty to obey the instructions of the conductor and go into a baggage car if he so requires. *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 453.

It has been held that the conductor's permission to remain in such a car is a waiver of the rule. *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 380. See also *Watson v. Northern R. Co.* 24 U. C. Q. B. 102.

If the passenger is in the baggage car with the assent of the conductor he is where, as between himself and the company, he has a right to be notwithstanding its rule that he cannot ride there, and in case of injury through the company's negligence he may recover unless the injury was caused by being in the baggage car. *Carroll v. New York & N. H. R. Co.* 1 Duer, 580.

This is especially so if the rule is habitually disregarded. *Jones v. Chicago, St. P. M. & O. R. Co.* 48 Minn. 270.

So where the passenger had no knowledge of the rule, and he and others had frequently been permitted to ride in the baggage car before, and the conductor had accepted and punched their tickets while there, the court held that the passenger took the risk of any injuries from dangers inherent in the construction or use of the car for the purpose of carrying baggage, but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, could not have been deemed to have been negligent. *New York, L. E. & W. R. Co. v. Ball* (N. Y.) June 1, 1891.

If the danger from the particular accident which

occurred was materially increased by the fact that the passenger was not in his proper place he cannot recover unless he was where he was with the consent of the conductor; but if the nature of the accident is such that the danger of it was not enhanced in consequence of the position occupied by the passenger, or if he occupied the place with the knowledge of the conductor, his right of recovery will not be affected by the fact that he was in an improper place. *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 167, 42 Am. Rep. 204.

The conductor is not bound at the peril of the company to know that the passenger is in a position of danger and warn him away. *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 167, 42 Am. Rep. 204.

Where workmen were in the habit of returning from work in the baggage car with the acquiescence of the conductor, the court held that the jury might reasonably conclude that they were there with the permission of the conductor and for the benefit of the company, and that they could recover for injuries received by the breaking of a rail in the roadbed. *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 240, 38 Am. Dec. 593.

In *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651, the question was very fully discussed as indicated in the principal case, and the case of *O'Donnell v. Allegheny Valley R. Co.* was distinguished on the ground that in the one case the violation had been going on for two months while in the other the accident occurred during the first violation so far as the injured passenger was concerned, and the court held that the conductor has no authority to waive such a rule. H. P. F.

essential to the status of a passenger on a railroad train.

13. A person who was injured while in an express car of a passenger train had, up to six weeks prior to the accident out of which the action arose, been an express messenger, and had run on the same train with the conductor of the colliding passenger train, but had left such employment and at the time of the accident was engaged in other business not connected with the railroad. On boarding the train he went into the passenger car. He had funds sufficient to pay his fare, but the conductor, who, there was evidence to show, was aware of these facts, omitted, without fault of the party, to ask him for his fare, and gave as a reason for this omission that he thought the party was in the employ of the express company. Held, that the evidence did not justify a conclusion either that the party was attempting to obtain a ride without paying fare, and to this end was practicing a fraud or imposition on the conductor or the company by passing himself off as an express messenger returning to his "run," or that he had at no time the legal status of a passenger thereon.

(June Term, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Alachua County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. J. R. Parrott and Robert W. Davis for appellant.

Mr. E. C. F. Sanchez for appellee.

Raney, Ch. J., delivered the opinion of the court*:

This is an action to recover damages received by Walter J. Hirst in a collision between two trains on appellant's railroad, Hirst being on a passenger train, which was on its schedule time, and the other train being a special, or extra, train loaded with iron rails.

The rule as to negligence announced by this court in *Louisville & N. R. Co. v. Ynietra*, 21 Fla. 700, is that notwithstanding a person may be guilty of a negligent act from which injury results to another, still if the party injured has by his own negligence contributed to his receiving the injury, he cannot recover damages from the other party for such injury. The injury must have been caused solely by the negligence of the former party to entitle the latter to recover. This decision, which we see no reason to disturb, necessarily, even though impliedly, repudiates the doctrine of comparative negligence, which has found favor in the Illinois and other courts; and it dispenses with the necessity of our noticing the citations from those states made by appellee's counsel. The injury in question was received prior to the passage of the Act of June 7, 1887, chapter 8744, Laws of Florida, and hence the provision of the first section of this statute as to diminishing damages in proportion to the

amount of the default of the plaintiff, where both parties are at fault, has no application.

There is in the cause before us testimony to the effect that Hirst on boarding the train got on the passenger car; and that a rule of the Florida Southern Railway Company, appellant, forbade passengers from riding in any other than the passenger car, or, consequently, in the express car, in which car Hirst had gone and was at the time of the accident, he being six feet from the fore end of it, and sitting on the iron express box; and that the plaintiff knew of such rule; and also to the effect that this car was next to the engine, and was a more dangerous place than the passenger car, and was neither set apart as, nor was it in fact, the place where passengers usually rode, and was not arranged for them, nor had any seats, but was for the use of the express company; also that the plaintiff had ridden in the express car previously on the trip on the day of the accident in question, and that the conductor had been in there with him a short time, and that plaintiff had gone in there with the conductor and by his permission, or with his at least tacit consent; and tending to show that the conductor also knew that the plaintiff was in this car at the time of the collision between the passenger train and the special train loaded with iron rails. It was also testified that there was ample room in the passenger car, and that the plaintiff would not have been injured if he had been in the passenger car, and that he and the express agent were the only ones injured. There was no testimony tending to show that the conductor attempted to enforce the rule, or even suggested to the plaintiff the advisability of its observance, although the conductor says that plaintiff was not in the car by his permission. Hirst had not paid any fare, nor had the conductor applied to him for it.

Exceptions taken by the defendant to charges given to the jury, and to the refusal of one asked by the defendant, involve an inquiry into the legal effect of a rule of a railroad company forbidding passengers to ride in parts of the train set apart for other purposes, and naturally more dangerous than passenger cars, and of the power of conductors to waive such rules.

In *Houston & T. C. R. Co. v. Moore*, 49 Tex. 81, 80 Am. Rep. 98, the deceased, when he received the injuries from which he died, was riding on a freight train with the knowledge and consent of the conductor, but whether he had paid fare, or had a pass or permit, was not shown. He was the only person, except the employes of the company, on the train, and prior to a month or six weeks before his death, had run on the company's road for a year or two as an engine driver, and knew that passengers were not allowed to travel on the company's freight trains, and that officers in charge of such trains were forbidden to allow parties to ride on them without a special pass from the general superintendent of the road, which passes were not given, in view of the increased risks, without a release of the company from liability in cases of accidents to passengers. The decision of the court was

*Judge Young, of the fourth circuit, sat in the place of Mr. Justice Taylor, who was disqualified.)

that a regulation that freight and passengers shall be carried on separate trains is reasonable, and highly salutary to both the company and the public; and no one has the right to demand that he shall be allowed to ride on trains devoted exclusively to the carriage of freight, when the company makes other and suitable provisions for the transportation of passengers; and that a party who in violation of such regulation, and without the consent of the company, forces himself into one of its freight trains cannot hold the company responsible to him as a passenger, or recover of the company for injury thus contributed to by him while thus wrongfully on the train. That while it might be true that when the company should, notwithstanding such a regulation, habitually permit persons to travel on its freight trains it would be liable to such passenger the same as if he were on a regular passenger car, still when there is such a regulation, and there are no cars attached to freight trains except those ordinarily accompanying trains exclusively of this character, or only such cars as by their appearance or the manner in which they are fitted up, cannot be regarded as inviting persons on freight trains as passengers, the burden of proving that the party injured on such a train was justified in going on it as a passenger is upon him; and the conclusion of the court was that the evidence showed that the conductor did not have authority to waive the regulation, and that the deceased must have known this.

In *Prince v. International & G. N. R. Co.*, 64 Tex. 144, the injuries of the plaintiff were alleged to have been received through the negligence of defendant's employes while he was riding on a hand car on which he was invited to ride, and on which he was received as a passenger, and that the company sometimes used such car for the transportation of passengers invited to travel on it by the proper agents of the company free of charge; and the questions arose on a demurrer to the petition. The order overruling the demurrer was affirmed, and it was held that a railway company is liable in damages to one who is injured by the negligence of its agents while traveling on a hand car of the company, on which he had been invited to ride by the agent of the company in charge of the car free of charge, it appearing that such a car was sometimes used by the company for the transportation of passengers, and not shown that any regulation of the company prohibited traveling on such a car. In the opinion, the effect of the decision in *Houston & T. O. R. Co. v. Moore*, *supra*, is stated to be that the question whether or not a passenger is lawfully on a train does not depend necessarily upon the purposes to which the train is usually devoted; if, however, the train is usually employed in the transportation of passengers, a person who has paid his fare, or has been invited to ride free of charge, is presumed to be lawfully on the train. That if by the rules of the company passengers are expressly forbidden to be carried upon particular trains, the presumption is that any one claiming to be a passenger upon such a train is an intruder, and 16 L. R. A.

without lawful right to be there; but this presumption may be rebutted by showing that, though the rules forbid the transportation of passengers on such trains, yet, with the knowledge of the company, and without objection on its part, persons are habitually permitted to take passage on them. That the company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them dispensed with when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rule on his part would be a disobedience of the orders of his superiors. The case of *Gulf, O. & S. F. R. Co. v. Campbell*, 76 Tex. 174, was one in which the plaintiff sued for personal injuries suffered when upon a freight train, and there was evidence that he was refused passage by the conductor who told him he had no authority to carry passengers and could not; but that subsequently plaintiff was given permission to board the train by a man who stood on the platform and had a lantern in his hand, and in reply to the question, if he had charge of the train, answered affirmatively. It was held that plaintiff's presence on the train was not with the company's consent, and that he contributed to his injury, and among the charges held to have been improperly refused was one embodying what is set out above in the last three sentences relating to the *Prince Case*.

In *Robertson v. New York & E. R. Co.*, 22 Barb. 91, a railroad company by its printed rules and regulations prohibited its engineers from allowing any one, not in its employ, to ride on the engines. The plaintiff applied to the engineer to ride upon his engine, and was informed that it was against the rules of the company to permit it, but finally consented, and plaintiff rode there, without the knowledge of the conductor, and without paying fare; and it was held that the consent of the engineer conferred no legal right, and that the plaintiff, as he was not lawfully on the engine, was a wrong-doer, and that he could not recover damages for injuries incurred, through the negligence or want of skill of the defendant, while he was riding there; and further, that the *onus* was upon the plaintiff to show that the engineer had authority to permit him to ride on the engine, the presumption being that he had no right to be there, whether he paid fare or not. In the opinion it is said: "The plaintiff, without information on the subject from any of the defendants' agents or servants, had no right to presume that the engineer had authority from the defendants to permit him to ride upon the engine, especially as he paid no fare. The presumption was against his right to be upon the engine, whether he paid fare or rode free. The engine is not the place where even that class of passengers who pay no fare usually ride."

Eaton v. Delaware, L. & W. R. Co., 57 N. Y. 382, 15 Am. Rep. 513, is a case in which

it is held that where a railroad company makes, as it has the right to do, a complete separation of freight and passenger business, a freight conductor has such general authority only as is incidental to the business of moving freight, and no power as to the transportation of passengers; and notice of this limited authority will be implied from the nature and apparent division of the business. It was further decided that the presumption is, that a stranger riding on a freight train is not legally a passenger, and is not lawfully upon the train, and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut this presumption. The plaintiff was invited by the conductor of a coal train on defendant's road, to ride in the "caboose," with a promise to get him employment as a brakeman. No passenger car was attached to it, but, in addition to the coal cars, only the "caboose," for carriage of train implements and the accommodation of the train employes. Through the negligence of the defendant's employes the train was run into by another, and plaintiff while riding in the caboose, was injured. By a regulation of the defendant, printed for the use of the employes, passengers were forbidden to ride on coal trains, but of this plaintiff had no actual notice. It did not appear that passengers were permitted to ride, even occasionally, in the caboose. The trial court instructed the jury that if the plaintiff was upon the train with the assent of the conductor, and without being informed of the regulation, the defendant was liable; but the conclusion of the court of appeals was that this was error; that there was nothing in the attendant circumstances indicating any apparent authority in the conductor to create between the parties the relation of passenger and carrier, or to make an arrangement for plaintiff's employment as a brakeman, and that the facts did not establish that the plaintiff was lawfully on the train.

The same rule as to the presumption that persons riding upon trains which are palpably not designed for the carriage of passengers is announced in *Waterbury v. New York Cent. & H. R. R. Co.*, cited below.

Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 Am. Rep. 651, presents a case in which one Langdon died from injuries received in a collision of trains, such collision resulting from a misunderstanding of orders by the conductor of the train on which Langdon was. On boarding the train he went immediately to the baggage car, and was engaged in conversation with the baggage master when the collision occurred, the train having proceeded but a short distance in a brief period of time. He was in the employ of the defendant company as a night inspector of locomotives at the outer Pittsburgh depot of the Pennsylvania Railroad, and was not at work on the branch road, the Western Pennsylvania Railroad, operated by defendant company, on which branch road he was killed. He was riding on a commutation ticket, such as were ordinarily sold to passengers, and is accorded the position of a passenger, in the

opinion. He lived on the line of the Western Pennsylvania Railroad, and was in the habit of riding to and from his home daily on that road. When injured, he was in the baggage car contrary to a printed notice posted in it forbidding any passenger from riding therein. It appeared that no harm would have occurred to the deceased had he gone into any other car on the train. The defense relied on was that he was in the baggage car in violation of the rule of the company, and with positive knowledge, as a railroad employe, that he had gone into a forbidden place, and was there at his own peril, and that by this unlawful act, he had been the occasion of his death, and was guilty of contributory negligence. Plaintiff introduced evidence tending to show that Langdon was in the car with the implied assent of the conductor of the train, but not with express consent or permission to ride there. It was held that a passenger who voluntarily leaves his proper place in the passenger car of a railroad train, and rides in the baggage car or other place of danger, in violation of a known rule of the company, and is injured in consequence of such violation, cannot recover damages for the injury, though the accident by which it was occasioned was the result of the negligence of the company, and that a railroad conductor cannot, in violation of a known rule of his company, license a passenger to occupy a place of danger,—*a. g.*, the baggage car—and by such license render the company responsible for injury incurred by the passenger in consequence of his violation of the rule; and that a conductor cannot waive a rule which, by its very terms, he is commanded to enforce; that he may neglect to enforce it, and if it is a mere police regulation, such neglect may amount to a waiver of it as between the passenger and the company, but not so when the rule is for the protection of human life, as is one prohibiting passengers from riding in places of increased danger.

In the opinion in the last case the Pennsylvania court draws a distinction between the violation of a rule whose object is the safety of passengers, and those which are merely for the comfort of passengers, or for the convenience of the railroad company, observing that where the rule is for the convenience of the company, the company will be liable unless the violation of the rule caused the accident, whereas in the other case it is sufficient to relieve the company that the injury was received in consequence of the violation of the rule; and this, notwithstanding the fact that the negligence of the company's servants was the cause of the accident. The opinion also states the distinction, and the want of any inconsistency, between *Langdon's Case* and that of *O'Donnell v. Allegheny V. R. Co.*, 59 Pa. 239, the conclusion in which case, it is said, was, on account of its facts, mainly upon the ground that the plaintiff and his associates had been riding in the baggage car daily for two months under circumstances which would justify the jury in finding that their doing so was an arrangement for the benefit of the company, rather than as ordinary passengers; while, on the

other hand, Langdon "was riding in the baggage car for his own convenience and to have a chat with the baggage master, with whom he appeared to have been intimate." The court also distinguishes the case of *Lackawanna & B. R. Co. v. Chenevith*, 52 Pa. 882, 91 Am. Dec. 168, as one where the rule violated had no relation to the safety of the plaintiff as a passenger, the fact being that the plaintiff induced some of the company's employes, in the absence of the superintendent, to attach his freight car to a passenger train, in violation of a rule of the company, he agreeing to run all risks and to attend to the brakes on his freight car; and that of *Creed v. Pennsylvania R. Co.*, 86 Pa. 189, 27 Am. Rep. 698, where the plaintiff was riding in a caboose car, in violation of the rules of the company, on a mixed passenger and freight train, but it did not appear that the rule was one intended for the safety of the passenger, and was not claimed that the car was a place of danger.

In *Virginia Midland R. Co. v. Roach*, 88 Va. 375, the plaintiff, Roach, knew, or from the fact that he had been for months, until recently, an employe of the defendant company, should have known, that its rules forbid any one except the engineer and fireman to ride on its engines, yet, upon the invitation of the engineer or conductor, he got on the engine, and while riding there the train was negligently thrown off the track and he was injured; and the decision was that he could not recover. See also *Waterbury v. New York Cent. & H. R. R. Co.* 21 Blatchf. 814.

The doctrine of these authorities as to the absence of power in a conductor to waive rules intended for the safety of passengers is in effect approved in *Beach on Contributory Negligence*, 2d ed. §§ 151-154, and *Patterson's Railway Accident Law*, 288-290.

There are, however, other authorities which need to be noticed: *Hutchinson, Carriers*, § 654, and *Jacobus v. St. Paul & O. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, and *Dunn v. Grand Trunk R. Co. of Canada*, 58 Md. 187, 4 Am. Rep. 267. The commentator named says: "Even where the riding in such car is against the rules of the company, of which the passenger is informed, if he is in it with the knowledge of the conductor and without any attempt on his part to enforce the rule by removing the passenger, his presence there would not be such negligence as would exonerate the company from the consequence of its negligence or want of care." The doctrine of the stated Minnesota case, which he cites, seems to sustain his assertion, but the same cannot be said of such of the other cases cited by him as are within our reach: *Washburn v. Nashville & O. R. Co.* 8 Head, 638, 75 Am. Dec. 784; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502,—for in neither of these was there any question of the effect of a rule like that in question, and, according to what is said in *Pennsylvania R. Co. v. Langdon*, 92 Pa. 32, 37 Am. Rep. 361, the same observation is true of *Carroll v. New York & N. H. R. Co.* 1 Duer, 571, a case not at hand, as it is of *Baltimore & O. P. Co. v. State*, 72 Md. 86, 6 L. R. A. 16 L. R. A.

706. Of the Minnesota case it may be observed that in *McVeety v. St. Paul, M. & M. R. Co.*, 45 Minn. 268, 11 L. R. A. 174, where it was held that if a person knowingly induces the conductor of a railroad train to violate a rule of his company, and carry him without charge, he is guilty of a fraud on the company and cannot claim the rights of a passenger, it is said, citing the second and third cases *supra*, from Texas, and other authorities, that the same result follows if he rides upon a part of the train from which passengers are excluded, knowing that his act is against the rules of the carrier, and in permitting it the conductor is disobedient. The case of *Dunn v. Grand Trunk R. Co.*, *supra*, is one in which there was evidence tending to show that the plaintiff entered the saloon car attached to defendant's freight train; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare; that the saloon car was thrown from the track and plaintiff injured; and was also testimony tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers, but this was denied by the plaintiff. There were rules against passengers traveling on freight trains. The verdict was for plaintiff, and it was affirmed. Of this case it is properly said by the New York Court of Appeals, in *Eaton v. Delaware, L. & W. R. Co.*, *supra*, that it, in its precise facts, is not opposed to the conclusions of the New York court in the case mentioned. That the Maine case was distinguishable from the other by payment of fare and the attachment of a "saloon car," that it was not stated precisely that the saloon car was; that it might be assumed to be one fitted up for the accommodation of passengers, and the company might thus be assumed to have assented to a relaxation of its rules, and that the principle acted on was not to be extended beyond its precise facts. The Pennsylvania court remarks correctly of the same cause in *Langdon's Case*, *supra*: "There was no point that it was a place of danger," adding "nor that the rule was intended for the safety of passengers." We will not go into any more critical examination of the Maine case, nor determine whether or not it should be regarded as having been treated, in the opinion of that court, as a case in which the passenger had no knowledge or notice of the rule. We will remark that in discussing the duty of passengers to comply with reasonable rules, and the effect of employes' waiver of such rules, it is observed by Mr. Beach, in the second edition of his work on Contributory Negligence, section 154, citing numerous authorities, that with respect to the carriage of passengers on freight trains the rule is somewhat modified to the effect that whenever the company receives passengers upon its trains and collects fare from them, although it is done in violation of a rule of the company, it is lawful for the passenger to ride, and if, while so riding, he suffers an injury due to the company's negligence, he may have his action; the relation of carrier and passenger being created, notwithstanding the rule,

when the passenger is received on the freight train and allowed to pay his fare. An admission of the entire correctness of this proposition is, however, not inconsistent with our conclusions in the case before us, considering its facts.

The law requires of railroad companies the exercise of the highest degree of care for the safety of passengers traveling upon their trains. This care is not due only to the individual as such, but it is also a public duty for the protection of the state's citizens. It would be a strikingly odd system of jurisprudence which, while exacting of the operators of this very dangerous yet highly useful, means of transportation, the duty of extreme care towards those whom they undertake to carry, yet would refuse to permit such transportation companies to require of passengers that they, while being transported, shall confine themselves to the places provided for them as most conducive to their safety, and abstain from riding in parts of a train of greater danger, and set apart for other purposes. Such a system of law would present the hurtful incongruity of demanding a result indispensable to the safety of the traveling public, while, in the same breath, inhibiting an essential of such result. The preservation of the life and limb of the passenger require that he shall conduct himself consistently with, and not in antagonism to, the maintenance of his safety, and this duty involves that of observing all rules of the railroad company which may be reasonably necessary to his protection from harm. A rule which requires that passengers shall remain in the cars set apart for them, and shall not ride in a baggage or an express car, or other place of increased danger, is unquestionably reasonable, and is within the power of a railroad company. See also *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245, 250.

In view of the law as it is shown above to be, there was error in the following charge given to the jury:

"If you believe from the evidence that the conductor in charge of the defendant's train at the time of the accident knew that the plaintiff was traveling on the train the day the accident occurred, and before the accident occurred, and that the conductor knew that the plaintiff was in the express car and did not forbid his being there, then the court charges you that the plaintiff's being there at the time of the collision would not be contributory negligence on the part of the plaintiff."

"If it is contrary to the rules of the defendant company for passengers on its passenger trains to ride in the express car on such trains, and if the conductor of such train knew that that was the company's rule, and that to ride in such express car was accompanied by greater danger than other portions of such train, then it becomes the duty of such conductor to look out for and prevent the riding of passengers in such express cars, if he has knowledge thereof; and if he is cognizant thereof and permits passengers to thus ride in such express cars without taking any steps to prevent them, then the defendant company through such conductor

or its agent is guilty of negligence in not taking the necessary steps to prevent its passengers from riding in such dangerous portions of its train and is liable for any damages that may result to such passenger from a collision of such train with another of its trains while such passenger is thus riding."

Of the first of these instructions it is sufficient to say, as can safely be said, that its effect is to reject and entirely ignore the company's rule and the plaintiff's violation of it as constituting any defense to his action. The second charge makes the obligation upon passengers and the protection to a company, of a rule of this kind, even when it is known to the passengers; dependent upon the fidelity of the conductor where he knows that it is being violated; and under such instruction the rule can be of no protection to the company unless, to say the very least, there is some effort on the part of the conductor to enforce it. In this view we do not concur. Our judgment, on the contrary, is that the public welfare and sound reasoning dictate that it should be held contributory negligence for a passenger to violate a known rule of this character, even with the permission, connivance, or knowledge of the conductor, or without his protestation, where that officer is cognizant of both the rule and its infraction, if by the violation of such rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart and offering space for his accommodation. Whether there may be an exception to this view in cases of persons of tender years, or other disqualifying characteristics, is not for us to say; the point is not before us; the plaintiff was at the time of the accident not only twenty years of age, but also had been an express messenger on the defendant company's road long enough to render him familiar with the increased danger of riding in an express car next to the engine, over that incident to traveling in a passenger coach in the rear part of the train.

Of course as between the company and the conductor, it is the duty of the latter, as it is of any other agent, to enforce the rules of the company; but when a passenger voluntarily violates a reasonable rule, like that under consideration, which is for his preservation from harm, and brings upon himself injury which he would not otherwise have received, he not only cannot find relief from the consequences of his own negligence in the omission of the conductor to do his whole duty, but besides this, where, knowing of such a rule, he goes from the passenger car into a place like that in question, which cannot be regarded as intended for passengers, but naturally suggests that it is not for them, the burden is upon him to prove that he was justified in going there.

II. Though where the passenger suing knew at the time of the accident that there was a rule of this kind in force, he cannot invoke the mere delinquency of a conductor

in enforcing the rule, still it cannot be denied that there may be cases in which the conduct of the company has been such as to amount to an abandonment of the rule, or to preclude itself from claiming protection under it.

In *Houston & T. O. R. Co. v. Moore* it is conceded, as shown above, that it may be true that where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding a regulation to the contrary, it will incur the same responsibility to such passengers as if they were on a regular passenger car. In *Jones v. Chicago, St. P. M. & O. R. Co.*, 48 Minn. 279, a case in which it was held that the presence of the plaintiff in the baggage part of the combination car was not, under the circumstances of the case or nature of the injury, contributory to his receiving the injury, there was evidence that passengers used the baggage compartment as a smoking room, and the jury found specially that the rule forbidding passengers to be there was not in force; and it was said by the Minnesota court that this finding, read in connection with the evidence, must mean that the rule posted up was not enforced, but was disregarded by the defendant and its servants; and that this being so, it was immaterial that the plaintiff had or had not notice that such a rule had been posted up. There was evidence that the rule had been posted up in the car, but it did not appear that the plaintiff saw or knew the rule. It was also previously observed that even though there was such a rule posted up, if it was not enforced, if the defendant, through its servants in charge, habitually disregarded the rule and permitted passengers to ride in the baggage compartment so that the passenger might assume the rule to have become obsolete, it certainly could not treat the passenger as a wrong-doer from passing through the baggage compartment to reach the passenger division of the car on boarding the same. The facts in *Waterbury v. New York Cent. & H. R. Co.*, 21 Blatchf. 814, were that there was no express contract creating the relation of passenger and carrier between plaintiff and defendant, but on various prior occasions the plaintiff and other drovers, whose cattle were being transported between designated points, had been permitted by the employes of the railroad company to accompany their cattle by the same train, sometimes riding on the cars of the cattle train, and sometimes on the engine. At times the trains were delayed between these points and the cattle required attention, and, as no employe of the defendant was assigned to looking after the cattle, it seemed to be assumed between the employes of the defendant and the drovers that the latter should look after their own cattle. Upon the occasion of the accident, the plaintiff and another drover got upon the engine, there being only box cars on the train, and the engineer inquired of them if they had cattle on the train, and being informed that such was the fact, he made no objection to their riding on the engine. The engine ran off the track in consequence of a misplaced

switch and plaintiff was injured. A rule of the company forbade its employes from permitting any person to ride on the engine. The conclusion of the court in this case was that the plaintiff was not entitled to be carried as a passenger as an implied condition of the contract to carry the cattle, but the most that could be claimed was that he was riding on the engine permissively. That the real question in the case was whether he was being carried on the engine with the consent of the defendant, or only by the unauthorized permission or invitation of the defendant's employes. That it should have been left to the jury to determine, as a question of fact, whether the defendant had by its conduct held out its employes to the plaintiff as authorized, under the circumstances, to consent to his being carried on the train with his cattle. That, in this case where the company may have derived some benefit from the presence of drovers upon its cattle trains, and may have allowed its employes in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown; and it should have been left to the jury to determine, as a question of fact, whether, notwithstanding its rules for the government of its employes, the defendant had not held them out as having authority to consent to his being carried; and that if it should appear that its employes had been accustomed to allow drovers to accompany their cattle on the cattle trains so generally and constantly that the officers of the company must have known it, the consent of the company might be predicated upon acquiescence and ratification.

In the case before us the evidence as to the enforcement of the rule was as follows: Hirst said the express car is not the place where passengers usually ride. . . . It is not a place where passengers usually ride, but it is a common occurrence for passengers to go into the express car to ride and talk with the agent. . . . Yes, I knew the company claimed to have a rule that passengers should not ride anywhere but in the passenger cars, but it was never carried out; it was a frequent and common occurrence for friends of the express messenger to come into the express car and sit there and talk with the messenger, and passengers frequently went into the express car and sat around on the baggage and boxes in there, and smoked, and it was never objected to by the conductor. And the conductor Gamble testified: "It was against the rules of the company for passengers to ride in the express car, and Hirst knew it. . . . Passengers frequently sit in the express car, and talk and smoke."

If the trial judge had, upon the basis of this testimony, submitted to the jury the question: whether or not the defendant company had by its conduct held out to the plaintiff its employes in control of the train as authorized, notwithstanding its rule, to consent to his riding in the express car; or whether its employes had been accustomed to allow passengers to ride in the express car so generally and constantly that the offi-

cers of the company must have known it, and have acquiesced in the violation; or the question of there having been such continued and habitual disregard of the rule by the employees as must have reasonably produced the belief that the company had practically abandoned its rule, there would still be a question as to the testimony being sufficient to sustain a finding against the company on such theory or theories. Certainly where, as here, a passenger knows of the existence of such a rule, he cannot rely upon any mere delinquency of the conductor or other agent charged with its enforcement; but, on the contrary, there must be something which establishes the concurrence of the company in the disregard of the regulation. There has, however, not been even a submission to the jury of any such question, but the judge gave the case to the jury upon the theory that the virtue of the rule was dependent solely upon the fidelity of the conductor; and in this, as shown above, there was error.

III. In what is said above we have not lost sight of the fact that when the defendant has inflicted the injury intentionally, or when he has done so unintentionally, yet his conduct, though still within the domain of negligence, has been wanton or reckless of its injurious consequences, or, in other words, he has been guilty of what is now called, it may be inaptly, "willful negligence," the contributory negligence of the plaintiff is not a defense. Beach, Contrib. Neg. 2d ed. §§ 61-64; Cooley, Torts, 2d ed. 810; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 11 West. Rep. 876; *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 14 West. Rep. 837; *Banks v. Highland St. R. Co.* 186 Mass. 485; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 548, 58 Am. Rep. 594; *Gothard v. Alabama G. S. R. Co.* 67 Ala. 114; *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448. Though such wanton or reckless conduct has sometimes been spoken of as "gross negligence," the term does not define it, nor is gross negligence confined to only such an extreme degree of negligence, (Beach, Contrib. Neg. §§ 61, 62; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 874; *Chattanooga, R. & O. R. Co. v. Liddell*, 85 Ga. 482,) and we are entirely satisfied that the term "gross negligence" was not used by the circuit judge in his charge in any such extreme sense, for had it been he would not have recognized contributory negligence as a defense, as he has done in charges not necessary to be set out here. Not only was the case not submitted to the jury for consideration by it in this light, but the facts are not such as would authorize an appellate court to say, as a matter of law, that it was one in which the defense of contributory negligence cannot have a standing (*Brannen v. Kokomo, G. & J. Gravel Road Co.*, *supra*;) and to treat as harmless the errors pointed out above, and affirm the judgment.

IV. Exemplary damages can be allowed in cases of negligence, as distinguished from those of intentional injury, only where, as was said in *Florida R. & Nav. Co. v. Webster*, 25 Fla. 894, 419-421, and the authorities 16 L. R. A.

there cited, the negligence is of a gross and flagrant character evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. This being the rule, and the term "gross negligence" not being confined to this extreme degree of negligence, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages. It leaves the jury to its own ideas, whatever they may be, as to what want of care constitutes the gross negligence authorizing the allowance of such damages. The character of negligence should, instead of using the term "gross negligence," be defined as indicated above, in order that the jury may understand in what cases such damages may be given or indicted. *Chattanooga, R. & O. R. Co. v. Liddell*, *supra*.

V. The testimony does not justify us in concluding that Hirst was attempting, as claimed by counsel for appellant, to obtain a ride without paying fare, and to this end was practicing a fraud or imposition on the conductor or the company, by passing himself off as an express messenger returning to his "run." It is true there is testimony that up to six weeks before the day of the accident he had been an express messenger and had run on the same train with the conductor who was in charge of the colliding passenger train, but there is also testimony to the effect that he had left this employment, and, at the time of the accident, was engaged in other business at Tampa, and that on boarding the train he went into the passenger car, and that he had funds sufficient to pay his fare. The evidence, moreover, justified the jury in concluding that the conductor was aware of all this. The conductor did not ask him for his fare, and gives as a reason for not doing so that he thought Hirst was in the employ of the express company. There was, however, nothing in the conduct of Hirst to throw upon him any blame for this omission of the conductor.

Under this evidence we cannot conclude that Hirst's presence or his purposes on the train were fraudulent, or that he at no time had the legal status of a passenger thereon. The actual payment of fare is not indispensable to such status. *Ohio & M. R. Co. v. Muhling*, 80 Ill. 9, 81 Am. Dec. 836; *Pennsylvania R. Co. v. Books*, 57 Pa. 839; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 806; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 648, 14 L. ed. 502; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 87 Am. Rep. 428; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 618; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245.

The case is of course not one which involves the measure of the duty of a railroad

company to an express messenger, or other employé of an express company, traveling in an express car and injured while in the due performance of his ordinary functions, through the negligence of the company or its agents.

There are other assignments of error, but

they need not be noticed. What has been said above seems sufficient for future proceedings in the cause.

For the reasons indicated above, *the judgment must be reversed*, and it will be so ordered.

NEW YORK COURT OF APPEALS (2d Div.).

Wilhelmine STERGER, *Appt.*,

J. Wyckoff VAN SICLEN, *Resp't.*

(.....N. Y.)

1. Permitting the stairway in the rear of a private residence to become decayed and unsafe does not constitute a nuisance as to the occupant of an adjoining house so as to entitle him to damages from its owner if he is injured while attempting to use it for purposes of his own.

2. A property owner owes no duty to one who goes upon his premises in search of a child who is accustomed to play there, to have stairways thereon in a safe condition, the neglect of which will render him liable for injuries received by such person in consequence of the breaking of a step.

(May 8, 1892.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Circuit Court for Kings County in favor of defendant in an action brought to recover damages for personal injuries received by plaintiff in consequence of the breaking of a step in a stairway on defendant's premises. *Affirmed.*

Statement by **Parker, J.:**

By this action the plaintiff seeks to recover damages for injuries sustained under the following circumstances: On the afternoon of June 20, 1886, while descending the steps leading from the ground to the rear stoop of premises known as "No. 68 Schenck Avenue," Brooklyn, a step broke, causing her to fall and resulting in injury. The premises were owned by the defendant, but occupied by one Leopold, a tenant, who entered into possession about the 1st of March, 1884. The plaintiff occupied the house next adjoining, and between four and five feet from the one in which Leopold resided. The premises were separated in the rear by a fence through which an opening had been made by knocking off some of the boards. It appeared that the defendant knew of the condition of the steps and agreed to repair them, and he offered evidence tending to show that he made an agreement with the tenant by which he was to make the repairs for a fixed sum, which was deducted from the rent. This testimony was to some extent con-

troverted; and, plaintiff's counsel having asked to go to the jury before the court dismissed the complaint, the refusal of such request is assigned for error on this review. But appellant's contention cannot avail if, adopting the view of the evidence most favorable to her, a dismissal of the complaint was required.

Mr. James D. Bell, with **Mr. Roswell H. Carpenter**, for appellant:

If the premises were in an unsafe and insecure condition to defendant's knowledge when he rented them he is liable in this action although he was not in actual possession at the time the injury happened.

Hungerford v. Bent, 28 N. Y. S. R. 191, affirmed by Court of Appeals, 2d Div. Dec. 1, 1891; *Edwards v. New York & H. R. R. Co.* 98 N. Y. 247, 50 Am. Rep. 659; *Ahern v. Steele*, 5 L. R. A. 449, 115 N. Y. 208; *Davenport v. Ruckman*, 87 N. Y. 568, 574; *Timlin v. Standard Oil Co.* 126 N. Y. 514.

The duty of a landlord of demised premises which he has agreed to keep in repair towards persons lawfully upon the premises is to keep them in such state of repair as that they will not suffer injury.

Palmer v. Dearing, 98 N. Y. 7; *Peil v. Reinhardt*, 12 L. R. A. 848, 127 N. Y. 881.

Only the tenant can take advantage of the covenant. The landlord's liability to other persons grows out of his general duty not to use his property to the detriment of persons lawfully upon it. In other words it is based upon his negligence and not upon his contract.

Odell v. Solomon, 99 N. Y. 635.

Here the landlord agrees to repair and by reason of that covenant he is privileged to enter upon the premises for a reasonable time, for the purpose of ascertaining the necessary repairs.

Saner v. Bilton, 47 L. J. Ch. Div. 267.

Under such a covenant we understand the law to be that the guest or visitor is not a mere licensee, but he has a right upon the premises, and the landlord is liable to him for the landlord's negligence.

Anderson v. Kryter, 9 Cent. L. J. 885.

Mr. A. Simis, Jr., for respondent:

The plaintiff was not upon the premises where she was injured by reason of any invitation from defendant, either expressed or implied. He was under no duty or obligation to her to keep said premises in repair; conse-

NOTE.—Upon the question of a landowner's duty to a trespasser or licensee, see *Schmidt v. Bauer*, 5 L. R. A. 580, and *note*, 80 Cal. 553; *note* to *Wasson v. Pettit* (N. Y.) 5 L. R. A. 794; *Gordon v.* 16 L. R. A.

Cummings, 9 L. R. A. 640, and *note*, 123 Mass. 512.

For an interesting application of the doctrine in case of one who went upon the premises to attend a wake, see *Hart v. Cole* (Mass.) *ante*, 557.

quently there was no negligence as to her which can give a right of action.

Larmore v. Crown Point Iron Co. 2 Cent. Rep. 409, 101 N. Y. 391.

The defendant's covenant with Mrs. Leopold to keep her premises in repair, upon which plaintiff relies, does not inure to the benefit of the plaintiff; such covenant can only be enforced by the covenantee or his assigns.

Odell v. Solomon, 99 N. Y. 635.

Parker, J., delivered the opinion of the court:

We are of the opinion that the evidence does not permit a recovery. No contractual relation exists between the plaintiff and defendant. The covenant of the landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach. *Odell v. Solomon*, 99 N. Y. 635. But when the occasion of the injury constitutes a nuisance as to the party complaining, then a landlord may be chargeable in damages, on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorizing him to re-enter for the purpose of making repairs. *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449. We are thus brought to the question whether the decayed steps in the rear of defendant's premises, leading from the ground to a stoop, constituted a nuisance as to the plaintiff, who occupied an adjoining house. If so, the defendant, by reason of his covenant to repair, may be responsible for the injury occasioned to plaintiff while walking down them. This inquiry admits of but one answer, and does not seem to be worthy of the citation of authority, but it may not be out of place to refer to the cases cited by the appellant. It may be observed, in passing, that the owner may ordinarily exercise such dominion over, and make such use of, his real estate, as he chooses, provided the rights of others are not thereby violated. No right of the plaintiff was violated. The enjoyment of the premises occupied by her was not interfered with. Had she remained on them the injury would not have occurred. But she chose to go on private property, and up or down back steps, over which she had no authority, and as to which she had acquired no such interest, by contract or otherwise, as would have entitled her to demand as a right that the so-called nuisance be abated. As to her, it was not a nuisance, because it did not invade either her property or personal rights. *Murphy v. Brooklyn*, 98 N. Y. 642.

Appellant cites *Timlin v. Standard Oil Co.*, 126 N. Y. 514, where it is held that, if an owner lease premises without abating an existing nuisance, he is liable to respond in damages for an injury resulting therefrom. But that case has no application here. The nuisance complained of was dangerous to the public and the adjoining owner. The wall of a building was so out of repair that it fell over upon the tracks of a railroad company, killing plaintiff's intestate while engaged in repairing the track.

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, the owner made an excavation on his own land, but so near to the highway as to render travel thereon dangerous, and failed to

guard it, and the instruction of the trial court to the jury that the excavation was a nuisance if made in the highway, or so near it that a person exercising ordinary care was liable to fall into it, was sustained; the court holding that the circumstances of that case imposed a duty on the defendant to protect the excavation. It appeared that the excavation had been made in a place long used by the public, and the character of the user was thus described by the court: "It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place, and part of the highway." While the court held that the situation presented by the evidence supported the judgment, it did not fail to emphasize the general rule that the owner of property has the right to put his property to such use as he chooses, "and in the absence of special circumstances, if a person traveling on a highway deviates therefrom, and falls into a pit or excavation on the adjacent land, the owner is not responsible for the resulting injury." There are cases where the use to which an owner of property puts it is of such a public character that he is bound to observe reasonable care in keeping it in such a condition as to save harmless those who are invited to come on to it for the benefit and profit of the owner.

Cases of this kind are considered by this court in *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391. A drayman, in the ordinary course of his business, drove a horse upon pier No. 34, North river; and, a rotten plank giving way, the horse fell through and was killed. In the opinion by Folger, J., it is said that the occupant is liable "for an injury to the property of a person lawfully upon it therewith. . . . This is not put upon the ground that the south half of the pier was a public place or highway. It was private property, to a certain degree, though held as such for public objects. . . . By the use to which it was put by the occupant, from which a profit to him was directly or indirectly derived, and which persons of the calling of plaintiff aided, there was a license and an invitation given to the plaintiff to come and go over this pier in the following of his employment, . . ." and thus "was imposed on him the duty of taking care, so long as it was thus kept open, that those who had a lawful right to go there could do so without danger to their property."

Swords v. Edgar, 59 N. Y. 283, 17 Am. Rep. 295, was a case of injury by a defective pier, and the court said: "Though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it, and refuse entrance upon it to any and all persons, yet so long as it was kept open to that portion of the public of which the intestate was one, for the profit of defendant's lessees, there was upon such lessees, primarily, the duty of taking care, so long as it was thus kept open, that those who had lawful right to go there could do so without incurring danger to their persons." But a further consideration of cases is neither needful nor useful. No case has been found, nor do I think can be, which supports the contention that as to this plaintiff

the decayed back stairs of a private residence, under the circumstances proven, constituted a nuisance.

As there is no injury, in a legal sense, which can give a right of action, unless it is occasioned by a violation of some duty owing to the injured, there remains for consideration but one other ground on which it is claimed that defendant's liability can be predicated. It is urged that a recovery can be supported because the defendant negligently permitted the stairs to remain in an unsafe condition. The question is therefore presented, Did the defendant's duty require the exercise of any care to protect the plaintiff while on the premises? The fact that a landlord leases premises with a condition that he may re-enter for the purpose of making repairs does not enlarge his responsibility as to third persons, or burden him with the duty, as to them, of observing any greater degree of care than would be required were he in possession. As it may tend to avoid confusion, therefore, we will consider the question of negligence from the standpoint of actual occupation by the owner, this defendant. It will be well to get in mind first the situation of the premises, and the circumstances surrounding and leading up to the injury. For such purpose, we will take the testimony of the plaintiff. At the time of the injury, she occupied a house next to, and between four and five feet from, the house of defendant, where the injury occurred. Between the houses was a fence, and in the rear of the houses an opening had been made by knocking some boards off. Her little girls were accustomed to go into the yard and play; and on the 20th of June, 1888, about half past 5 in the afternoon, plaintiff went over to bring the children home. They were then in the house; and as she was walking down the back steps, holding one of them by the hand, the fourth or fifth step from the bottom broke, and her foot went through, causing her to fall to the ground, resulting in injury. From these facts, it appears that the plaintiff was not brought within the risk of these unsafe steps by the occupier's invitation on a matter of common interest, or in the exercise of a right. She was therefore a mere licensee. "Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right. It is an excuse or license, so that a party cannot be treated as a trespasser." *Martin, B.*, in *Bolch v. Smith*, 7 Hurlst. & N. 745. The general rule is that a licensee must take the property as he finds it. Mr. Pollock, in his work on Torts, states the rule as follows: "Persons who, by the mere gratuitous permission of owners or occupiers, take a short cut across a waste piece

of land, or pass over private bridges, or have the run of a building, cannot expect to find the land free from holes or ditches, or the bridges to be in safe repair, or the passages and stairs to be commodious and free from dangerous places." The exceptions to which he alludes need not be mentioned, for they are not in point here. Mr. Pollock cites, in support of the rule quoted, English decisions, mainly; but the same rule has been generally, if not universally, applied in the various jurisdictions in this country. In *Severy v. Nickerson*, 120 Mass. 806, 21 Am. Rep. 514, a laborer employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel, for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. *Devens, J.*, speaking for the court, said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and to one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor, is well settled. The former enters at his own risk. The latter has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him, in order that no injury may occur." In *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 2 Cent. Rep. 409, the plaintiff, an employe of defendant, quit work two days before the injury on account of the supposed danger incident to the work at the pit where he was employed. At the suggestion of the foreman of that pit, he applied at another pit, and was engaged to commence work there on the following Monday; and while near a machine used in raising buckets of ore from the mines to the surface of the ground, a lever was thrown out of its socket, and, flying around, struck and broke his leg. It was held that he could not recover, the court saying: "He was on the premises, at most, by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied; nor was he there, in any proper sense, on the business of the company. . . . The fact that the plaintiff had, on going to pit No. 10, engaged to commence work on the following Monday, did not change his relation to the company, or make him other than a mere licensee on the premises."

That case is decisive of the one under consideration, so far as the question of negligence is concerned; for it is an authority for the assertion that the plaintiff's own testimony establishes conclusively that while she was on defendant's premises she was, at most, a mere licensee.

The judgment should be affirmed.

All concur, except *Haight, J.*, not voting.

RHODE ISLAND SUPREME COURT.

Welcome B. DARLING, Admr., etc., of
James W. Pemberton, Deceased,

NEW YORK, PROVIDENCE & BOSTON
R. CO.

(.....R. I.....)

1. The maintenance of a tell-tale intended to warn brakemen of the approach of a train to a bridge, which is unsafe for brakemen on a portion of the cars which are of unusual height, is a breach of the railroad company's duty to provide safe appliances, although it is safe for cars of the ordinary height.
2. A brakeman does not assume the risk of an unsafe tell-tale intended to give warning of approach to a bridge and which should not be in itself a source of any danger, especially where it is only dangerous to brakemen on cars of more than ordinary height.
3. A joking remark to the jury that they can have "all night if necessary" in answer to the foreman's promise to knock at a certain time and let the court know if they had agreed, made by an officer sent to inquire if there was prospect of agreement, is not to be regarded as a threat to keep them out all night, or as putting such a constraint upon them

as to render their verdict void, where it does not appear that any prejudice resulted from it.

4. The affidavit of a juror to his belief that a message from the court and the remark of an officer influenced the verdict, is not conclusive of the fact, even if it is to be held competent evidence.

(May 21, 1892.)

PETITION by defendant for a new trial of an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence, in which a verdict had been returned in plaintiff's favor. *Denied.*

The facts are stated sufficiently in the opinion.

Mr. Lorin M. Cook, for defendant, in support of the petition.

Messrs. Arthur L. Brown and Augustus S. Miller, for plaintiff, *contra* :

A tell-tale which is in itself a source of danger is an absurdity.

If a tell-tale is made of such rigidity that it can sweep a man from a car top, then it becomes as dangerous as the bridge itself, and there should be another tell-tale to give warning of approach to it.

NOTE.—Coercion of disagreeing jury.

By court.

By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict. *Thompson & Merriam, Juris*, § 310.

And it was regarded as not only proper, but requisite, that they be coerced to an agreement upon a verdict. *Proffatt, Jury Trials*, § 475.

While the court may properly advise the jury to cultivate a spirit of harmony and agree upon a verdict if possible, there should be no intimidation or extended confinement if they did not agree. *Phoenix Ins. Co. v. Moog*, 81 Ala. 385.

In *Wiggins v. Downer*, 67 How. Pr. 65, *Vann, J.*, said: "It is in the power of the court, without threatening constraint, to actually constrain a jury by confining them for a long time with nothing to eat."

In *Green v. Telfair*, 11 How. Pr. 261, *Harris, J.*, said: "A judge may also keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree; but beyond this, I do not think he is at liberty to go. An attempt to influence the jury, by referring to the length of time they are to be kept together or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury, in order to affect their deliberations. I think he has no right even to allude to his own purpose as to the time they are to be kept together." In this case a verdict was set aside for a remark by the court to the jury on Saturday afternoon that they should be confined till Monday unless they agreed; before he left town on that evening. The verdict was agreed upon within half an hour thereafter.

Westbrook, J., in *Erwin v. Hamilton*, 50 How. Pr. 22, says that it should "be left to the good sense and wise discretion of the judge who pre-

sides at the trial to determine how long the jury shall be detained, and what, if anything, shall be said as to the probable length of the detention;" and he refused to set aside a verdict because he had informed the jury at about 7:30 o'clock on Friday evening that unless they agreed within an hour, the court should adjourn till 3:30 on the following Monday, and sent them the same information at 10:30 on that evening, whereupon within five minutes they came to an agreement. He expressly repudiated *Green v. Telfair*, 11 How. Pr. 261.

In *Slater v. Mead*, 53 How. Pr. 57, the jury after being out a long time reported that they could not agree. After further instructions the court said: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." A verdict upon an almost immediate agreement was set aside as induced by constraint.

In this case *Green v. Telfair*, *supra*, was approved.

It is reversible error for the judge to send word to a jury that they would be kept together till a time four days distant unless they sooner agreed. *Terre Haute & L. R. Co. v. Jackson*, 81 Ind. 19.

In *Taylor v. Jones*, 2 Head, 565, a new trial was granted for a remark of the judge to a disagreeing jury that he must keep them together until they could agree,—until the fourth Monday of the next month if necessary,—with an intimation that it would be better to find a wrong verdict than not to agree.

In *East Tennessee & W. N. O. R. Co. v. Winters*, 36 Tenn. 240, 245, it was held that the remarks of the judge to a disagreeing jury taken as a whole were not erroneous although the court disclaimed ruling that one sentence, *viz.*, "I do not like to work all the week without accomplishing anything,"—taken alone, would not constitute reversible error.

It is reversible error for the court to say to a jury, out for two days, that they would not be discharged till the end of the term, "if it lasted three weeks, unless they sooner agree," where they re-

This is one of the appliances which it is the master's duty to maintain in proper condition. *Warden v. Old Colony R. Co.* 137 Mass. 204.

There was no contributory negligence.

It is the absolute duty of the master to provide safe machinery and appliances, and the servant is justified in relying upon the master's performance of this duty.

Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; *Connolly v. Poillon*, 41 Barb. 386; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 383; *Wood, Mast. & S.* p. 715, note; *Myers v. Hudson Iron Co.* 150 Mass. 125; *Scanlon v. Boston & A. R. Co.* 147 Mass. 484; *Ferren v. Old Colony R. Co.* 8 New Eng. Rep. 330, 143 Mass. 197; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 260.

Pemberton was entitled to take it for granted that the tell-tale was not dangerous.

Contributory negligence is not imputable to a person for failing to look out for a danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended.

Gustafsen v. Washburn & M. Mfg. Co. 153 Mass. 463; 4 Am. & Eng. Encyclop. Law, pp. 34, 35; *Nance v. Newport News & M. V. R. Co.* (Ky.) Nov. 12, 1891; *Georgia Pac. R. Co. v. Davis* (Ala.) April 30, 1891; *Dorsey v. Phillips Colby Co.* 42 Wis. 583; *Illinois Cent. R. Co. v. Welch*, 53 Ill. 183, 4 Am. Rep. 598.

turned a verdict on the following day. *Chesapeake, O. & S. W. R. Co. v. Barlow*, 66 Tenn. 537.

In *Physloc v. Shea*, 75 Ga. 466, it was said: "The old idea of starving juries to coerce a verdict has passed away," and it was there held error for the trial judge to inform a jury which had been out all night without supper or breakfast that meals would be allowed them only at their own expense, because such statement operated as a threat to starve those jurors without money into finding a verdict, as was shown by an agreement within ten minutes thereafter.

Where the court ordered a jury reporting a disagreement just before dinner time looked up till they should agree, without allowing them to have their dinner, a verdict agreed upon within several hours was set aside. *Hancock v. Blam*, 3 Bart. 33.

The trial judge may properly in his discretion intimate to a disagreeing jury his intention to confine them till the end of the term—some ten days distant. *State v. Grizzard*, 39 N. C. 115.

Where the jury on Saturday of the first week of the term announce that they cannot agree it is not error for the judge to state that there are two more weeks of the term and he will give them plenty of time to consider and then to direct the sheriff to provide comfortable accommodations for them. *Osborne v. Wilkes*, 108 N. C. 553. It is there said: "The jury . . . are supposed to have sufficient intelligence to understand the extent of the judge's power, and to have such conceptions of their own duty that they will not be driven to return a hasty and unjust verdict for fear of being kept in comfortable quarters, but separated from their families, for a few days or for two weeks, if they could not sooner concur as to their findings."

By bailiff in charge.

In *Wiggins v. Downer*, 67 How. Pr. 65, it was held that a statement by the officer in charge of a jury, which had already been out fifteen hours, purport-

ing to be a message from the court, that unless they agreed they would be confined till the next day at noon, while improper, did not amount to such legal constraint as would avoid the verdict.

Looney v. McLean, 129 Mass. 83, 37 Am. Rep. 293; *Whittaker v. West Boylston*, 97 Mass. 278; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Kane v. Northern Cent. R. Co.* 128 U. S. 91, 32 L. ed. 339; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478.

There is not the slightest suggestion that any improper influence was exerted upon the jury or that the prevailing party derived any advantage.

The affidavit of the juror is harmless, but inadmissible.

Tucker v. South Kingstown, 5 R. I. 553; *Handy v. Prov. Ins. Co.* 1 R. I. 400; *Leach v. Wilbur*, 9 Allen, 212.

The jury had retired at 5 o'clock P. M., on Thursday. Between 4 and 5 o'clock in the morning of Friday one of the jurors asked the officer in charge how long the court was going to keep them there, to which the officer replied that he did not know but they would have to stay there till Saturday night; and a little after 5 o'clock of the same morning the jury agreed. The court refused to grant a new trial.

Where an officer told the jury that unless they agreed, they would be detained until the next day at noon; this, though improper, was held not sufficient to avoid the verdict.

Wiggins v. Downer, 67 How. Pr. 65.

ing to be a message from the court, that unless they agreed they would be confined till the next day at noon, while improper, did not amount to such legal constraint as would avoid the verdict.

It is improper for a bailiff in charge of a jury to inform them that the court is about to adjourn, and unless they agree upon a verdict soon—it being late Saturday evening—they will be kept over until a certain time Monday morning, but where the information was not given as coming from the court, a new trial will not be ordered on that account. *Nelling v. Industrial Mfg. Co.* 78 Ga. 260.

In *Cole v. Swan*, 4 G. Greene, 32, a new trial was awarded because the bailiff in charge of the jury informed them that they would be kept by the court from Saturday evening until Monday morning without anything to eat unless they would agree upon a verdict. It does not appear whether such message purported to be that of the court.

In *Obeur v. Gray*, 68 Ga. 132, judgment was reversed because the bailiff told them that in his opinion the judge would keep them out a week or compel them to agree.

A jesting remark by the bailiff to the jury that, unless they decided the case one way or the other, they should have nothing more to eat, and no water to drink, although taken seriously by some of the jury, will not vitiate their verdict. *Pope v. State*, 38 Miss. 121.

In *Gholston v. Gholston*, 31 Ga. 625, a verdict was set aside because of a communication to the jury by the sheriff of his belief that the judge was preparing to take them with him into another county unless they agreed.

A new trial will not be granted because the foreman of the jury or the officer in charge kept them out till 2 o'clock in the morning, and did not inform the other jurors at 11 o'clock—three hours earlier—of the direction of the presiding justice to permit the jury to separate if they had not agreed at that hour. *Spinney v. Bowman* (Me.) 4 New Eng. Rep. 639.

J. G. G.

Such communications will not afford ground for a new trial where it is obvious that no prejudice resulted.

Thompson, Trials, § 2556.

Matteson, Ch. J., delivered the opinion of the court:

The defendant petitions for a new trial on several grounds, of which three only were urged at the hearing, viz.: (1) That the verdict was against the evidence; (2) that the court erred in its instructions to the jury; (3) that the jury were influenced in their decision by a communication to them by the officer in charge of them.

We think the evidence was sufficient to warrant the jury in finding that the deceased was thrown from the train by coming in contact with the lower bar of the "tell-tale;" that the tell-tale, though safe for brakemen upon trains composed of cars of the ordinary height,—the space between the top of a common box car and the lower bar of the tell-tale being six feet and two and twenty-eight one hundredths inches,—was unsafe for brakemen upon cars of a greater height, which have come into use for special purposes, such as cars for the transportation of beef, some of which were a part of the train on the night of the accident to the deceased; that the maintenance of a tell-tale, which was unsafe, by reason of the height of some of the cars in use and by reason of the weight or rigidity of its frame, rendering it likely to throw brakemen from their feet if they came in contact with it, was a breach of the defendant's duty to provide safe appliances for its employes which amounted to negligence. We also think that, while the deceased assumed all the ordinary risks incident to his employment as brakeman, the risk of injury from the tell-tale was not such a risk. A tell-tale is not in itself a source of danger, since its purpose is to protect by giving timely warning of the approach to a bridge. Moreover, this particular tell-tale was dangerous only to brakemen upon cars of a greater than ordinary height. It was therefore not a manifest danger. The deceased had a right to assume when he entered upon the employment that the defendant had performed its duty to provide and maintain safe appliances, and hence that this particular tell-tale was safe, and, unless it be shown that he had been, in some way, apprised of the danger and continued in the employment, he is not to be held to have assumed the risk of injury from it. The evidence does not show that he had been so apprised. He had been in the employment of the defendant about five weeks. The train went over the side track, under this tell-tale, on an average two or three times a week, for the purpose of taking on or leaving cars, but only in the night; and though the place was lighted, to a greater or less degree, by an electric light, the darkness and his absorption in the performance of his duties were circumstances not favorable to a close observation of the height of the tell-tale above the cars; besides, his position as "head middleman" frequently required him to be upon the ground, when the train was passing under the tell-tale, for the purpose of throwing switches, and even when upon the top of the train he was in no danger, unless he happened to

be upon a car of the greatest height. It does not appear that he had previously been upon such a car when passing under the tell-tale, or had had his attention directed to its height above such a car, and, being a structure intended for his protection, his attention would, on that account, also, be less likely to be directed to it as a source of danger. We are of the opinion that the verdict was not against the evidence.

The instructions of the court to the jury were in accordance with the views herein stated. We find no error in them, or in the refusals to give the instructions requested by the defendant.

After the case had gone to the jury, and they had been in their room about an hour deliberating upon their verdict, the judge directed the officer in charge of them to inquire of the foreman if there was a prospect of an early agreement, as he wished to go out to dinner at a quarter of 6. The officer conveyed the message to the foreman, who answered that he would knock by a quarter of 6, and let the court know whether the jury had agreed. Thereupon the officer said to the foreman, "If you do not, you can take your own time;" and jokingly added, "All night, if necessary." The defendant contends that this remark of the officer operated as a threat to the jury that, unless they agreed before a quarter of 6, they would be kept out all night, or, at least, until they should agree within that time, and was therefore such a constraint put upon them as to render their verdict void; and it further contends that it is not required to show affirmatively that such communication tended to its injury, but that such communication was so dangerous and impolitic that it should be presumed conclusively that harm was done. There are cases which support this claim. *Cole v. Swan*, 4 G. Greene, 82; *Obeart v. Gray*, 68 Ga. 182. But the weight of the authority, and the better opinion, as it seems to us, is to the effect that, unless the communication from the officer to the jury had a manifest tendency to influence the jury improperly against the unsuccessful party, or was such that prejudice has resulted to such party, it furnishes no ground for a new trial. Thus in *Wiggins v. Downer*, 67 How. Pr. 65, it was held that the expression to the jury by the officer in charge of them of an opinion that, unless they agreed, they would be detained until the next day at noon, though improper, was not such an irregularity as should avoid the verdict, and did not amount to an illegal constraint. And again, in *Leach v. Wildur*, 9 Allen, 212, it appeared that, between 4 and 5 o'clock in the morning, the jury having retired to their room about 5 o'clock of the preceding day, Thursday, one of the jurors asked the officer having them in charge how long the court would keep them together, and he replied that he did not know, but they would have to stay until Saturday, and that a little after 5 o'clock the jury agreed. It was held that a new trial would not be granted. And see *Reins v. People*, 80 Ill. 256; *Price v. Lambert*, 8 N. J. L. 122; *Pope v. State*, 36 Miss. 121; *McGuire v. State*, 10 Tex. App. 125. The officious intermeddling of the officer was highly reprehensible, and might have subjected him to punishment. It was a violation of his duty and of his oath; but it appears to

have been thoughtless, without any design to favor either party, and it had no manifest tendency to prejudice the defendant; nor does it appear that prejudice has resulted from it to the defendant. The defendant, it is true, has produced the affidavit of a juror to his belief that the message of the court and the remark of the officer influenced the jury in giving a verdict for the plaintiff, as immediately after certain of the jury who had been for the de-

fendant changed, and agreed to a verdict for the plaintiff. But, apart from the consideration that the affidavit of a juror is not competent evidence to prove what takes place in the jury room for the purpose impeaching the verdict, the affidavit is only to the belief of the juror, based upon a fact by no means conclusive.

Defendant's petition for a new trial denied and dismissed.

CALIFORNIA SUPREME COURT.

Henry D. P. ALLEN, *Appt.*,
v.
Charles F. ALLEN *et al.*, *Respts.*
(.....Cal.....)

1. The statutory rule that a Statute of Limitations may be pleaded without stating the facts by a general statement that the cause of action is barred by a specified section of the statute, is not subject to an implied exception in the case of a statute as to actions barred in another state.

2. The time for redemption of land from a mortgage or absolute deed given as security cannot be extended by subsequent statute as this would change the contract rights and obligations of the parties.

3. The right to redeem land from a mortgage or absolute deed given as security is governed by the law of the place where the land lies, and a rule there prevailing that such right is barred when an action on the debt is barred must control, although in another state where the parties reside and the contract was

NOTE.—Change of decision of a state court as an unconstitutional impairment of contract.

The Constitution of the United States provides, article 1, section 10, that no state shall pass any law impairing the obligation of contracts.

In *Ohio Life Ins. & T. Co. v. De Bolt*, 57 U. S. 16 How. 416, 14 L. ed. 997, which was taken to the Supreme Court of the United States from a state court, the claim was made that the validity of a contract had been impaired by subsequent state legislation. Incidentally the question arose as to the effect upon a corporate charter which a change in the construction of the state Constitution by a supreme court of the state would have. The court said that "the sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation of the state or decision of its courts altering the construction of the law." It will be noticed that the language in the above decision is broad enough to bring a decision by the supreme court of the state within the inhibition of the Constitution of the United States against impairing the obligation of contracts, but further investigation will show that the rule as adopted was merely intended as one for guidance of the United States court in dealing with cases which had reached it in some proper manner and not as an adjudication that such decision was an unconstitutional Act which would give the United States court jurisdiction to revise the judgment of the state court.

In *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520, which was a writ of error to the district court of the United States for the district of Iowa, and involved the validity of bonds issued by a municipal corporation, the court refused to follow decisions of the state court rendered after the bonds were issued which overruled former decisions holding them valid.

A similar ruling was made in *Havemeyer v. Iowa County Suprs.*, 70 U. S. 3 Wall. 295, 18 L. ed. 38, which went up on certificate of decision between judges of the United States circuit court for the district of Wisconsin. In *Lee County v. Rogers*, 74 U. S. 7 Wall. 181, 19 L. ed. 180, which went up on a writ of

error from the circuit court of the United States for the northern district of Illinois. In *Kenosha v. Lamson*, 78 U. S. 9 Wall. 477, 19 L. ed. 725, which was a writ of error to the circuit court of the United States for the district of Wisconsin. *Olcott v. Fond du Lac County Suprs.* 58 U. S. 16 Wall. 673, 21 L. ed. 382, which was a writ of error to a United States circuit court. *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968, which came from a United States court. *Weightman v. Clark*, 103 U. S. 256, 25 L. ed. 362, which came from a United States court. *Taylor v. Ypellanti*, 105 U. S. 80, 26 L. ed. 1006, which came from a United States court. *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090, which although a writ of error to the state court, was taken up on the ground that the contract had been impaired by subsequent legislation and the court had occasion incidentally to consider a change in the construction given by the state court to its Constitution and reiterated the statement that the exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the statute interpreted were concerned and their validity and obligations could not be impaired by any subsequent decision altering the construction. *Burgess v. Sellgman*, 107 U. S. 20, 27 L. ed. 359, which came from a United States court. *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. ed. 633, which was from a United States court. *German Sav. Bank of Davenport v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, which was from a United States court.

It will be noticed that although the United States court refuses to permit a state court to impair the obligations of a contract in all of the above decisions it was only after it had acquired jurisdiction on some grounds other than the unconstitutionality of such decisions. While the above decisions were being rendered and in connection with the Iowa municipal bonds, an attempt was made to bring up for review a decision of the supreme court of the state declaring bonds invalid. The report of the cases does not show that the bonds were issued in accordance with decisions holding them valid, but from the time in which the case came up and the general circumstances it may be inferred that there was little if anything in it to distinguish it from the above cases, but the court dismissed the writ of error for want of jurisdic-

made the bar of the debt would not defeat the right to redeem.

4. **Decisions on which the parties to a contract rely** do not constitute a part of it so as to exempt the contract from the operation of a subsequent decision declaring a different rule upon the same subject and overruling the earlier decisions.

(Beatty, Ch. J., *dissent*.)

(June 18, 1892.)

APPPEAL by plaintiff from a judgment of the Superior Court for Humboldt County in favor of defendants and from an order denying his motion for new trial in an action brought to redeem from an absolute deed given as security for a loan. *Affirmed*.

The facts are stated in the opinion.

Messrs. Stanly, Stoney & Hayes, with *Messrs. J. N. Gillett and E. W. Wilson*, for appellant:

1. Defendants never in any form pleaded the laws of the state of New York. The statute or law upon which they depended must be set out *in hac verba* or else it will not be considered as pleaded.

Gillette v. Hill, 83 Iowa, 220; *Hoyt v. McNeil*, 18 Minn. 890; *Norris v. Harris*, 15 Cal. 255; *Roots v. Merriwether*, 8 Bush, 397.

tion, holding it to be a fundamental error "that this court can as an appellate tribunal reverse the decision of a state court, because that court may hold a contract to be void which this court might hold to be valid." *Mississippi & M. R. Co. v. Rook*, 71 U. S. 4 Wall. 177, 18 L. ed. 381.

In the case of *Mississippi & M. R. Co. v. McClure*, 77 U. S. 10 Wall. 510, 19 L. ed. 997, which was a writ of error to the Supreme Court of Iowa and involved the validity of municipal bonds, the case was dismissed for want of jurisdiction, and the court stated that the state had passed no law upon the subject after the bonds were issued, and the Constitution of the state which as construed by the supreme court worked the result complained of, was in force when the bonds were issued. The 25th section of the Judiciary Act was held not to give jurisdiction in such cases, but the court stated that if the case had been brought from the circuit court under the 22d section of that Act the question of the validity of the bonds would have been open for examination.

In *Knox v. Exchange Bank of Virginia*, 79 U. S. 12 Wall. 379, 20 L. ed. 414, which was a writ of error to the Supreme Court of Appeals of Virginia, the claim was made that the charter of the bank making its notes receivable for debts due to it, was a contract which the decision of the Virginia court had impaired. The court stated: "We are not authorized by the Judiciary Act to review the judgment of the state courts because their judgments refuse to give effect to valid contracts or because those judgments in their effect impair the obligations of the contract."

In *New Orleans Water Works Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 13, 31 L. ed. 607, the court said that the prohibition in the United States Constitution against the impairment of the obligations of contracts was aimed at the legislative power of the states and not at the decisions of their courts, and in *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 778, the court said that a decision of the state court was not a law within the meaning of the provision of the Constitution which declares that no state shall pass any law impairing the obligation of a contract. The decisions of the United States 17 L. R. A.

The plea was fatally defective for the reason that it neither alleges that the cause of action arose in the state of New York nor that the period of time prescribed by that law had elapsed at the commencement of the action. These are necessary and material averments.

Headington v. Naff, 7 Ohio, 229; *Templeton v. Sharp* (Ky.) 10 Ky. L. Rep. 499.

Section 91 of chapter 8 of title 1, of Wait's Annotated Code of Procedure, pleaded by defendants, applies solely to personal actions. The appellant's cause of action was one to ascertain the amount due upon a mortgage and therefore that section does not govern the case.

Miner v. Beekman, 50 N. Y. 387; *Hubbell v. Sibley*, 50 N. Y. 468.

An action to redeem under these circumstances is in effect under our system merely an action to remove a cloud. And since a court of equity may require justice to be done as a condition of removing a cloud why should there be any period of limitation for such an action.

Raynor v. Drew, 72 Cal. 307.

If the personal demand is barred under the laws of the state of New York because of a failure to elect that remedy the defendants may still elect to foreclose their mortgage here and to which suit the plaintiff could not successfully plead the Statutes of Limitation.

court have, however, had more or less effect upon state decisions, and the state courts have to some extent acquired the idea that the obligation of a contract ought not to be impaired by a subsequent decision of a court.

In *Ray v. Western Pennsylvania Nat. Gas Co.*, 13 L. R. A. 290, 188 Pa. 576, it was ruled that the principle of the United States decisions did not apply where the decision complained of was upon a question of general common law and not an interpretation of a state statute.

In *Farrior v. New England Mortg. Security Co.* (Ala.) 12 L. R. A. 856, the court decided that overruling decisions of a state court of last resort, which were in force at the time a mortgage was given by a married woman, and which upheld its validity under the statutes, did not affect the right of the mortgagee, upon the ground that contracts when made under such circumstances cannot be annulled by subsequent decisions of the same court overruling former ones.

In *Harmon v. Auditor of Public Accounts*, 11 West. Rep. 69, 123 Ill. 122, the court said that the state court cannot by a decision any more than a state legislature can by a statute impair the obligation of a contract.

In *Geddes v. Brown*, 5 Phillim. 180, the court ruled that one who in accordance with the law as laid down by the court of last resort enters into a contract, should not suffer because it is subsequently set aside and another rule substituted for it. See also *Menges v. Dentier*, 83 Pa. 495.

Upon the question of impairment of remedy generally, see note to *Best v. Baumgardner* (Pa.) 1 L. R. A. 386.

Of impairment of contract right by procrastinating remedy, see *Phinney v. Phinney*, 4 L. R. A. 843, and note, 81 Me. 450.

Upon the question of whether the rule of the *lex fori* or that of the *lex loci* governs in determining whether an action is barred, see *O'Shields v. Georgia Pac. R. Co.* 6 L. R. A. 182, and note, 88 Ga. 621; *notes to Bank of North America v. Rindge* (Mass.) 13 L. R. A. 58, and *Nelson v. Chesapeake & O. R. Co.* (Va.) 15 L. R. A. 583.

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Ould v. Stoddard, 54 Cal. 613; *Henry v. Confidence G. & S. Min. Co.* 1 Nev. 619; *Mackie v. Lansing*, 2 Nev. 902; *Michigan Ins. Co. of Detroit v. Brown*, 11 Mich. 265; *Cookes v. Culbertson*, 9 Nev. 199.

The cause of action arose within the state of California and not within the state of New York. Acts of limitation unless they expressly discharge the debt are simply a part of the remedy.

Carson v. Hunter, 46 Mo. 467, 2 Am. Rep. 520; *Miller v. Brenham*, 68 N. Y. 83; *State v. Swope*, 7 Ind. 91; *Meek v. Meek*, 45 Iowa, 294; *M'Elmoye v. Cohen*, 88 U. S. 18 Pet. 312, 10 L. ed. 177; *McCormick v. Brown*, 36 Cal. 180; *DeCordova v. Galveston*, 4 Tex. 470.

The instrument in this case was and is a mortgage executed in the state of New York, upon lands situated in the state of California. Under such circumstances the nature, construction, and validity of the contract is to be governed by *lex loci contractus* while all matters pertaining to the remedy or the enforcement of the contract, must be determined by *lex fori*.

Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268; *Swank v. Hufnagle*, 9 West. Rep. 629, 111 Ind. 453; *Goddard v. Sawyer*, 9 Allen, 78; *United States v. Crosby*, 11 U. S. 7 Cranch, 115, 3 L. ed. 287; *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 32; 1 Jones, Mortg. § 823; *Farmers L. & T. Co. v. Postal Telegr. Co.* 5 New Eng. Rep. 346, 55 Conn. 384.

The law of the remedy is therefore no part of the contract, and "when the question is settled that the contract of the parties is legal and what is the true interpretation of the language employed by them in framing it, the *lex loci* ceases its functions and the *lex fori* steps in and determines the time, the mode, and the extent of the remedy.

Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334.

The court found as facts that the plaintiff was continuously a resident of the state of New York and absent from the state of California from March, 1865, to the year 1886, and that the defendants never came to nor were in the state of California until in the year 1886. Under our laws, then, the action was not barred and could and can be enforced at any time within four years after that period.

Code Civ. Proc. § 351; *Brown v. Nourse*, 55 Me. 230; *Graves v. Weeks*, 19 Vt. 178; *Petchell v. Hopkins*, 19 Iowa, 531; Wood, Cal. Dig. art. 22, § 22.

We are not called upon to look further than the law in force at the time the action was brought since that law governs the case.

Winston v. McCormick, 1 Ind. 56; *State v. Swope*, 7 Ind. 91; *Sampson v. Sampson*, 68 Me. 328.

The Code of Civil Procedure went into effect less than four years after the execution and delivery of the mortgage.

Under section 346 plaintiff has the right to bring his action to redeem from the mortgage at any time, or until the defendants have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.

Warder v. Ensen, 73 Cal. 291.

The bar of the statute not then having be-

come complete, the effect of this provision was to extend the plaintiff's right to commence his action for an indefinite time unless a five years' adverse possession intervened.

The right to foreclose and the right to redeem are co-existent, and until the remedy to foreclose is barred, the right to redeem may be exercised.

Montgomery v. Spect, 55 Cal. 352; *Taylor v. McClain*, 60 Cal. 651.

If neither of the parties were ever in the state how can it be said that the cause of action of either one is barred.

Plaintiff is entitled to have the cloud removed from his title independent of the Statute of Limitations.

De Casura v. Orena, 80 Cal. 132; *Booth v. Hoskins*, 75 Cal. 271; *Hall v. Arnott*, 80 Cal. 348.

Can there be any laches imputed to the plaintiff when the legal title never passed from him and where the defendants have never been in possession.

Williams v. Conger, 49 Tex. 532.

An unbroken line of decisions from April, 1858, down to April, 1870, held that a mortgage, whatever its terms, was a mere security and conveyed no title to the mortgagee.

McMillan v. Richards, 9 Cal. 411, 70 Am. Dec. 655; *Nagle v. Macy*, 9 Cal. 428; *Haffley v. Maier*, 18 Cal. 13; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Goodenow v. Ewer*, 16 Cal. 461; *Fogarty v. Sawyer*, 17 Cal. 589; *Lord v. Morris*, 18 Cal. 488; *Dutton v. Warshauer*, 21 Cal. 609, 82 Am. Dec. 765; *Grattan v. Wiggins*, 23 Cal. 16; *Cunningham v. Hawkins*, 27 Cal. 603; *Polhemus v. Trainer*, 30 Cal. 687; *Gay v. Hamilton*, 33 Cal. 688; *Jackson v. Lodge*, 36 Cal. 28; *Mack v. Wetzel*, 39 Cal. 247.

Such laws are a part of the contract.

Bishop, Cont. §§ 565, 566; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Edwards v. Kearney*, 96 U. S. 595, 24 L. ed. 793.

Since the rendering of the decisions in the cases of *De Eaplnoa v. Gregory*, 40 Cal. 58, and *Hughes v. Davis*, 40 Cal. 117, our court has returned to the doctrine announced in its many earlier decisions and with them now holds that a deed absolute in form given merely to secure an indebtedness is a mortgage and does not pass the legal title to the premises.

Taylor v. McLain, 64 Cal. 514; *Healy v. O'Brien*, 66 Cal. 517; *Raynor v. Drew*, 72 Cal. 307; *Booth v. Hoskins*, 75 Cal. 271; *Smith v. Smith*, 80 Cal. 323; *Hall v. Arnott*, Id. 349; *Murdoch v. Clark* (Cal.) June 7, 1890.

Under neither the former nor the present decisions therefore did the legal title pass to the respondents.

II. The deed from John H. Allen to respondents was a mortgage.

The real character of the instrument depends upon the intention and purpose of the parties in executing it to be determined from the facts and circumstances surrounding and succeeding its execution.

Sweetzer's App. 71 Pa. 278; *Montgomery v. Spect*, 55 Cal. 352.

The true test is whether the object of the instrument was to evidence a purchase and transfer an interest in land, or merely to secure a debt or obligation. In the former case it is a deed, in the latter case it is a mortgage.

Montgomery v. Spect, supra; Horn v. Ketchas, 46 N. Y. 611; *Carr v. Carr*, 52 N. Y. 258; *Hushon v. Hushon*, 71 Cal. 411.

The instrument is none the less a mortgage because the grantor is not the person whose debt is secured and who holds the equity of redemption.

Murray v. Walker, 81 N. Y. 389; *Houser v. Lamont*, 55 Pa. 815; *Carr v. Carr*, 52 N. Y. 258; *Pardee v. Treat*, 82 N. Y. 891; *Dodd v. Neilson*, 90 N. Y. 243; *Smith v. Cremer*, 71 Ill. 185; *Purdy v. Bullard*, 41 Cal. 447; *Morris v. Budlong*, 78 N. Y. 552; *McBurney v. Wellman*, 42 Barb. 401; *Stoddard v. Whiting*, 46 N. Y. 627.

An instrument which when executed is a mortgage is always thereafter a mortgage.

Horn v. Keeltas, supra; Odell v. Montross, 68 N. Y. 500.

The respondents' right to foreclose their mortgage was not barred at the date of the commencement of the action for the following reasons:

(1) The respondents' action to foreclose their mortgage could only have been brought in the state of California.

(2) At the date of the deed to respondents, December 30, 1869, the following was the law of California:

"If when the cause of action shall accrue against a person he is out of the state, the action may be commenced within the time herein limited after his return to this state."

2 Hittell, Gen. Laws, 4864, § 22, p. 635. See *Pulmer v. Shaw*, 16 Cal. 98; *Walt v. Wright*, 66 Cal. 202.

When the Codes went into operation the appellant's right to redeem had not been barred both because the right to foreclose still existed and because the respondents never having been in the actual occupancy of the premises, the statute had not yet commenced to run.

Hubbell v. Sibley, 50 N. Y. 473; *Miner v. Beekman*, 50 N. Y. 841.

The Civil Code changed the rule followed by the courts before its adoption and gave to mortgagors the privilege at any time after the principal obligation becomes due to have the lien extinguished that would otherwise cloud their title upon paying the debt regardless of the running of the Statute of Limitations against the principal obligation.

Hall v. Arnott, 80 Cal. 355; *Hubbell v. Sibley*, 50 N. Y. 473; *Moore v. Cable*, 1 Johns. Ch. 397, 1 L. ed. 182; *Miner v. Beekman*, 50 N. Y. 841.

The provisions of the Codes became applicable to mortgages made before as well as afterwards when the statute had not already extinguished them.

Billings v. Hall, 7 Cal. 1; *Grattan v. Wiggins*, 28 Cal. 16; *Skinner v. Buck*, 29 Cal. 253; *Wood, Lim. Act*, chap. 1, § 2.

If the Code prescribes the rule the statute has not yet commenced to run against the appellant's cause of action as the respondents have never been in the actual possession of the land.

Moore v. Cable and *Hall v. Arnott, supra*.

In New York the statutory limitation against a mortgagor was ten years, and the statute did not commence to run until the mortgagee entered and held the premises adversely.

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Hubbell v. Sibley and *Miner v. Beekman, supra*.

Respondents were not only mortgagees, but trustees of the appellant. The legal title had been conveyed to them by John H. Allen, appellant's trustee, and accepted by them with a knowledge of and subject to the trust. It is a principle of equity that the holder of an equitable title, for example the beneficiary of a trust, can be divested of his equitable title by adverse possession only.

Gilbert v. Sleeper, 71 Cal. 290; *Reynolds v. Sumner*, 12 West. Rep. 827, 126 Ill. 73; *Love v. Watkins*, 40 Cal. 571, 6 Am. Rep. 624; *Coulson v. Walton*, 34 U. S. 9 Pet. 81, 9 L. ed. 59; *Harris v. King*, 16 Ark. 122; *Wood, Lim. Act*, chap. 17, § 219; *Varick v. Edwards*, 11 Paige, 291, 5 L. ed. 140.

Messrs. J. D. H. Chamberlin and S. M. Buck, for respondents:

I. The cause of action was clearly barred by the provisions of section 843 of the Code of Civil Procedure of this state.

The cause of action set forth in the complaint was an equitable action, not otherwise provided for in the Code, and suit must be brought thereon in four years.

Piller v. Southern Pac. R. Co. 53 Cal. 43.

The defendants can plead the *lex fori* all parties to the action being nonresidents and submitting themselves to the jurisdiction of the courts of this state.

Fike v. Clark, 55 Mo. 106; *Thomas v. Black*, 22 Mo. 330; *Moore v. Carroll*, 54 Ga. 126.

A statutory exception to the bar of the statute similar to section 851 of the Code of Civil Procedure of this state applies only to residents of this state and not to nonresidents submitting themselves to the jurisdiction of the courts where the remedy is sought.

If defendants cannot enforce their claims against the plaintiff for money paid and advanced to him by reason of the Statutes of Limitation then the plaintiff cannot enforce his equitable right to redeem.

Grattan v. Wiggins, 23 Cal. 35; *Cunningham v. Hawkins*, 24 Cal. 408, 35 Am. Dec. 75; *De Espinosa v. Gregory*, 40 Cal. 62; *Taylor v. McClain*, 60 Cal. 651.

At the execution of these deeds a deed absolute in form, but intended as a mortgage, conveyed the legal title as title.

Jackson v. Lodge, 36 Cal. 28; *Hughes v. Davis*, 40 Cal. 120; *De Espinosa v. Gregory, supra*; *Davenport v. Turpin*, 43 Cal. 604; *Pico v. Gallardo*, 52 Cal. 206; *Higgins v. Higgins*, 46 Cal. 264.

If the deeds in controversy conveyed the legal title although given as security, then as no possession was given defendants under said mortgage deeds the Statute of Limitations commenced to run at the execution of the deeds.

Code Civ. Proc. §§ 339-361; *Grant v. Burr*, 54 Cal. 310; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651.

When plaintiff's right to redeem became barred by the Statute of Limitations defendants' title became absolute; when plaintiff's right to enforce his equity of redemption was gone, all his equities became merged in the legal title.

2 Jones, Mortg. § 1146, and cases cited.

The rights of redemption and foreclosure are reciprocal.

Raynor v. Drew, 73 Cal. 307; *Taylor v. McClain*, 60 Cal. 651.

II. A trust deed executed as security for the payment of money transfers the legal title.

Fuquay v. Stickney, 41 Cal. 583-587; *Partridge v. Shepard*, 71 Cal. 478; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 860.

In order to constitute a mortgage, the conveyance and defeasance must be between the same identical parties.

Low v. Henry, 9 Cal. 549; Am. & Eng. Encyclop. Law, title *Defeasance*.

Defendants could not have sustained an action to foreclose this absolute deed.

Koch v. Briggs, *supra*.

The court cannot decree that defendants hold the legal title in trust for plaintiff as security for moneys advanced and to be advanced, because there are no allegations of the complaint which would authorize it.

Taylor v. McClain, 64 Cal. 513; *De Cazara v. Orena*, 80 Cal. 84; *Mondran v. Gouz*, 51 Cal. 153; *Boons v. Chiles*, 85 U. S. 10 Pet. 209, 9 L. ed. 899; *Rathbun v. Rathbun*, 6 Barb. 107; *Green v. Covillaud*, 10 Cal. 332, 70 Am. Dec. 725; *Morenhout v. Barron*, 42 Cal. 605; *Gregory v. Nelson*, 41 Cal. 284; *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Murdock v. Clarke*, 59 Cal. 688.

The legal title being in defendants, the statute commenced running in 1869, and when defendants' cause of action to recover the money advanced to plaintiff became barred, then any cause of action plaintiff may have had to redeem became barred also.

2 Jones, Mortg. § 1146; *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Grattan v. Wiggins*, 23 Cal. 16; *Arrington v. Liscomb*, 84 Cal. 366; *Koch v. Briggs* and *Taylor v. McClain*, *supra*.

By the laws of New York defendants lost their right to collect the moneys advanced to plaintiff in 1875, ten years before plaintiff came to this state.

The effect of section 861 (Code Civ. Proc.) is to permit a defendant who is sued here by one who has not been a citizen of this state, and upon a contract made in another state, to plead the Statute of Limitations of such state when more favorable to him than our own.

Osgood v. Arth, 10 Fed. Rep. 365; *Penfield v. Chesapeake, O. & S. W. R. Co.* 29 Fed. Rep. 494, 134 U. S. 352, 38 L. ed. 942.

The laws of this state which existed when the transaction occurred, and which created and defined the legal and equitable obligations of the parties arising out of the loan and the execution of the deeds as security therefor, are to be read as forming part of the contract itself.

Bishop, Cont. §§ 565, 566; *Bronson v. Kinzie*, 42 U. S. 1 How. 319, 11 L. ed. 146; *United States v. Quinoy*, 71 U. S. 4 Wall. 550, 18 L. ed. 408.

At the time these deeds were executed, being absolute in form, intended as security only, they transferred the legal title, and there was left in the person executing it a mere equity of redemption.

16 L. R. A.

Hughes v. Davis, 40 Cal. 117.

And whenever the debt to secure which the deed was made became barred by the Statute of Limitations the right to redeem was also barred.

De Espinosa v. Gregory, 40 Cal. 58.

The right to foreclosure and the right to redeem were always regarded as reciprocal and commensurable, and if one was lost by lapse of time, so was the other also.

Cunningham v. Hawkins, 24 Cal. 403, 85 Am. Dec. 73; *Arrington v. Liscom*, 84 Cal. 366; *Koch v. Briggs*, 14 Cal. 257, 73 Am. Dec. 651.

The states may change the remedy, provided no substantial right secured by the contract is impaired; whenever such a result is produced by the Act in question, to that extent it is void.

Walker v. Whitehead, 88 U. S. 16 Wall. 318, 21 L. ed. 358.

Section 346 of the Code of Civil Procedure, if held applicable, would operate as a material change in the rights and obligations of the parties as they existed at the date of the execution of these deeds.

Heyward v. Judd, 4 Minn. 433; *Phinney v. Phinney*, 4 L. R. A. 348, 81 Me. 450.

The settled interpretation of the law by our supreme court in *Hughes v. Davis*, 40 Cal. 117; *De Espinosa v. Gregory*, 40 Cal. 58; *Davenport v. Turpin*, 43 Cal. 604; *Pico v. Gallardo*, 53 Cal. 206,—became a part of the law of this state, as much so as if incorporated into the body of it by the Legislature.

Christy v. Fridgeon, 71 U. S. 4 Wall. 196-203, 18 L. ed. 322-324; *Union Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341.

III. Whenever the transaction has been one whereby the legal title to the property passed out of the mortgagor no foreclosure is necessary.

Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; *Cunningham v. Hawkins*, 24 Cal. 406, 85 Am. Dec. 73; *Millard v. Hathaway*, 27 Cal. 120-146; *Arrington v. Liscom*, 84 Cal. 366; *Taylor v. McClain*, 60 Cal. 652; *Grant v. Burr*, 54 Cal. 300; *Tyler v. Mayre* (Cal.) June 30, 1891; *Fuquay v. Stickney*, 41 Cal. 583; *Partridge v. Shepard*, 71 Cal. 478; *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 860.

The several sections of the Code show that the Legislature never intended those sections to be retroactive.

New York & O. M. R. Co. v. Van Horn, 57 N. Y. 477; *Goitlotel v. New York*, 87 N. Y. 443; *Thorne v. San Francisco*, 4 Cal. 132; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 884; *Society for Prop. Gasp. v. Wheeler*, 2 Gall. 139; *Chew Heong v. United States*, 112 U. S. 559, 28 L. ed. 778; *Mann v. McAtee*, 37 Cal. 14; *Sharp v. Blankenship*, 59 Cal. 289; *Central Pac. R. Co. v. Schackelford*, 63 Cal. 265; *Hibernia Sav. & Loan Soc. v. Jordan*, 6 Pac. Coast L. J. 686; *Hibernia Sav. & Loan Soc. v. Hayes*, 56 Cal. 297.

The Legislature has no power to take away, change, or modify vested rights. Any law postponing the time within which appellant was obliged to pay in order to preserve his

equity impaired the obligation of this contract.

Louisiana v. New Orleans, 102 U. S. 207, 26 L. ed. 133.

Such acts have been held within the inhibition of the Constitution in numerous cases.

January v. January, 7 T. B. Mon. 542, 18 Am. Dec. 211; *Goenen v. Schroeder*, 8 Minn. 387; *Boice v. Boice*, 27 Minn. 371; *Greenfield v. Dorris*, 1 Sneed, 648; *Robinson v. Howe*, 18 Wis. 842.

The laws relating to enforcement of a contract are part thereof.

Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; *Smith v. Cleveland*, 17 Wis. 568; *Edwards v. Kearzey*, 96 U. S. 595, 607, 24 L. ed. 798, 799.

In this case the legal title to the property vested in defendants. The Legislature had no power to divest it and confer it upon plaintiff.

Helm v. Webster, 85 Ill. 116; *Koenig v. Omaha & W. R. Co.* 8 Neb. 383; *Devey v. Lambier*, 7 Cal. 347; *Stafford v. Lick*, Id. 480; *Skinner v. Buck*, 29 Cal. 253.

The Legislature cannot alter or repeal an Act so as to affect contracts made during the existence of the Act.

Toulumne Redemption Co. v. Sedgwick, 15 Cal. 515.

The remedy enters into and forms a material part of the obligation of a contract.

Walker v. Whitehead, 83 U. S. 16 Wall. 314, 21 L. ed. 357; *Rawson v. Thornton*, 48 Ga. 537; *Gunn v. Barry*, 82 U. S. 15 Wall. 610, 21 L. ed. 212; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Scaine v. Bellerille*, 39 N. J. L. 526.

And a statute can no more impair the efficacy of a contract by changing the remedy than attack its vitality in any other way.

Smith v. Morse, 2 Cal. 524; *Johnson v. Duncan*, 3 Mart. (La.) 531, 6 Am. Dec. 675; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 705; *United States v. Muscatine*, 75 U. S. 8 Wall. 583, 19 L. ed. 498; *Walker v. Whitehead*, *supra*; *Olcott v. Fond du Lac County Suprs.* 83 U. S. 16 Wall. 678, 21 L. ed. 332; *Gunn v. Barry*, 82 U. S. 15 Wall. 623, 21 L. ed. 215; *Edwards v. Kearzey*, 96 U. S. 601, 24 L. ed. 799; *Taylor v. Stearns*, 18 Gratt. 244; *Nevitt v. Fort Gibson Bank*, 6 Smedes & M. 518; *Von Baumbach v. Bade*, 9 Wis. 560; *Thompson v. Com.* 81 Pa. 314.

Paterson, J., delivered the opinion of the court:

Appellant received from the state a certificate of purchase for the lands described in the complaint, on March 28, 1860, and in August following assigned the same to one Collins, to secure an indebtedness of \$30, and thereafter a patent was issued from the state to Collins. Appellant paid Collins the amount due him; and the latter, by request of appellant, conveyed the land to John H. Allen, who paid no consideration therefor. Respondents thereafter advanced to the appellant certain sums of money for the payment of taxes which had become delinquent, and, to secure the repayment to them of said sums, the appellant, on June 12, 1869, caused said John H. Allen to convey the lands to them as security for the repayment of the

money they had advanced. This deed was absolute in form. John H. Allen received no consideration for the deed. Neither of the parties has ever been in actual possession of the land. The contract of loan was oral, and no time was fixed in which appellant was to make repayment. Plaintiff never made any demand for an accounting, or any offer to redeem, prior to the year 1885, and defendants did not, prior to that time, assert any claim of title to the lands adverse to plaintiff's right to a reconveyance upon payment of the indebtedness. This action was commenced March 15, 1887. The court below rendered judgment for the defendants. A motion for a new trial was denied, and plaintiff appealed from the order, and from the judgment.

1. The court below held that plaintiff's cause of action was barred by the provisions of section 361, Code Civ. Proc. That section provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held a cause of action from the time it accrued." It is claimed by appellant that under that section it was incumbent on the respondents to set out the facts upon which they rely, to show that the cause of action arose in the state of New York, and that, under the laws of that state, it was barred by the Statute of Limitations. A complete answer to this contention is found in section 458, Id., which provides: "In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure, and if such allegation be controverted the party pleading must establish on the trial the facts showing that the cause of action is so barred." The rule thus established was intended to simplify the form of pleading such defenses, and is one which the court cannot depart from on a conjecture that the Legislature intended to except from its operation cases of this kind.

The contract was made in New York, where all the parties resided, and neither of them was in this state thereafter until the year 1885; and it is claimed by appellant that, under sections 346, 351, Id., and 2908, Civil Code, the respondents' right to foreclose their mortgage was not barred at the date of the commencement of this action; that appellant remained the equitable owner of the property, and his right to redeem was kept alive. Those sections read as follows: "Sec. 346. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagees in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five

years after breach of some condition of the mortgage." "Sec. 851. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." "Sec. 2908. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." Civil Code. In support of this contention, counsel for appellant say, in substance: "Respondents' action to foreclose could have been brought only in this state. The word 'return,' as employed in section 851, *supra*, is applicable to persons coming from abroad, as well as to citizens who have left the state for a temporary purpose and returned thereto. The statute had not commenced to run in 1865, because the respondents had never been in the actual occupancy of the premises. Section 2908, Civil Code, and section 846, Code Civil Proc., provided rules of limitation different from those which had previously been followed by the courts of this state, and those new rules are applicable to mortgages made before, as well as those made after, the adoption of the Codes, unless the remedy was extinguished at the time the Codes took effect. Respondents were not only mortgagees but trustees of appellant; and the statute could not commence to run in their favor until an offer to redeem was made by appellant. There could be no laches on the part of appellant, because the legal title remained in him, and no adverse claim was made by respondents." These contentions cannot be lightly passed over. They deserve to receive and they have received our careful attention. In the solution of the question presented as to the effect of the deed, we must read, as a part of the contract, the laws of this state existing at the time the contract was made, (*Klinck v. Pries*, 4 W. Va. 4, 6 Am. Rep. 268; *United States v. Crosby*, 11 U. S. 7 Cranch, 115, 3 L. ed. 287,) although the nature of the construction of the contract of loan, which was made in New York, is determined by the latter state, (*De Wolf v. Johnson*, 23 U. S. 10 Wheat. 867, 6 L. ed. 848.) It is true an action to foreclose must be brought where the property is situated; but it does not follow that respondents could have maintained an action to foreclose at the time this suit was commenced. Both parties resided in the state of New York, where the contract was made, and either could have maintained an action there on the contract. The plaintiff could have enforced his right to redeem, and the defendants could have recovered the amount for which they held the land as security. *Montgomery v. Spect*, 55 Cal. 353; *Kanawha Coal Co. v. Kanawha & O. Coal Co.* 7 Blatchf. 415; *Garänder v. Ogden*, 22 N. Y. 827, 78 Am. Dec. 192; *Williams v. Fitzhugh*, 37 N. Y. 444. In this state, when an action on a promissory note, secured by mortgage of the same date upon real property, is barred by

the Statute of Limitations, the mortgagee has no remedy upon the mortgage. *Lord v. Morris*, 18 Cal. 483; *Heinlin v. Castro*, 22 Cal. 100. The debt is regarded as the principal, and the mortgage as a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. *McCarthy v. White*, 21 Cal. 495. If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. Code Civ. Proc. § 861. At the time the conveyance was made by John H. Allen to the respondents, a deed absolute in form, but intended as a mortgage, in this state, transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt, to secure which the deed was made, became barred by the Statute of Limitations, the right to redeem was barred. *Hughes v. Davis*, 40 Cal. 117; *De Espinosa v. Gregory*, Id. 58. The right to redeem and the right of the creditor to sue on a contract were reciprocal. When one was lost the other could not be enforced. *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Arrington v. Liscom*, 34 Cal. 366; *Grattan v. Wiggins*, 23 Cal. 35. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. *Bronson v. Kinzie*, 43 U. S. 1 How. 316, 11 L. ed. 145; *Walker v. Whitehead*, 88 U. S. 16 Wall. 818, 21 L. ed. 358; *Heyward v. Judd*, 4 Minn. 483, (Gil. 375;) *Phinney v. Phinney*, 81 Me. 450, 4 L. R. A. 848. Under the decisions just cited, section 846, Code Civ. Proc., is inapplicable, because it would effect a material change in the rights and obligations of the parties, (*Phinney v. Phinney*, and *Heyward v. Judd*, *supra*;) and for the same reason *Raynor v. Drew*, 72 Cal. 807, and other and later cases declaring the rule stated in that section, are not in point. They are based upon that section of the Code, and it was passed posterior to the time the parties entered into the contract.

It is claimed by the appellant that the finding of the court, "that the cause of action stated in the complaint is barred by the provisions of section 861 of the Code of Civil Procedure," is not supported by the evidence. The defendant introduced in evidence section 91, chap. 3, title 11, Wait Code. It is not disputed that this section applies to personal actions, and supports the fourteenth finding of the court "that, by the laws of the state of New York, an action upon a verbal agreement for the payment of money is barred within six months after the cause of action accrues thereon, and the right of defendants to maintain any action against plaintiff to recover the said sum of \$500, as security for which the said deeds from Cox and John H. Allen were executed to them, has been barred by the laws of said state at all times since the 20th day of November, 1874; and the right of defendants to maintain any action against plaintiff to recover the moneys advanced by them to him, as

stated in finding No. 11, has been barred by the laws of said state at all times since September 18, 1877." But it is claimed that, as the appellant's cause of action is one to ascertain the amount due upon a mortgage, and that he may be permitted to pay the same, and remove a cloud from his title, the section referred to does not apply to the case, but is governed by section 97, which provides that an action for relief not otherwise provided for must be commenced within ten years after the cause of action shall have accrued. As we have seen, however, as soon as the debt is barred the remedy upon the mortgage is lost. Respondents could not have maintained an action in New York for the recovery of the money due. They, therefore, could not maintain an action in this state to foreclose the mortgage, and the right to redeem was lost; and as the right to redeem and the right to maintain an action on the contract are reciprocal, the fourteenth finding of the court, which is not attacked, is conclusive against the plaintiff's right to maintain this action.

If it be conceded that in New York an action to redeem from a mortgage of lands situated in that state can be maintained, although an action for the recovery of the money due could not be maintained there, the result must be the same, because, as stated before, the effect of this deed depends upon the laws of this state existing at the time the contract was made. The interest of each party in the land was measured and controlled by the *lex loci rei sita*. *Klinik v. Price*, and *United States v. Crosby*, *supra*. The right to redeem is governed by the laws of this state.

It is claimed that, at the time the contract was entered into, it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true there had been decisions to that effect, but in the year following it was held (*Esplanosa v. Gregory* and *Hughes v. Davis*, *supra*), that a deed absolute in form intended as a mortgage did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law. "They can say what a law means; and if afterwards they see that they have made a mistake, they can correct their error by an overruling of a former decision, the consequence of which overruling is that the blunder is thenceforward deemed never to have been law." Bishop, Cont. § 569. It has been held here that, although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they would not be relieved from the obligations thereof because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the same subject. *Kenyon v. Welby*, 20 Cal. 637. There are some cases in which the Supreme Court of the United

States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so far as contracts made under the Act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute,—as much so as if it were an amendment made by the Legislature. *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Louisiana v. Pilsbury*, 105 U. S. 294, 26 L. ed. 1095; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Thompson v. Lee County*, 70 U. S. 8 Wall. 327, 18 L. ed. 177. These cases, however, all involved the question as to the validity of negotiable securities. We think that the case of *Oulahan v. Sweeney*, 79 Cal. 537, is distinguishable from the case at bar. The amendment therein referred to simply required the purchaser of property sold for delinquent taxes to serve upon the owner of the property a notice stating that the property had been sold for delinquent taxes, the date of the sale, the amount for which it was sold, the amount then due, the time when the right of redemption would expire, and when the purchaser would apply for a deed. This requirement was a mere incident to the right of the purchaser to receive a deed; it merely prescribed the manner in which he should proceed to demand the deed to which he was entitled. It was conceded, "for the purposes of the case, that the Legislature cannot make an absolute extension of the time for redemption of property previously sold."

We think the court below held the right view of the case, and its judgment and order are therefore affirmed.

We concur: **McFarland, J.; Harrison, J.; Garoutte, J.; DeHaven, J.**

Sharpstein, J., concurs in the judgment.

Beatty, Ch. J., on June 23, 1892, filed the following opinion:

I dissent. According to the opinion of the court, the plaintiff's action was barred by section 861 of the Code of Civil Procedure, because, and only because, an action by defendants to foreclose would have been barred by said section.

I am not satisfied with the reasoning by which the conclusion is reached that the defendants were barred of their action to foreclose before this action was commenced, but, conceding it to be correct, it does not follow, in my opinion, that the plaintiff's right of action was thereby lost. That the right to redeem and the right to foreclose were barred at the same time was undoubtedly the law of this state prior to the Codes, but since they were enacted the right to redeem is unaffected by the extinguishment of the right to foreclose. Code Civ. Proc. § 846; Civil Code, § 2908; *Raynor v. Drew*, 72 Cal. 870; *Booth v. Hoskins*, 75 Cal. 271; *De Cuzara v. Orena*, 80 Cal. 184; *Hall v. Arnott*, 80 Cal. 854; *Warder v. Enslin*, 73 Cal. 291. In other words, the Codes have prescribed another rule for the limitation of actions to redeem from mortgages and other

liens. By the old rule the right to redeem was barred when the right to foreclose was barred, and whether this resulted from the fact that each was covered by the same clause of the statute, or from the equitable doctrine of mutuality of rights and remedies under such contracts, the rule itself had no other effect than to fix a period of limitation to the right to redeem. This rule has been changed, and the period of limitation enlarged, by a law passed since the making of the contract here involved, but before the right of action of either of the parties had been lost, and before the commencement of this suit. The question, therefore, is, Which rule applies, the old or the new?

That these provisions of the Codes were intended to apply to all actions commenced after they took effect is to my mind perfectly clear. It is true the Codes are not retroactive, (Civ. Code, § 8; Code Civ. Proc. § 8,) and it is also true that vested rights should never be impaired by giving a retroactive effect to a law. But a law enlarging the period of limitations upon existing contracts is not a retroactive law, and it impairs no vested rights. Unless restricted in its operation by its own terms, a new rule of limitations necessarily applies to all actions thereafter commenced, and to all causes of action not already extinguished by the running of time under the pre-existing rule. This being so, we have only to look to the express provisions of the Codes to see how far the new rules by them prescribed are restricted in their operation upon actions commenced after they took effect. In section 6 of the Civil Code we find the following provision: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." Section 8 of the Code of Civil Procedure contains the same language. The clear implication is that actions not commenced and rights not vested prior to the adoption of the Codes are to be controlled by their provisions. The more specific provision respecting the application of the new rules of limitation is found in section 363 of the Code of Civil Procedure, and is as follows: "This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section." Here the implication is equally clear that the new rules apply to all actions not already commenced, and to all cases where the time prescribed by existing statutes for barring the remedy has not fully run. In this case the time had not run, and the action had not been commenced. The conclusion, therefore, cannot be avoided that the rule of the Code applies, unless its application would have the effect of changing the contract or impairing its obligation. The respondents contend, and the court holds, that such would be its effect. They say that the law of the state of California, as it existed at the date of their deed from John H. Allen, defining the mutual rights and obligations of the parties to

the transaction, entered into and became a part of the contract, and that such law gave them (the respondents) an important right which the above-cited provisions of the Codes would take away or materially abridge. If this is true, it must be conceded that the Code provisions are inapplicable. But is it true? What are the rights conferred by the Law of 1869 which the Codes take away or impair? They do not take away or impair the right of a mortgagee to foreclose, they merely enlarge the time within which the mortgagor may redeem, and this is all the respondents have to complain of. By the law of California prior to the Codes, they say a mortgage in the form of an absolute conveyance invested the mortgagee with the legal title to the land, leaving in the mortgagor a mere equity of redemption which was barred and extinguished at the same moment that the debt was barred, thereby creating in the mortgagee a title complete, absolute, and indefeasible, without the necessity of a foreclosure; and, therefore, they insist it must be held that this right to obtain a complete title without foreclosure was among the advantages they bargained and paid for, and is a right of which they could not be deprived by subsequent legislation, as they would be if subjected to the Code provisions (Sec. 346, Code Civ. Proc.; sec. 2903, Civ. Code,) under the operation of which they could never perfect their title except by foreclosure, or by five years' adverse possession of the mortgaged premises after condition broken. The completeness of this argument is marred by the fact that it assumes too much for the law of California before the Codes. The decisions relied on by respondents do not go to the extent claimed for them. The cases cited are *Hughes v. Davis*, 40 Cal. 117; *De Esplnosa v. Gregory*, 40 Cal. 58; *Pico v. Gallardo*, 53 Cal. 206. A critical examination of this line of decisions will show that the only case in which a mortgagee by deed absolute could acquire an indefeasible title to the mortgaged estate without foreclosure was when he had possession. This was the case in *De Esplnosa v. Gregory*. The mortgagee was in possession, the right to foreclose was barred, and it was held that the mortgagor had thereby lost the right to redeem. The mortgagee got the land without foreclosure. But in *Hughes v. Davis*, and *Pico v. Gallardo*, the mortgagors were in possession, and the mortgagees were suing in ejectment after their right to foreclose was barred. It was held that the mortgagees had the legal title to the lands, and that they were entitled to recover possession, in the absence of allegations in the answers setting forth the equities of the defendants, with an offer to pay the amount of the mortgage liens, and prayer that the conveyances be declared mortgages. In other words, a right of redemption on the usual terms, against the mortgagee out of possession, was distinctly admitted, although the right to foreclose was barred.

Now, what right of these respondents under the law as declared in the cases referred to, would be taken away or impaired by sustaining plaintiff's action to redeem? They

never had possession of the mortgaged premises, and had no right to the possession. If, after their right to foreclose was barred,—if it ever was barred,—they had anticipated the plaintiff in taking possession of the land, their title might thereby have become perfect under the doctrine of *De Esplnosa v. Gregory*, but if plaintiff had anticipated them in taking possession, their only remedy would have been to sue in ejectment, in which case he could have set up his equity, and effected a redemption, according to the doctrine of *Pico v. Gallardo*, upon precisely the same terms that can be imposed in this action. The only difference between this case and the case supposed is that plaintiff, without taking possession, and without waiting to be sued, offers the respondents, in advance, all that he would be compelled to pay in order to redeem if he had taken possession, and waited for them to sue. To allow this would surely not be to deprive the respondents of any valuable right. Enough has been said, I think, to show that respondents never brought themselves within the rule of *De Esplnosa v. Gregory*, because they never had possession of the land; but if the fact had been otherwise all the decisions of this court are to the effect that a law extending plaintiff's right of redemption would be valid. Take the case of tax sales: Prior to March, 1885, the purchaser of land sold for delinquent taxes became at once entitled to a tax deed if the property was not redeemed before the expiration of the year. In March, 1885, the law was so amended as to require the purchaser to give 80 days' notice to the owner or occupant of the land of his intention to apply for a deed. This amendment to the law was held to apply to sales made before its adoption. *Oullahan v. Sweeney*, 79 Cal. 589. It is impossible to distinguish that case from this, and if it was correctly decided there can be no doubt of the power of the Legislature to extend the right of a mortgagor to redeem. See also *Moore v. Martin*, 88 Cal. 488, and *Toutumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

In the briefs of counsel a large number of decisions are cited from the reports of other states bearing more or less directly upon this point, with respect to which it can only be

said that they are so conflicting as to furnish no ground for reversing our own decision in *Oullahan v. Sweeney*, *supra*. A decision on this point by the Supreme Court of the United States would of course be binding authority, as the immunity asserted arises under the Constitution of the United States, but no such decision has been cited. What was said by Judge Taney, in *Bronson v. Kinzie*, 42 U. S. 1 How. 816, 11 L. ed. 145, has been pronounced *obiter*, and its authority denied by this court. See dissenting opinion of Judge Heydenfeldt, in *Thorne v. San Francisco*, 4 Cal. 156, adopted in *Moore v. Martin*, 88 Cal. 488. Of the cases cited in the department opinion heretofore filed, (27 Pac. Rep. 80,) that of *Phinney v. Phinney*, 81 Me. 450, 4 L. R. A. 848, comes nearer than any other to sustaining the contention of respondents, but even that might be distinguished, for the law there held unconstitutional was one by which the equity of redemption could be indefinitely extended at the suit of a stranger to the mortgage. Finally, it may be said that if the doctrine under discussion is to control the decision of this case, it may be invoked by the appellant with quite as much justice as by respondents.

The cases of *Hughes v. Davis* and *De Esplnosa v. Gregory* were not decided until the year following the deed of John H. Allen, and they directly overruled a long line of decisions by this court holding that a mortgage by deed absolute did not pass the legal title. The construction given to our laws by these decisions was the law itself at the date of that deed, and fixed the rights of the parties so that they could not be changed by a subsequent construction any more than by subsequent legislation. *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520. For these reasons I conclude that the finding of the superior court, that plaintiff's cause of action was barred by section 361 of the Code of Civil Procedure, is not sustained by the evidence, and, therefore that a new trial should have been granted, and that the order appealed from and the judgment should be reversed, and the cause remanded for a new trial.

NORTH DAKOTA SUPREME COURT.

Daniel J. DAVIS *et al.*, *Respts.*,
v.

Lorenzo N. BRONSON, *Appt.*

(.....N. Dak.....)

***Defendant having refused to perform a contract for the erection of a**

***Head note by CORLISS, Ch. J.**

creamery by plaintiffs before they had entered upon the performance thereof.—*Held*, that an action to recover the contract price would not lie, although plaintiffs had, notwithstanding defendant's refusal to perform, completed the creamery according to contract. Plaintiffs had no right to go on with the contract under such circumstances, and recover the contract price; their only remedy being for damages for breach of the contract.

NOTE.—Rights of one who completes contract in disregard of notice to desist.

In *Clark v. Marniglia*, 1 Denio, 817, defendant delivered to plaintiff certain paintings to be cleaned

16 L. R. A.

and repaired. After plaintiff had commenced the work defendant countermanded his order. It was held that plaintiff could recover for labor and materials used prior to the countermand and such damages as might be assessed for the breach of

November 27, 1901.)

APPEAL by defendant from a judgment of the District Court for La Moure County in favor of plaintiffs in an action brought to recover the contract price for the erection of a creamery. *Reversed.*

The facts are stated in the opinion.

Mr. George W. Newton, for appellant:

Before the plaintiffs had done any act under said contract—could have received it even—the appellant, by letters and telegram, revoked and countermanded his contract; or, in other words, broke his contract. Thus, there was a breach of his executory contract. At the very most, it only subjected him to an action, on the part of the plaintiffs, to recover the damages suffered by them up to that point—the time of the breach. Such damages were for the jury to find and assess, and that question should have been submitted to the jury for their determination.

The court refused to submit the question of damages to the jury as an open question and ruled that the measure of damages was the subscription with legal interest from the time the creamery was completed.

Danforth v. Walker, 87 Vt. 289, 40 Vt. 257; *Derby v. Johnson*, 21 Vt. 17; *Nye v. Taggart*, 40 Vt. 295, found in Roberts' Vermont Digest, p. 168 (240, 241, 256); *Clark v. Marsiglia*, 1 Denio, 817; *Spencer v. Halstead*, Id. 606; *Dillon v. Anderson*, 48 N. Y. 237; *Wilson v. Martin*, 1 Denio, 602; *Moline Scale Co. v. Beed*, 52 Iowa, 307; *Nebraska City v. Nebraska H. Gas Light & C. Co.* 9 Neb. 839.

The fact of others being subscribers has no effect upon the question. The contract was a several contract with the plaintiffs, on the part of each subscriber.

Davis v. Belford, 14 West. Rep. 202, 70 Mich. 130.

Whether appellant would be liable to his co-subscribers for damages for not fulfilling on his part, is a question not in the case. It can, in no way, be made available to the plaintiffs.

Ashuelot B. & S. Co. v. Hoit, 56 N. H. 548, found in 1 Waterman, Corp. p. 167, note; *Athol M. H. Co. v. Carey*, 116 Mass. 473; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

That plaintiffs would be liable to the appellants' co-subscribers in case they had not performed, is a question not in the case. If it were, the reply is, that the claim, as an element of damages, is entirely too remote.

Smith v. Smith, 45 Vt. 433; *Roberts, Vt. Dig.* p. 178 (358).

Messrs. Moer & Harris for respondents.

Corliss, Ch. J., delivered the opinion of the court:

The theory on which plaintiffs were allowed to recover against the appellant was that they had fully performed on their part all the conditions of an agreement with appellant and others to erect and equip a creamery at La Moure in this state. We are compelled to reverse the judgment because it appears that the plaintiffs were not justified in proceeding with the work under the contract for the purpose of charging the appellant with the full amount which he and his copartner agreed to pay as their share of the contract price, as it is undisputed that the appellant broke the contract the day after it was made, and plaintiffs received notice of his determination not to carry out the agreement on his part on the second day after the contract was entered into. This was be-

contract, but not for labor performed after the countermand.

The court said: "In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith toward the employer."

Clark v. Marsiglia, *supra*, is cited with approval on this point in *Lord v. Thomas*, 64 N. Y. 107.

In *Moline Scale Co. v. Beed*, 52 Iowa, 307, the defendant ordered of the plaintiff a scale to be built by the latter in co-operation with the former, who was to furnish the foundation and lumber. Before the plaintiff had received the order from its agent it was countermanded. In disregard of the countermand the plaintiff proceeded with its part of the contract and sued for the contract price. Held that it could not recover.

Notice to a contractor not to proceed with the erection of houses under the contract will preclude recovery of a payment for work performed subsequent to the notice. *Heaver v. Lanahan* (Md.) June 17, 1901.

In *Nebraska City v. Nebraska H. Gas-Light & C. Co.*, 9 Neb. 839, a city notified a gas company to furnish no more gas to it under a contract still in force. The court said: "The taking of this step, however, did not amount to a rescission of the contract, but simply to a breach of it, for which the company in a proper action would be entitled to recover adequate damages. But, in such action, the contract price of the gas furnished after the refusal to re-

ceive it would not necessarily be the measure of damages recoverable."

Where several tax-payers unite in an agreement to contest by legal proceedings the issuance of municipal bonds, but before any steps are taken or any expense incurred thereunder one of them gives notice of his withdrawal, he is not liable to contribute to the payment of expenses subsequently incurred by his associates. *Solomon v. Penoyer* (Mich.) Dec. 21, 1901.

In *Marsh v. Blackman*, 50 Barb. 833, a recovery of an installment due on a contract made by the defendants for the support of their father during his natural life was upheld, notwithstanding notice to the plaintiff from the defendants that they "shall pay nothing further under said contract, and prefer to pay such damages as you may be legally entitled to than to proceed any further under it." The court was of opinion that the contract was one that equity would specifically enforce against the defendants, and said: "If it be a case for specific performance, the plaintiff, having the power to perform, is at liberty to do so, and recover at law under the contract."

In *McAlister v. Safley*, 65 Iowa, 719, it was held that one who selected a monument to be completed, inscribed, and erected could not rescind the contract, and that notwithstanding notice that she would not take it before the seller had inscribed or erected it, the latter could complete and erect it according to the contract and recover the agreed price. In this case the transaction was treated as a sale by which the title to the monument passed.

J. G. G.

fore they had taken any steps under it. Appellant could not, under the facts of this case, rescind the agreement without the assent of all parties thereto. Nor is it claimed that he did rescind it. The utmost that can be urged is that he arbitrarily refused to perform his part of the contract. This would subject him to an action for damages for breach of the contract. But the plaintiffs could not, in the face of this refusal on his part to perform, undertake and carry to completion the work under the contract to be performed by them, and thereupon insist that they were entitled to recover from the appellant his share of the contract price. The authorities are very clear on this point. Bishop, Cont. §§ 837-841; *Danforth v. Walker*, 87 Vt. 239, 40 Vt. 257; *Moline Seals Co. v. Beed*, 52 Iowa, 807; *Nebraska City v. Nebraska H. Gas-Light & C. Co.* 9 Neb. 339; *Clark v. Marniglia*, 1 Denio, 317; *Butler v. Butler*, 77 N. Y. 472.

No damages for breach of the contract by the appellant were proved, nor was there any allegation of such damages. The action was upon the contract to recover the contract price, and not for damages for breach of it. For this vital error the judgment is reversed, and a new trial ordered.

All concur.

ON REHEARING.

It is urged that *Kadiash v. Young*, 108 Ill. 170, and *Roebbing's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, are conclusive in favor of the doctrine that one party to a contract cannot, by notice of his determination not to perform, given before the time to begin performance has arrived, create such a breach of the contract as will compel the other party, who does not assent to the breach, to treat the contract as then broken, and limit him to the recovery of such damages as are proper on the basis that the contract is then broken. These cases do sustain such a doctrine, and it is undoubtedly an elementary rule of law. The full scope of these and kindred decisions is that the person who has not broken his part of the compact may, at his option, extend to the person who has signified his purpose to violate the agreement an opportunity for repentance, measured by the time to elapse between the refusal to perform and the date when performance is to commence. He may, and some cases hold that he must, treat the contract as subsisting, not for the purpose of performing it in the face of a persistent, unchangeable refusal of the other party to carry out, and then of recovering the full contract price, but for the purpose of insisting that such party shall, when the time of performance arrives, finally determine whether he will stand by his agreement or by his former repudiation thereof. All that these cases decide is that the repudiating party may not force the other party to sue for a breach of the contract before the time of performance arrives, and therefore have his damages fixed by the condition of affairs at the time of the premature repudiation of the contract, as though such repudiation had been made on the day of performance. But when the time to perform

arrives, then, if the refusal to carry out the agreement is not withdrawn, there is no principle on which the other party to the contract can perform and sue for the contract price any more than in the case of a refusal made for the first time on the very day of performance. The party keeping the contract need not mitigate the damages by treating as final a premature repudiation thereof, but this is far from establishing the proposition that he may increase the amount to be paid by the other party by completing the contract after notice of repudiation, made on the day of performance, or made before that day, and never withdrawn, but, on the contrary, constantly insisted upon down to and including that day. In *Kadiash v. Young*, 108 Ill. 170-185, the soundness of the cases cited to sustain our conclusion is expressly recognized. After citing some of them, the court says: "It will be observed in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it. As it was said in *Frost v. Knight*, L. R. 7 Exch. 111, the defendant was, in case of notice, not to perform a contract the time of performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind; in those there was." The court quotes with approval the language used in *Danforth v. Walker*, 87 Vt. 244, where the court says: "While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that hour or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages of the other party." It is to be noted that in the case at bar the refusal to perform was not premature. The contract specified no time when performance thereof should be entered upon by the plaintiffs, but it provided that the building, with all of its equipments, must be finished within 100 days after the amount had been subscribed. The plaintiffs might, under these provisions, have entered upon the performance of their part of the agreement at once. It was the right of the appellant to notify them immediately of his determination not to carry out his part of the contract, in order to save himself from the increased damage which a partial performance before notice might cause. *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384, is confidently relied on by respondents. The language used in this and similar cases must be construed in the light of the facts. In the case in 114 Mass. an action for damages was brought before the defendant was under any obligation to perform the contract, the action being based upon defendant's premature refusal to carry out the contract. The decision merely was that the action was prematurely

brought; that the defendant might, before the time for performance arrived, change his mind, and insist on a performance of the contract. The case does not decide that when one party to a contract may, under its terms, enter upon the performance of it, the other party may not, subject always to liability for damages, prevent the completion of the contract, or prevent the commencement of work thereunder, for the purpose of subjecting him to liability for the full contract price. If respondents' contention is sound, it was beyond the power of the appellant ever to escape the payment of the contract price, although he had been the only party to the contract on his side. He could not break it so as to subject himself to damages, and prevent the respondents from completing the creamery and holding him for the contract price until the same had been fully completed and ready for delivery, for only then, it is said, was the appellant bound to do any act on his part under the contract; and when the creamery was finished it was claimed that appellant would not escape payment of the price, because it is said the title instantly vested in him and his associates in the contract, not only without his assent, but against his will. What, then, becomes of the doctrine that one party to a contract cannot, except in special cases, enforce specific performance thereof, but must make his claim for damages? And what becomes of the authorities recognized as sound by respondents' own cases, which hold that the party who has something to do must not, after notice of refusal from the other party, go on with the work, and thus increase the liability of such other party to him? Respondents seem to urge that at no time is notice of refusal to perform efficacious to prevent performance on the other side except at the moment that the party breaking the compact is bound to perform. Their own cases are against this position. Said the court in *Daniels v. Newton*, 114 Mass. 538, 19 Am. Rep. 384: "The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when, and in a manner in which, he is entitled to perform it or have it performed." It may well be true that where the performance by the party notified not to perform consists of a single act—as the tender of a deed—notice before the time for such delivery will not warrant an action for damages; but where the final act of tender is the culmination of other acts which, in the nature of the case, must precede it,—as where the party is to manufacture or build the thing to be delivered, then it is quite clear that the conduct which before the time of delivery prevents the taking of the preliminary steps,—the manufacture of the article or the erection of the building,—as effectually prevents, before the day of tender arrives, the possibility of delivery, as though that day in fact had arrived, and a tender of the thing had been rejected. In such a case the contract is as effectually broken by the notice not to go on with it, given before the

day of delivery arrives,—the person who is to do the work having then the right to enter upon the performance of the same,—as though the notice had been given on the very day of delivery. The question in all cases is whether one party has prevented performance by the other party at the time when performance by him is due. This can be done as well by preventing the taking of those preliminary steps without which the final step cannot be taken as by preventing the taking of such final step itself. These preliminary steps must often precede by many days the time of performance, and it therefore must follow that notice of refusal to carry out the contract in such a case, given before the time of performance, will operate as a breach of the contract in case the time has arrived at which the person willing to keep the contract may enter upon the work under the contract.

Counsel refer to the statute touching rescission of contracts, and insist that the appellant has not shown that the case falls within any of the provisions of such statute. In this he is correct. There was no rescission of the contract. A lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract. This is the common-law rule, and our statute merely echoes this rule. "A contract is extinguished by rescission." Section 3588, Comp. Laws.

Counsel seem to be unable to make the distinction between the right of one party to refuse to perform his agreement, always subject to his liability for damages, and the rescission or utter destruction of a contract for all purposes, resulting from mutual consent, or from the action of one party alone, where by reason of fraud, duress, or other legal ground for rescission the right is vested in him to elect to abrogate the contract without liability thereunder for damages or for the contract price. The burden of the argument seems to be that no person can break a contract unless he can and does rescind it. The result is that no compact can ever be violated so as to subject the person attempting to infringe it to damages, for there is no breach on this theory, except in cases where there can be no breach, because by rescission the contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. The two lines of thought run in diverse directions. One starts with the fact that one party has refused to perform, and leads to the conclusion that the other party must do nothing from the moment he is aware of such refusal to increase the liability of the one breaking the agreement, and must, therefore, so long as such refusal is not recalled, abstain from going on with the work he has to perform under the contract; the other finds a mutual abandonment of the contract, or an abandonment by one who, under the law, has a legal right to abandon it, and leads inevitably to the conclusion that there is no contract to be performed by any one, and hence that no damages for breach thereof can be incurred, and

that no liability for the contract price can possibly exist. That the Massachusetts supreme court, in *Daniels v. Newton*, did not intend to decide contrary to our views is apparent from the fact that the same court, only six months later, without overruling *Daniels v. Newton*, or even regarding it as at all bearing on the question, expressly recognized and enunciated the doctrine on which we rest our decision. In *Collins v. Delaporte*, 115 Mass. 159, that court says: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits."

It is urged that the plaintiffs were bound to build the creamery despite the defendant's refusal to go on with the contract, because there were other parties to the contract, who could have held the plaintiffs liable in damages had they, acting upon defendant's breach of the agreement, refrained from constructing the building. We see no principle on which the other parties could have recovered from the plaintiffs damages under these circumstances. Their agreement was with all the defendants, including this appellant. They did not agree to build a creamery for the other defendants, and take their responsibility for the contract price. It furnishes an ample justification for a failure to go on with the work that one of the contracting parties—perhaps the only responsible one—has by a breach of the contract made it impossible for the plaintiffs to complete the building, and charge such party with the contract price. The contract was entire, and the plaintiffs could not be compelled to perform it as to and for only a portion of the contracting parties. It is illogical to assert that the plaintiffs would have been liable to the other parties had they, acting upon the appellant's breach, refrained from carrying out the agreement on their part. On what principle does this assertion stand? The general rule is, as we have already stated, that the contracting party who has certain things to do under his contract, has no right to proceed with the execution of the contract, and charge the other party with the expense thereof, after he has been notified that such other party will not stand by his compact. There is no reason why the rule should not apply in the case of a refusal to perform, emanating from one of two. The parties on the same side of a contract are bound together in interest, and there is no reason why all of the rest should not be responsible for the default of any one. The nature of the engagement is that the contracting party will continue bound to perform only on condition that they all continue faithful to their compact, and not on condition of only a portion standing by their engagement. Whether defendant may be liable to his co-contractors for breach of an implied agreement to keep his promise we need not now decide.

It is urged that the decision in *Buchel v. Lott* (Tex. App.) 15 S. W. Rep. 413, is in point. We cannot see the faintest resemblance between that case and the one at bar. The appellant, with others, had signed a

subscription list, aggregating \$23,000. The amount subscribed was to be a bonus to be paid on the construction of a line of railway within a specified time. The railroad was so constructed, and in an action against the appellant to recover the amount of his subscription, the court held him liable on the theory that the consideration for his promise was executed; the promise of each subscriber being such a consideration for the promise of the others as rendered absolute the obligation to pay the amount of the subscription; and that, therefore, appellant could not withdraw his subscription. In the class of cases of which this is one the doctrine is recognized that the liability is as absolute as though each subscriber had received as a loan the amount which he agrees to pay as a subscription. There is an obligation to pay the money, which is indefeasible by any act of the subscriber. Said the court in this case: "He became bound upon said contract, the moment he signed it, for the amount subscribed by him, subject only to the condition that the railway should not be constructed according to the terms of the contract." This doctrine is by no means recognized universally, and it is not too much to say that the weight of reason and authority is against it. *Twenty-Third St. Bapt. Church v. Cornwell*, 117 N. Y. 601, 6 L. R. A. 807; *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *University of Des Moines v. Livingston*, 57 Iowa, 807.

But this question we are not called upon here to decide, nor is it at all material, for, assuming the decision to be sound, it makes nothing against our position, for here there was a general agreement on the part of all to pay \$5,000 for the creamery. Each was bound for the full amount. The plaintiffs agreed to build the creamery for \$5,000, and the engagement of the subscribers is to pay, not the amount set opposite their several names, but the sum of \$5,000 generally. "We, the subscribers hereto, parties of the second part, agree to pay the above amount for said creamery when completed," etc. The consideration for this joint promise to pay \$5,000 was the erection of this creamery. The consideration therefore was not executed, but executory. There did not arise upon the signing of the contract by the appellant an absolute obligation to pay \$5,000, or any portion of it, the same as though he had actually received the consideration for the promise,—the theory upon which subscribers are held liable in the class of cases to which *Buchel v. Lott*, belongs—but he became bound to stand by his agreement, or, in default thereof, to pay such damages as a breach of his contract would cause.

The petition for rehearing is denied.

All concur.

Bartholomew, J., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision: **Judge Templeton**, of the first judicial district, sitting by request.

CALIFORNIA SUPREME COURT.

William S. BARNES, *Recept.*,
v.
Hattie A. Smith BARNES, *Appt.*

(.....Cal.....)

1. The filing of a paper stating that an action is dismissed does not take away jurisdiction of the court until entry of a judgment of dismissal.
2. Causing mental suffering, although not affecting bodily health, may constitute extreme cruelty under Civ. Code, § 94, which defines it as the "infliction of grievous bodily injury or grievous mental suffering."
3. There is no abuse of discretion in refusing a motion for a continuance if the circumstances cast suspicion on the good faith of the application.

(Beatty, Ch. J., and DeHaven and Harrison, JJ., dissent.)

(June 18, 1902.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff and from an order denying a new trial in an action brought to secure a divorce. *Affirmed.*

The case is stated in the opinion.

Mr. John P. O'Brien, with Messrs. E. L. Campbell, W. T. Baggett and W. W. Foote, for appellant:

The court erred in making its order herein dated July 2, 1889, granting plaintiff leave to withdraw his dismissal, and had no jurisdiction to proceed with the trial of the cause.

Thompson v. Spragg, 66 Cal. 350; *Merritt v. Campbell*, 47 Cal. 542; *Grimes v. Chamberlain*, 27 Neb. 605.

The discretion confided to the court to deny continuance is a legal discretion to be exercised not capriciously or arbitrarily but by fixed legal principles, and in a manner to subserve and not to impede or defeat the ends of substantial justice.

Bailey v. Taaffe, 29 Cal. 424; *Lybecker v. Murray*, 58 Cal. 189; *Stringer v. Davis*, 30 Cal. 322; *Purinton v. Frank*, 2 Iowa, 565; *State v. Painter*, 40 Iowa, 298; *Ex parte Marks*, 49 Cal. 681; *Ex parte Hoge*, 48 Cal. 5; *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723; *Carter v. Wharton*, 82 Va. 264; *Haines v. Roebuck*, 47 N. J. L. 228; *Wright v. Leary*, 29 Minn. 466.

Courts are extremely liberal in granting adjournments even when simply expedient and much more when any necessity exists.

Turner v. Morrison, 11 Cal. 31.

The public has an interest in such cases, and the court should afford both parties the fullest possible hearing in such matters.

McBlain v. McBlain, 77 Cal. 509; *Wadsworth v. Wadsworth*, 81 Cal. 138; *Cottrell v. Cottrell*, 88 Cal. 460; *Stewart, Mar. & Div.* § 327.

The finding of the court, as a conclusion of law, "that the defendant has inflicted upon the plaintiff grievous mental suffering," is wholly without support from and is wholly contrary to the evidence produced.

Waldron v. Waldron, 9 L. R. A. 487, 85 Cal. 251.

The evidence on behalf of plaintiff does not constitute or support a cause of action for divorce on the ground of extreme cruelty.

Ibid.; *Mahoney v. Mahoney*, 19 Cal. 626, 81 Am. Dec. 91; *Rice v. Rice*, 6 Ind. 100; *Beebe v. Beebe*, 10 Iowa, 138; *Close v. Close*, 25 N. J. Eq. 526; *Stewart, Mar. & Div.* §§ 263-267.

The alleged accusations if made at all,—and we have only the hired private detective, Mrs. Mahoney's evidence to support the allegation,—were never made by the defendant either in the presence of the plaintiff or in public. They were made, if at all, to a private detective employed for the very purpose, no doubt, of inducing the defendant, under the guise of a sympathetic friend, to say harsh things against her husband. The plaintiff could never have heard of them but for the act of his father in purposely communicating them, that he might, if possible, induce the son to abandon the defendant. There is not an adjudication by any court, and we confidently believe never will be, that accusations thus made constitute a ground for divorce.

Blake v. Blake, 70 Ill. 618; *Moller v. Moller*, 115 N. Y. 466; *Peck v. Peck*, 10 West. Rep. 524, 66 Mich. 586; *Minds v. Minds*, 9 West. Rep. 125, 65 Mich. 633.

The uncorroborated testimony of Mrs. Mahoney was insufficient to support a decree of divorce in the case at bar.

Blake v. Blake, *supra*; *Browning, Mar. & Div.* p. 70; *Moller v. Moller*, *supra*.

Mr. W. S. Hinkle, for respondent:

This action was never dismissed, and the court had jurisdiction to make all proper orders therein, and to try and determine the same.

Seymour v. Wood, 68 Cal. 81; *Sore v. McGovern*, 65 Cal. 244; *Page v. Alameda County Super. Ct.* 76 Cal. 372; *Page v. Page*, 77 Cal. 88; *Re Cook*, 1 L. R. A. 567, 77 Cal. 230.

The general appearance for the defendant by Hon. David S. Terry and W. T. Baggett, Esq., gave the court jurisdiction of the person of defendant.

Douglas v. Pacific Mail S. S. Co. 4 Cal. 304; *Seale v. McLaughlin*, 28 Cal. 668; *Mahony v. Middleton*, 41 Cal. 41.

The filing by defendant of her answer and cross-complaint was a second appearance on her behalf, and waived service of summons

NOTE.—What seems to be the present tendency of the law on the subject of divorce is well illustrated by the above decision, in which the more conservative position of the earlier cases is departed from and one of greater liberality in favor of divorce is adopted.

16 L. R. A.

For another illustration of this tendency, see *Robinson v. Robinson* (N. H.) 15 L. R. A. 121.

For note on the subject of cruelty as a ground for divorce, see *Doolittle v. Doolittle* (Iowa) 6 L. R. A. 187.

or the issuing of process. By this proceeding the defendant was fully within the court's jurisdiction.

Cronise v. Carphill, 4 Cal. 121; *Snydam v. Pitcher*, 4 Cal. 280; *Douglas v. Pacific Mail S. S. Co. supra*; *Smith v. Curtis*, 7 Cal. 584; *Hayes v. Shattuck*, 21 Cal. 51; *Randall v. Falkner*, 41 Cal. 242; *Foote v. Richmond*, 42 Cal. 489; *Dyer v. North*, 44 Cal. 157; *Johnson v. Tyson*, 45 Cal. 257; *Kimball v. Alameda County Suprs.* 46 Cal. 19; *Ghiradelli v. Greene*, 56 Cal. 629; *Spring Valley Water Works v. Schottler*, 62 Cal. 70; *Tyrrell v. Baldwin*, 67 Cal. 1.

The affidavit of an attorney of a party that he is "informed and believes" as to any fact in issue is not evidence which could properly have any persuasive influence on the court.

Barnard v. Wilson, 66 Cal. 258; *People v. Jenkins*, 56 Cal. 5.

An allegation that the facts could not, "so far as affiant knows, be proved by any other person or persons," falls far short of the well-known rule that the party must show that the facts cannot otherwise be proved.

Poppe v. Dalton, 81 Cal. 218.

Mr. Baggett's voluntary absence from the state after the cause was set for trial was no ground for a continuance.

Lightner v. Mencl, 35 Cal. 452; *Kern Valley Bank v. Chester*, 55 Cal. 51.

The whole case showed that the defendant wished the court to continue the trial of a case which had been three times set for trial because she was traveling with an Opera Bouffe Company which was expected to bring up in San Francisco some time during the month of January, and that her claim of sickness was a transparent sham. There was no abuse of discretion in proceeding with the trial under such a state of facts.

Frank v. Brady, 8 Cal. 47; *Musgrove v. Perkins*, 9 Cal. 212; *Pilot Roak Creek Canal Co. v. Chapman*, 11 Cal. 161; *Griffin v. Polhemus*, 20 Cal. 181; *People v. DeLacy*, 28 Cal. 590; *People v. Gavitt*, 28 Cal. 156; *Hastings v. Hastings*, 31 Cal. 95; *Wilkinson v. Parrott*, 32 Cal. 102; *Harper v. Lamping*, 38 Cal. 641; *Carey v. Philadelphia & C. P. Co. Id.* 694; *People v. Mortimer*, 46 Cal. 114; *Kern Valley Bank v. Chester, supra*.

The false and malicious charges made by defendant against the plaintiff entitled him to the relief awarded by the court.

De Halsey v. Halsey, 74 Cal. 491, 67 Cal. 24; *Powelson v. Powelson*, 22 Cal. 358.

Whether a false and malicious charge, made after the actual separation of the parties, would be less apt to inflict grievous mental anguish for that reason, is for the trial court to determine in view of all the facts.

Valensin v. Valensin, 73 Cal. 106.

Nor need the vicious slander any more than threats or words of menace be addressed to or in the presence of the assailed party.

1 Bishop, Mar. & Div. p. 730; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. Rep. 778, 3 Eng. Eccl. Rep. 329; *Hollister v. Hollister*, 6 Pa. 449.

As to the view which courts take of such conduct as that imputed to the plaintiff by the defendant, see—

Ciocci v. Ciocci, 26 Eng. L. & Eq. 604; *Leach v. Leach* (Me.) 3 New Eng. Rep. 828; *Holyoke v.* 16 L. R. A.

Holyoke, 3 New Eng. Rep. 169, 78 Me. 404; *Popkin v. Popkin*, 1 Hagg. Eccl. Rep. 765.

The law gives the same relief to a complaining husband as to a complaining wife.

Kirkwall v. Kirkwall, 2 Hagg. Consist. Rep. 277; *Waring v. Waring*, 2 Phillim. 182, 1 Eng. Eccl. Rep. 210; *White v. White*, 1 Swab. & T. 591; *Lynch v. Lynch*, 88 Md. 828; *Kempf v. Kempf*, 84 Mo. 211; *Jones v. Jones*, 66 Pa. 494.

Per Curiam:

Action for divorce upon the ground of extreme cruelty. Judgment was entered in favor of plaintiff, and the defendant appeals.

1. After the filing of the complaint in this action, and before any appearance on the part of defendant, the attorney for plaintiff filed with the clerk of the superior court a paper properly entitled in the cause, and stating, "The above-entitled action is hereby dismissed;" but no judgment of dismissal was entered. It is claimed by appellant that upon the filing of this paper the court lost jurisdiction of the action, and that jurisdiction was not restored by the subsequent appearance and answer of defendant. This objection to the jurisdiction of the court was made in various forms in the court below, and overruled. The court did not err in its rulings upon this point. The filing of the paper referred to was, in effect, an order for a dismissal of the action, and would have been sufficient authority for the clerk to have entered a judgment of dismissal; but until the entry of such judgment the court retained jurisdiction of the case. *Page v. Alameda County Super. Ct.* 76 Cal. 372; *Accock v. Halsey*, 90 Cal. 215; *Rochat v. Gee*, 91 Cal. 355.

2. It is urged by appellant that the facts alleged in the complaint and found by the court do not entitle plaintiff to the decree which he obtained, dissolving the marriage which existed between him and appellant. The cruelty alleged and found is that appellant inflicted grievous mental suffering upon plaintiff by imputing to him, in the presence of others, the grossest immorality and personal impurity. It is not necessary to state here, with any particularity, the language by which these charges were made. It is sufficient to say that such charges, if false, were well calculated to bring upon a person of ordinary sensibility grievous mental suffering. But it is not alleged in the complaint, nor is it found by the court, that the charges of which plaintiff complains had any injurious effect upon his health, and for this reason it is claimed that the complaint and findings do not support the judgment under the law as declared by this court in *Waldron v. Waldron*, 85 Cal. 251, 9 L. R. A. 487. It was held in that case that a finding to the effect that the defendant had inflicted upon the plaintiff therein grievous mental suffering, but without injury to her health, was not equivalent to a finding of extreme cruelty upon the part of the defendant, and would not sustain a judgment for divorce upon that ground; and in discussing the question as to what constitutes such extreme cruelty as will justify a divorce, the court said: "Although the character of the ill treatment, whether it operates directly upon the body or primarily

upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of the sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party." And it was further said in that case "that the practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body 'can be practically endured,' and must be endured if there is no other remedy than by divorce; because no 'scale' by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body." Tested by this rule, it must be conceded that the findings here are insufficient to sustain the judgment. But the case from which we have just quoted was decided by a bare majority of the court as it was then constituted, and, while the conclusion there reached finds support in many earlier cases cited in the opinion, we do not think it can be sustained without a wide departure from the letter and spirit of section 84 of the Civil Code of this state, which declares: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." The language of this section is plain, and cannot be properly construed as declaring that only grievous bodily injury shall constitute extreme cruelty, and that extreme mental suffering, which is not shown to have injuriously affected the body or health of the complaining party, is not sufficient. The tendency of modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual life of the parties to it,—a relation designed to bring to them the comfort and felicities of home life,—and between whom, in order to fulfill such design, there should exist mutual sentiments of love and respect. "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the health, . . . or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statute." *Carpenter v. Carpenter*, 30 Kan. 744.

Section 84 of the Civil Code is in harmony with the law as thus stated, and under it the infliction of grievous mental suffering is extreme cruelty. It may be true that there is "no scale by which to gauge the purely mental susceptibilities and sufferings" of another, nor is it necessary that there should be any such exact measure. The common judgment of mankind recognizes the fact that there may

be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this "grievous mental suffering" is a pure question of fact to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. As said by *Mr. Justice McFarland* in his dissenting opinion in *Waldron v. Waldron*, *supra*: "Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts." We cannot say in this case that the court was not fully justified in finding that the conduct of the defendant inflicted upon plaintiff grievous mental suffering, as alleged in the complaint. The evidence was sufficient to sustain the finding of the court that plaintiff had been a resident of the state for more than six months prior to the commencement of the action.

The refusal of the court to grant a continuance cannot be held to be an abuse of discretion. In *Kneebone v. Kneebone*, 83 Cal. 647, the court said: "It is settled law in this state that applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal, unless the record affirmatively shows that it abused its discretion. In *Mugroce v. Perkins*, 9 Cal. 212, the court, per Field, J., said: 'The granting or refusing a continuance rests in the sound discretion of the court below, and its ruling will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than the appellate court, and when it exercises a reasonable, and not an arbitrary, discretion, its action will not be disturbed.' And similar language has been used in many subsequent decisions." This action was commenced on May 14, 1889. The defendant was personally served with summons nine days later, and on June 21st she appeared, and demurred to the complaint. On July 28 the demurrer was withdrawn, and the defendant was allowed thirty days in which to answer the complaint. She procured further extension of time, and filed an answer and cross complaint on October 15, 1889. An application was made on the 16th of October to have the cause set for trial, but by reason of the illness of the presiding judge the hearing of the motion was postponed until the 25th, when the cause was set for trial on December 2, following. Counsel for defendant objected to the order of the court setting the case for trial on December 2 on the ground that it would be necessary to take the depositions of witnesses residing in New York; that defendant was an actress by profession, and dependent upon herself for a living; and that her senior counsel

would be necessarily absent from the state for about a month. Counsel for plaintiff stated that he would waive service of notice for the issuance of the commission to take depositions, and thereupon the order was made as stated. An application was made on December 2 for a continuance until the 15th day of January, 1890, and the cause was continued until the 6th day of December, 1889, at which time the motion for a continuance to January 15th was made and denied. The commission to take depositions was not issued until the 18th day of November, 1889. When the cause came on for trial, December 6th, 1889, counsel for defendant filed an affidavit, and in connection therewith several letters and telegrams received from the defendant, as a basis for his motion for a further continuance until January 15. It is apparent from the language of the court in denying this last motion that it believed the defendant was not acting in good faith, but was endeavoring to postpone the action of the court until her business engagements would bring her to San Francisco, and we cannot say that such conclusion may not have been fairly drawn from all the circumstances of the case. Defendant had actual notice more than six months prior to the day of the trial of the charge which plaintiff made against her, and the cause was at issue nearly two months before the trial occurred. It appears from the letters and telegrams that the defendant was at Minneapolis, Minn., November 15; Milwaukee, Wis., November 19; Marshalltown, Iowa, November 22; Des Moines, Iowa, November 23; Kansas City, November 26 and 27; St. Louis, December 2d, 4th and 6th; and was informed at these times of all that had occurred. The court doubtless concluded that, if the defendant could thus travel about in the east, she was able to make the trip to San Francisco in time to be present at the trial; and, as stated before, we cannot say that its order was an abuse of discretion. It has been held here that there is no abuse of discretion in refusing a motion for a continuance if the circumstances cast suspicion on the good faith of the application, and induce the belief that it was intended only for delay. *People v. Mortimer*, 46 Cal. 120. While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience.

The judgment and order are affirmed.

De Haven, J.:

I dissent from the judgment and from so much of the foregoing opinion as holds that the action of the court below in denying the motions of defendant for a continuance was not an abuse of discretion. The defendant is a nonresident of the state; and her answer was filed October 15, 1889, and on the 25th of that month the court, on motion of plaintiff, and against the objection of defendant, set the case for trial on December 2, 1889; and afterwards the time for trial was continued by con-

sent until December 6, 1889, without prejudice to the right of defendant to move for a further continuance. Upon that day the defendant moved for a continuance of the case until January 15, 1890. The motion was upon the ground that depositions of certain witnesses had not been returned, and also for the alleged reason that defendant was ill at Kansas City, Mo., and unable to come to San Francisco without endangering her prospects for recovery. This motion was supported by the affidavit of one of her attorneys, which stated, among other things, "that affiant is further informed by telegrams received from defendant on the 23d, 26th, and 30th days of November, 1889, and also from affidavits of Dr. J. C. Rogers, hereto attached, and affiant believes, and thereupon states, that defendant is now ill at Kansas City, Missouri, and unable to travel without danger to her health." Accompanying this was the affidavit of defendant herself and her physician to the same effect. Many telegrams from defendant to her attorney were also produced. I am unable to find anything in the record which directly contradicts the facts stated in these affidavits in regard to the state of defendant's health. That which comes the nearest to doing so is found in the statement or affidavit of plaintiff's father, wherein it is said: "I am informed and believe that she is now performing as an opera bouffe artist with a company, and has been doing so for many months, and is not too sick to come here or travel." Manifestly, this is not an assertion that the defendant was not in fact sick, as stated in the affidavits of herself and physician; but it is argued that the telegrams, dated at different places, show that she was traveling with her company, and, therefore, that she was not sick. These telegrams certainly show that she had not severed her connection with the company, and that she was able to travel between the places, but it does not necessarily follow, because she did this, that it would have been prudent for her to attempt the longer overland journey. The motion for a continuance until January 15th was denied, and upon the next day the defendant moved for a continuance for one week. The motion was made upon the same affidavits, and additional telegrams and a letter from defendant. One telegram was dated upon the previous day, December 6, and is as follows: "Allow sufficient time for traveling. Last notice too short. Fight for continuance. Telegraph early." The letter was dated December 2, 1889, and was addressed to her attorney. In it she said: "I am very anxious to hear definitely about the trial. I am unable to take so long a journey alone at present. I have worried myself ill, until nervous prostration got the better of me. I am also suffering from rheumatism. I must give notice this week to the company, if I intend to remain with them, and open January 18 in San Francisco. I can't put them off in this matter. I can't hear from you, and every night they send for decided answer, and I am unable to decide. If I come to San Francisco, I give up my engagement in the middle of winter. You say nothing about the divorce being granted to me, if I accept settlement. I have done nothing to grant a divorce, but if there is no other alter-

native I must." This motion was also denied, and in so doing, as well as in its denial of the previous motion, I think the court erred. The defendant was a nonresident of the state, an actress by profession, and under engagement as such, and while it appears from the letters and telegrams to her counsel that she did not wish to break this engagement if she could avoid it, and that this was one reason why she may have desired a postponement of the trial, still there is nothing in these letters and telegrams to warrant the inference that she and her counsel were acting in bad faith with the court in asking for a continuance upon the ground of the state of her health, as represented in the affidavits of herself and physician, or that such affidavits were untrue.

In actions for divorce public policy imperatively requires that nothing should be done in haste. The public are interested in having no divorce granted except for adequate cause, and the surest way to determine whether there is good cause or not is to hear both sides. In accordance with this rule, it has always heretofore been held by this court that in actions for divorce, applications to set aside a judgment of default; and for leave to answer, a more liberal rule is to be applied than in other cases, in which only private rights of property are involved. Thus in the case of *Wadsworth v. Wadsworth*, 81 Cal. 182, this court reversed the action of the lower court in refusing to set aside a default, although it was admitted that the appellant had been guilty of such negligence as would in an ordinary action have deprived her of the right to such relief. The court there said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in *McBain v. McBain*, 77 Cal. 509. In that case the court, per Paterson, J., said: 'The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while, in an ordinary action, the neg-

lect shown might be sufficient to deprive her of a right to relief, yet in this kind of case a more liberal rule should prevail." It is plain to my mind that if the court below had kept in view the rule as thus declared it would not have denied to the absent defendant a continuance for one week, which would have enabled her to be present, and give evidence in her own defense; more especially when such motion was based upon the solemn affidavit of her counsel, in which he assured the court, upon his information and belief, "that it was the intention of the defendant to be present in San Francisco at said trial on December 2, 1889, and that she was and is prevented therefrom by her said illness, and not otherwise." It is very apparent from all of the telegrams, letters, and affidavits submitted to the court that defendant desired to be present at the trial, and neither of the motions for a continuance called for any unreasonable delay, and there is nothing in this record to show that plaintiff could possibly have been injured if either of them had been granted. Under such circumstances, the refusal of the court to postpone the trial was error, and not within the limits of that judicial discretion which the law intends shall govern and restrain courts in their rulings upon such questions, and which discretion is never capricious, arbitrary, or unjust, but is always "exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice." *Bailey v. Taafse*, 29 Cal. 424. Whatever cause may have existed for a divorce in this case, or however unwise or unfortunate the marriage between the parties may have been in the first instance, I can find in such facts no justification for bringing on the trial against a nonresident woman in fifty-three days after issue joined, in the face of a demand for the limited and reasonable postponement asked for by her counsel, and which motions it must be presumed from this record were made in good faith. The marriage was a lawful one, and gave to the defendant rights of which she should not be deprived without full and complete opportunity for defense. The judgment and order should be reversed.

We concur: **Beatty, Ch. J.; Harrison, J.**

VERMONT SUPREME COURT.

Joseph BALLARD

v.

Oscar A. BURTON.

(.....Vt.....)

1. Forebearing to withdraw money from a bank for a reasonable time although without any definite time agreed upon is a sufficient consideration for the signing by a third

NOTE.—Upon the question of what will constitute a sufficient consideration for a contract, see note to *First Presby. Church v. Cooper* (N. Y.) 8 L. R. A. 468; *Talbott v. Stemmons*, 5 L. R. A. 856, and note, 89 Ky. 222.

R. A.

See also 36 L. R. A. 463.

person as surety of another certificate of deposit in place of a former one which is surrendered.

2. A benefit to the promisee or a detriment to the promisor is not necessary to make a good consideration for a contract if the exercise of a present right is forborne because of the promise.
3. The return of a certificate of deposit is properly made to the receiver of a bank where the bank has been closed and a receiver appointed.
4. One who takes a new certificate of deposit signed by a third person instead of withdrawing his money may testify that he would have withdrawn it if such person had not signed the certificate.

5. Merely adding the word "surety" to his signature by one who signs his name on the back of a certificate of deposit in order to induce a depositor to take such certificate in place of a former one, instead of withdrawing his money, does not prevent him from being held liable as maker instead of as indorser.

(June 3, 1892.)

EXCEPTIONS by defendant to rulings of the Franklin County Court made during the trial of an action brought to enforce the alleged liability of defendant for the amount of a certificate of deposit which he had indorsed, which resulted in a judgment in favor of plaintiff. *Judgment reversed.*

The certificate of deposit which constituted the foundation for the cause of action was as follows:

"No. 3,488. First National Bank of St. Albans. St. Albans, Vt., Jan. 14, 1884. I hereby certify that Joseph Ballard has this day deposited in this bank nine hundred sixty-two dollars, payable to the order of himself on return of this certificate properly indorsed, with interest at 4 per cent per annum.

[Signed] A. Sowles, Cashier;"
—and on the back thereof, "E. A. Sowles, A. Sowles. O. A. Burton, Surety."

Messrs. Farrington & Post and Wilson & Hall, for defendant:

In order to sustain the action, plaintiff must show a valuable consideration, and a valuable consideration is defined as imparting a benefit or gain to the party making the promise, or a loss or injury of some kind to the party to whom it is made.

Dan. Neg. Inst. § 160.

No benefit is shown either to the bank, to E. A. Sowles, to Albert Sowles, or to the defendant. The only consideration for the certificate was a past and executed consideration; and such a consideration will not support the promise of a third party.

1 Chitty, Cont. p. 68; *Ritz v. Adams*, 9 Vt. 283; *Harding v. Oragie*, 8 Vt. 501.

It cannot be said that the simple fact of leaving money that had been on deposit for years, without any definite time being fixed and subject to immediate payment is a benefit to the debtor. The bank was insolvent and the payment to any creditor in full would naturally work an injury to the directors and stockholders by increasing their personal liability, and liability to a larger assessment upon their stock.

U. S. Rev. Stat. § 5242.

The exchange of certificates worked no harm to the plaintiff; his money was in the bank and he waived no security. Forbearance to sue is not enough to support a promise; there must be an agreement to forbear.

Mcconney v. Stanley, 8 Cush. 85; *Manter v. Churchill*, 127 Mass. 84.

The bank was hopelessly insolvent and plaintiff knew it. Hence he could not have retained the money had he drawn it.

U. S. Rev. Stat. § 5242; *Larkin v. Hapgood*, 56 Vt. 597; *First Nat. Bank of Selma v. Colby*, 88 U. S. 21 Wall. 606-616, 22 L. ed. 687-689; *Bump, Bankr.* § 5128, and cases cited; *Roberts v. Hill*, 24 Fed. Rep. 571.

16 L. R. A.

Plaintiff never returned the certificate in question indorsed, and never made a demand on the bank or either of the indorsers, therefore he cannot recover.

Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; *Smilie v. Stevens*, 39 Vt. 315; *Brown v. McElroy*, 52 Ind. 404.

Messrs. H. C. Adams and Ballard & Burleton, for plaintiff:

The case shows that the plaintiff forbore drawing out his money. Whether any particular time was given is immaterial.

Hakes v. Hotchkiss, 23 Vt. 231.

Any damage or suspension or forbearance of a right will be sufficient to sustain a promise.

Seaman v. Seaman, 12 Wend. 881.

Start, J., delivered the opinion of the court:

The defendant's motion for a verdict was properly overruled. It appears from testimony, not controverted, that the defendant was a stockholder and director of the First National Bank of St. Albans. The plaintiff and his sister had money deposited there, evidenced by certificates of deposit. There was a run on the bank, and the plaintiff presented these certificates, and demanded the money evidenced by them. There was a sufficient amount of money at hand to pay the sums demanded; but the officers of the bank desired to retain it, and asked the plaintiff to leave it. Thereupon he told them he would accept of a new certificate signed by the defendant; otherwise he wanted the money. They gave him such a certificate, and he surrendered up to the bank the old certificates. The plaintiff subsequently paid his sister the amount of her certificate, which was included in the new certificate. The cashier of the bank understood the plaintiff was to forbear for a reasonable time the exercise of his right to draw his money, and the plaintiff did forbear until the bank closed its doors, and its funds went into the hands of a receiver. At this time the bank was insolvent. The evidence fails to show that a definite period of forbearance was agreed upon, but no question is made but that the plaintiff did forbear for a reasonable time. The uncontroverted evidence clearly entitled the plaintiff to a holding by the court that there was a sufficient consideration for the defendant's promise. The request by the officers of the bank that the plaintiff leave the money, his reply, the giving of a new certificate, the surrender of the old ones, and the forbearance of the plaintiff admit of but one interpretation. The plaintiff, in consideration of a new certificate signed by the defendant, surrendered the old certificates, and agreed to and did forbear the exercise of a legal right to then draw his own and his sister's money. In view of the uncontroverted facts and circumstances in the case, any other construction of the contract would be meaningless. It is a rule, in construing contracts, that they are to be so understood as to have legal and actual operation; and a construction which would be senseless, in view of the circumstances of the case, or wholly inapplicable, should never be adopted. *Story, Cont.* § 640; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Evans v. Sanders*, 8 Port. (Ala.) 497, 38 Am. Dec. 297.

Words are not to be construed in a frivolous or ineffectual sense, when a contrary exposition can be given them. They should have a reasonable construction, according to the intent of the parties. Chitty, Cont. 79. In *Gunnison v. Bancroft*, 11 Vt. 490, it is held that language used by one party to a contract is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it. In *Judevine v. Goodrich*, 35 Vt. 19, where one, in reply to the request of another for a license to do something in respect to the former's property, did not intend to accede to the request, but purposely used language susceptible of a double interpretation in this respect, with the intention that the other party should derive the impression that he did accede to the request, and the other did derive such impression and relied on it, it was held that he was bound to the same extent as if he had, in express words, granted the license. When the plaintiff said to the officers of the bank, in reply to their request that he leave the money, that he would accept a new certificate signed by the defendant, otherwise he wanted his money, they had the right to understand him as offering to leave the money for a reasonable time if such a certificate were furnished. They accepted of his offer, furnished the certificate, he accepted of it, and forbore for a reasonable time the exercise of his right to draw the money. All parties seemed to have understood that such was his undertaking, and what was said and done admits of no other interpretation, and such will be deemed to have been the contract.

It is insisted that the defendant's promise was without consideration, because no time of forbearance was agreed upon. A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise to pay the debt by a person other than the debtor. *King v. Upton*, 4 Me. 387, 16 Am. Dec. 266; *Elton v. Johnson*, 16 Conn. 253; *Hove v. Taggart*, 133 Mass. 284; *Prouty v. Wilson*, 123 Mass. 297; *Robinson v. Gould*, 11 Cush. 55; *Moore v. McKenney*, 83 Me. 80. In *Hove v. Taggart*, *supra*, Field, J., in delivering the opinion of the court, says: "It seems to have been assumed in this commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise." In *Moore v. McKenney*, *supra*, decided by the Supreme Court of Maine in 1890, the defendant wrote his name upon the back of the note declared upon, intending thereby to guarantee its payment. He did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; no time of forbearance was agreed upon, and it was held that the court properly ordered a verdict for the plaintiff. Walton, J., in delivering the opinion of the court, says: "If the promise is in general terms, no particular time being named, the law implies that the forbearance shall be for a reasonable time.

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Such is the legal construction of such a promise. The debtor, therefore, by such promise, does obtain a right, not only to some delay, but to a reasonable delay; such, as, under all the circumstances, he is reasonably entitled to." In *King v. Upton*, *supra*, the promise countell on was to pay the debt of another, in consideration that the creditor would "forbear and give further time for the payment of the debt," naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient. In *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593, it is held that an agreement to pay the debt of another in consideration that the creditor would forbear and give further time for payment is founded upon a good consideration, although no definite time of forbearance is named. In *Hakes v. Hotchkiss*, 23 Vt. 235, it is said: "If no agreement be made as to the length of time during which the promisee will forbear, the law will presume that he undertakes to forbear for a reasonable time; and this is sufficiently certain, and is a good consideration." Parsons, in his work on Contracts (vol. 1, p. 442,) says: "Nor need the agreement to delay be for a time certain, for it may be for a reasonable time only, and yet be sufficient consideration for a promise."

The Revised Statutes of the United States (sec. 5242, relating to banks) provide, among other things, that all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner provided in that chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. It is insisted by the defendant that a payment by the bank at the time the plaintiff called for his money would have been void under this provision of the statute; that the plaintiff lost nothing by his agreement and forbearance; and that neither the bank nor the defendant were benefited thereby. Notwithstanding this statute and the insolvency of the bank, the plaintiff waived a legal right in consideration of the defendant's promise. Before he agreed to forbear, the certificates were not subject to any defense, and he could have negotiated them, and they would have been payable on presentation at the bank. By surrendering them, and taking a new certificate impaired by his agreement to forbear, he made his claim subject to a defense that would be likely to affect its negotiability and value. Had the plaintiff drawn his money, it is not certain that the receiver would have called for it, or that he would have recovered it by an action. A determination of the receiver's right to the money might necessitate a trial of doubtful issues of law and fact. The plaintiff had a right to draw, and to try and hold, the money. He waived this right in consideration of the defendant's promise. But for this promise he would have drawn his money January 14, 1884. The receiver was not appointed until some three months thereafter, during which time no one could have rightfully called on him for the money; and during this time, at least, he waived his right to have and enjoy his money. He may, or may not, have been damaged by

waiving these rights. He waived them in consideration of the defendant's promise, and that is sufficient.

Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne. In *Anson, on Contracts*, p. 62, it is said: "Courts will not inquire whether the thing which forms the consideration does, in fact, benefit the promisee or a third party or is of any benefit to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as a consideration for the promise made to him." The law will not enter into an inquiry as to the adequacy of the consideration for a promise, but will leave the parties to be the sole judges of the benefits to be derived therefrom, unless the inadequacy of the consideration is so gross as of itself to prove fraud or imposition. *Judy v. Louderman*, 48 Ohio St. 562. In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise. 1 Parsons, Cont. p. 444. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. 2 Kent, Com. 12th ed. p. 465. In *Burr v. Wilcox*, 13 Allen, 273, Wells, J., in defining "consideration," says: "Any act done at the defendant's request, and for his convenience, or to the inconvenience of the plaintiff, would be sufficient." The exchequer chamber, in 1875, defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud, and with full knowledge of all the circumstances. *Doyle v. Dixon*, 97 Mass. 218, 93 Am. Dec. 80. Pollock, in his work on Contracts, p. 166, says: "Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present." In *Boyd v. Freize*, 5 Gray, 554, Shaw, Ch. J., says: "An agreement, therefore, to forego one's legal right, or forbear collecting a debt, or enforcing any other beneficial right, is a good consideration for an express promise made upon it. Such agreement may be express or implied by law."

There was evidence tending to show that the defendant was a maker of the certificate, and, if such maker, his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly indorsed, should be returned to the bank. The bank having been closed, and a receiver appointed, a return of the certificate, properly indorsed, to the receiver, was all that was required. No other demand or notice was necessary before bringing suit. There were no officers of the bank to whom the certificate could be returned. The funds of the bank were in the hands of the receiver, and, for the purpose of returning the certificate as therein provided, the receiver

was the bank. The plaintiff was allowed to testify that he would not have left his money in the bank, if he had not understood that the defendant was obligated to pay it. The plaintiff was allowed to testify, without objection, that he went to the bank for the purpose of drawing his money; and there was no error in allowing him to state that he would have done what he proposed to do, but for the defendant's promise. The defendant requested the court to instruct the jury "that if Albert Sowles and Edward S. Sowles signed the certificate as indorsers, with the right of demand and notice, then, under the testimony, the defendant is not liable." We think, from the testimony, that, if Albert and Edward A. Sowles were indorsers, then the defendant was an indorser; but the necessity for such instruction was obviated by the instruction that, if the jury found that the defendant was an indorser, then the plaintiff could not recover, and it was not error to decline to give the instruction requested. Whatever may have been the relation of the signers of the certificate to each other, they were for the purpose of determining their liability to the plaintiff, either makers or indorsers of the certificate. The evidence showing the understanding between the signers of the certificate as to their respective liability to the plaintiff, and as between each other, was not withdrawn from the consideration of the jury; and it was for them to say, from all the evidence, whether the undertaking of the defendant was that of a maker or that of an indorser. The court told the jury that, if nothing was said to the plaintiff to explain to him that their obligation on the certificate was that of indorsers, and not makers, he had the right to understand that they were makers and absolutely liable upon it. It is insisted by counsel for the defendant that the affixing of the word "surety" to the defendant's name was notice to the plaintiff that the defendant intended to limit and restrict his liability, and that this fact should overcome the presumption of law laid down by the court. The word "surety" affixed to the defendant's name, only indicated to the plaintiff the fact that the defendant was surety for the bank, and this was already known to him. He knew that the bank had the money; that the defendants E. A. Sowles and A. Sowles did not have it; and that, in fact, they were sureties for the bank; but this fact did not change the undertaking of the defendant from that of a maker to that of an indorser entitled to demand and notice. A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any person lawfully holding the paper. *Bank of Newbury v. Richards*, 35 Vt. 264. The defendant was liable, prima facie, as a maker of the certificate. *National Bank of Bellows Falls v. Dorset Marble Co.* 61 Vt. 106, 2 L. R. A. 428; *Strong v. Rikers*, 16 Vt. 554. But this presumption was susceptible of being controlled by evidence of the real obligation intended to be assumed by the defendant, and known to the plaintiff. The court made a proper application of this rule in admitting evidence as to what transpired before and at the time of the execution of the certificate of deposit, as affecting the liability of the defendant, and told the jury that, if

they found that the defendant was an indorser, then the plaintiff could not recover. To justify the verdict returned by the jury, they must have found that the defendant's undertaking was that of a maker of the certificate. The court told the jury that, if the defendant put his name upon the certificate for the purpose of stopping a run on the bank and tiding it over its then exigency, this would be a sufficient consideration. If this was not the true test of consideration, the defendant has no reason to complain. It was not necessary that he receive a consideration. As the evidence stood, the question as to whether he received a consideration was an immaterial issue, and the defendant was not prejudiced by the court's submitting such issue to the jury. It appeared from the undisputed facts that his principal received a sufficient consideration to support his promise. This was all that was required. *Moore v. McKenney*, *King v. Upton and Howe v. Taggart*, *supra*. The court might have properly held that a sufficient consideration was

established by the uncontradicted facts, and withheld this question from the consideration of the jury. The plaintiff concedes that there was error in the *pro forma* ruling of the court upon the question of interest, and offers to remit the excess of interest included in the judgment rendered in the county court.

Judgment reversed.

Judgment for the plaintiff to recover \$962, with interest to be computed at the rate of 4 per cent per annum from the date of the certificate to the date of the writ, and 6 per cent thereafter, and his costs in the county court, less the dividends paid on the certificate by the receiver, and the defendant's costs in this court.

Taft, J.:

On the 14th of January, 1884, the bank was hopelessly insolvent and the plaintiff had no right to withdraw his money. I therefore, while not dissenting, doubt on the subject of consideration.

TEXAS SUPREME COURT.

Hyman BLUM, *Appt.*,

v.

L. A. SCHWARTZ *et al.*

(.....Tex.....)

1. An execution lien is superior to a prior unrecorded conveyance of which the creditor had no notice at the time of the levy, and notice thereof after the levy is immaterial.

NOTE.—*Priority of liens of judgment or of prior unrecorded conveyance.*

In absence of express statutory definition.

Where the statute avoids an unrecorded conveyance only as against subsequent purchasers in good faith and for a valuable consideration, being silent as to creditors, the lien of a judgment is inferior to an unrecorded mortgage. *Vaughn v. Schmalzle*, 10 L. R. A. 411, 10 Mont. 186.

The liens of judgment creditors are not within the protection of the Registry Acts unless expressly named. They are not "purchasers" or "mortgagees." *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Pixley v. Huggins*, 15 Cal. 127; *Beavan v. Oxford*, 6 DeG. M. & G. 492, 517; *Runyan v. McClellan*, 24 Ind. 165; *Bell v. Evans*, 10 Iowa, 353; *Cover v. Black*, 1 Pa. 493; *Rodgers v. Gibson*, 4 Yeates, 111; *Helster v. Fortner*, 2 Binn. 40; *Cover v. Black*, 1 Pa. 493; *Greenleaf v. Edes*, 3 Minn. 264; *Sparks v. State Bank*, 7 Blackf. 469; *Orth v. Jennings*, 8 Blackf. 420; *Schmidt v. Hoyt*, 1 Edw. Ch. 652, 6 L. ed. 279; *Jackson v. Dubois*, 4 Johns. 216; *Schroeder v. Gurney*, 73 N. Y. 420; *Thomas v. Kelsey*, 30 Barb. 268, 275; *Crisfield v. Murdock*, 127 N. Y. 815; *Evans v. McGlasson*, 13 Iowa, 150; *Sigworth v. Meriam*, 66 Iowa, 477; *First Nat. Bank of Tama City v. Hayzlett*, 40 Iowa, 859; *Moorman v. Gibbs*, 75 Iowa, 537; *Norton v. Williams*, 9 Iowa, 523; *Bell v. Evans*, 10 Iowa, 353; *Seever v. Delashmutt*, 11 Iowa, 174; *Hayes v. Thode*, 13 Iowa, 51; *Wright v. Jones*, 2 West. Rep. 350, 103 Ind. 17.

The lien of a judgment is not a "conveyance." *Wilcoxson v. Miller*, 49 Cal. 193.

Under a statute providing that mortgages shall take effect only from their recording the lien of a judgment is superior to a prior unrecorded mortgage. *Home Bldg. & Loan Asso. v. Clark*, 1 West. Rep. 337, 43 Ohio St. 427; *Mayham v. Coombs*, 14 Ohio, 428; *White v. Denman*, 16 Ohio, 60, 1 Ohio St. 16 L. R. A.

2. Proof of payment of a valuable consideration for land bid off by a judgment creditor at a sale under his execution lien which was superior to a prior unrecorded deed is not necessary to enable him to hold the land against the prior grantee.

(June 14, 1882.)

APPEAL by defendant from a judgment of the District Court for Wise County in

110; *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533; *Bloom v. Noggle*, 4 Ohio St. 45; *Foedick v. Barr*, 3 Ohio St. 471; *Van Thornhill v. Peters*, 26 Ohio St. 471.

Under the Missouri Registry Act avoiding unregistered conveyances except between the parties and such as have actual notice thereof the lien of a judgment is preferred to an unrecorded deed. *Reed v. Austin*, 9 Mo. 723, 45 Am. Dec. 393; *Frothingham v. Stacker*, 11 Mo. 77; *Waldo v. Russell*, 5 Mo. 387.

Under a statute providing that "the mortgages not recorded in time remain valid against the mortgagor but are postponed to all other liens created or obtained, or purchases made prior to the actual record," and that of "the younger lien is created by contract and the party receiving it has notice of the prior unrecorded mortgage, or a purchaser has the like notice, then the lien of the older mortgage shall be held good as against them," a judgment, being a lien not "created by contract," although obtained with notice of a prior unrecorded mortgage, is superior thereto. *Andrews v. Mathews*, 59 Ga. 466.

The return of an unrecorded deed to the grantor for the purpose of getting another deed with a different grantee does not revert the title in the grantor so that the lien of a judgment against him will attach. *Old Nat. Bank of Evansville v. Findley* (Ind.) April 26, 1892.

Priority of judgment by virtue of statutes.

It is expressly provided by the Virginia Recording Act that an unrecorded conveyance shall be void as to creditors, and under it, the lien of a judgment is superior to an unrecorded conveyance. *McClure v. Thistle*, 2 Gratt. 182; *Young v. Devries*, 51 Gratt. 304.

So, too, in West Virginia, (*Anderson v. Nagle*,

favor of plaintiffs in an action brought to try title to certain real estate. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Carswell, Fuller & Terrell, for appellant:

A statement by A. Devereux, a third person, in the hearing and presence of appellant's agent, that Dannanbarg had sold the land was insufficient to charge appellant with notice of an unrecorded vendor's lien against same held by Schwartz & Co. by transfer from Dannanbarg.

Wethered v. Boon, 17 Tex. 148; *Harrison v. Boring*, 44 Tex. 255; *Dalton v. Rainey*, 75 Tex. 516; *Wade, Notice*, § 7.

The superior title not being in the assignees of the vendors' lien notes and H. Blum being a subsequent purchaser with his deed on record at the date of the institution of the suits on the vendors' lien notes by the assignees to foreclose same, he was a necessary party to said suits and said judgments were insufficient to support the title of plaintiff against defendant, and the court should have rendered judgment for defendant.

The vendors' lien notes having been assigned by Dannanbarg, the legal title to the land sold did not pass to the assignees, but remained in Dannanbarg and the title was vested in appellant by his purchase at execution sale against Dannanbarg, and the court should have found that Dannanbarg and appellant were both necessary parties to suits to foreclose, and failing to join either of them in such foreclosure proceedings, the legal title was in defendant

which should have prevailed over the title asserted through such foreclosure proceedings.

Ufford v. Wells, 52 Tex. 612; *Pitman v. Henry*, 50 Tex. 357; *Byler v. Johnson*, 45 Tex. 509; *Black v. Black*, 62 Tex. 296; *Hamblen v. Fells*, 70 Tex. 133.

The recitations in a sheriff's deed is evidence of the bid of the appellant at the sale and the payment by them of the purchase money, and no additional proof was required of appellant to make prima facie this proof.

Müller v. Alexander, 8 Tex. 85; *Leland v. Wilson*, 84 Tex. 79.

The court erred in not giving judgment for defendant because the proof showed that defendant held title under an execution against Dannanbarg, the levy of which was made without notice of sale by Dannanbarg, actual or constructive, and a valuable consideration paid.

Morton v. Lowell, 56 Tex. 643, and cases cited.

Messrs. Soward & Martin for appellees.

Hobby, P. J., filed the following opinion:

This was an action in the ordinary form of trespass to try title brought by L. A. & E. M. Schwartz, appellees, against H. Blum, appellant, for the recovery of 1,280 acres of land located by virtue of veteran certificate issued to George Ramsdale, and situated in Wise and Jack counties. Suit was instituted July 8, 1890. The defendant answered by general demurrer and a plea of not guilty. Trial was had before the court, and judgment rendered

12 W. Va. 96; and *Mississippi (Washington v. Doe*, 54 U. S. 13 How. 233, 14 L. ed. 149); and the District of Columbia. *National Metropolitan Bank of Washington v. Hitz*, 1 Mackey, 111.

The New Jersey Recording Act expressly places subsequent judgment creditors on an equal footing with bona fide purchasers as to unrecorded conveyances and without actual or constructive notice thereof at the time of the recovery of judgment such conveyances are void as to such creditors. *Hodge v. Amerman*, 2 Cent. Rep. 741, 40 N. J. Eq. 99; *Garwood v. Garwood*, 9 N. J. L. 242.

The lien of a judgment creditor without notice of a prior unrecorded conveyance is superior although the title of the judgment debtor was not disclosed by the record and was unknown to the creditor till after the entry of the judgment. *Vreeland v. Claflin*, 24 N. J. Eq. 313.

Under a Registry Act making unrecorded conveyances void as against judgment creditors not having notice thereof, the lien of an unrecorded mortgage given by the ancestor is superior to that of a judgment against the heir obtained in the ancestor's lifetime. *Voorhis v. Westervelt*, 11 Cent. Rep. 226, 43 N. J. Eq. 642.

But *aliter* if the judgment was obtained after the ancestor's death. *Ibid.*

A bona fide purchaser of the heir's estate sold after the ancestor's death under such judgment, without notice of the unrecorded mortgage, will take free from the lien of such mortgage. *Ibid.*

Under a statute providing that no unrecorded conveyance "shall be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice," the claim of a judgment creditor to his debtor's share of the moneys arising from a sale in partition is superior to that under an unrecorded conveyance of such debtor's interest in the land of 16 L. R. A.

which the judgment creditor had no notice prior to the recovery of his judgment. *Eldridge v. Post*, 20 Fla. 579.

In Pennsylvania under a statute providing that no unrecorded mortgage "shall be good or sufficient to convey or pass any freehold or inheritance," it is held that an unrecorded mortgage is postponed to a judgment of subsequent date (*Semple v. Burd*, 7 Serg. & R. 290; *Friedley v. Hamilton*, 17 Serg. & R. 70, 17 Am. Dec. 638; *Jaques v. Weeks*, 7 Watts, 261; *Corpman v. Bacoastow*, 84 Pa. 383; unless the judgment creditor had actual notice of the unrecorded mortgage. *Manufacturer's & M. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335, 43 Am. Dec. 240.

In *Columbus Buggy Co. v. Graves*, 106 Ill. 459, 462, it is said: "Authorities from another state under a different statute do not apply under our statute, which provides that all deeds and title papers shall be in force and take effect from and after the time of filing the same for record, and not before, as to all creditors and subsequent bona fide purchasers without notice, and that as to them, all such deeds and title papers shall be adjudged void until the same shall be filed for record. A creditor, under the statute, is held to be one who effects a lien upon land. A judgment creditor and a purchaser are equally protected, and it is the settled law of this state that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources; and notice at the time of the levy of execution and sale, of an unrecorded deed or mortgage, will avail nothing as against the force of the lien."

A purchaser and a judgment creditor having a lien stand upon the same equity. *Massey v. Westcott*, 40 Ill. 160.

The judgment lien is superior to an unrecorded

on March 10, 1890, in favor of appellees for the land and cost of suit, to which appellant excepted, and gave notice of appeal. At request of appellant, the court filed his conclusions of law and findings of fact. To these findings and conclusions appellant excepted and filed his bill.

Both parties derive title from and under G. Dannanbarg, as a common source. The land in question was transferred by G. Dannanbarg to T. J. Chenoweth and T. J. Cox on the 15th day of August, 1882, by bond for title. At the same time Cox and Chenoweth paid G. Dannanbarg \$400, and gave their three several promissory notes to G. Dannanbarg for \$400 each, which notes became due on August 15, 1883, 1884, and 1885, respectively. The bond for title was not recorded until May 12, 1884. One of these notes was transferred to D. Schwartz & Co., and the others to P. O. Saunders. The first note was transferred before maturity, (August 15, 1882,) and prior to the levy of appellant's execution. Schwartz & Co. instituted suit on this note on September 17, 1888, against Cox and Chenoweth as makers, and Dannanbarg as indorser, and foreclosed their lien on the land involved, on No-

vember 5, 1888. Under this foreclosure, an order of sale was made, the land was sold in February, 1884, and Schwartz & Co. became the purchasers. The other two notes were assigned to P. O. Saunders, who also brought suit on them against Cox and Chenoweth and Max Steifel. In this suit judgment was rendered March 18, 1887, and the lien on the land foreclosed. It was sold in June, 1887, and the appellees bought in the same. On March 17, 1888, the firm of Leon & H. Blum, a firm composed of Leon Blum, defendant Hyman Blum, and Sylvan Blum, obtained a judgment against G. Dannanbarg in district court of Galveston county. That execution was issued on said judgment, and levied upon the land involved in this suit on the 31st day of March, 1888, and sold on the first Tuesday in June, 1888, to appellant, H. Blum. That said land was levied upon as the property of G. Dannanbarg. It appears, from further findings of the court, that appellant had no notice of the sale of the land owned by Dannanbarg to Cox and Chenoweth prior to the levy of the execution. But that after the levy, and before the sale, the court finds that "A Devereux told Hendrix, agent of defendant, that G. Dannanbarg had

conveyance of which the judgment creditor had no notice before his lien attached. *Ibid.*; Roane v. Baker (Ill.) 1 West. Rep. 373.

The holder of a judgment for costs is within the protection of the Recording Act as a "creditor." *McFadden v. Worthington*, 45 Ill. 363.

Under the South Carolina statute avoiding unrecorded conveyances "as to the rights of subsequent creditors," a judgment on a debt contracted before the execution of an unrecorded mortgage rendered after the date of such mortgage is inferior to the mortgage. *Carraway v. Carraway*, 27 S. C. 573.

Prior to the Act of 1876, extending the protection of the Recording Acts of subsequent creditors, the lien of all judgments was inferior to an unrecorded mortgage. *Ibid.*, referring to *Ash v. Ash*, 1 Bay, 806; *Smith v. Smith*, 1 McCord, Eq. 148; *Barwell v. Portous*, 2 Hill, Eq. 221; *Steele v. Mansell*, 6 Rich. L. 442; *Ash v. Livingston*, 2 Bay, 80.

Under the Nebraska statute providing that all deeds, mortgages, and other instruments shall be void "as to all such creditors and subsequent purchasers without notice whose deeds, mortgages, and other instruments shall be first recorded," a prior unrecorded deed made and delivered in good faith for a valuable consideration will take precedence of a judgment if recorded before any deed to the premises be recorded which is based upon such judgment. *Mansfield v. Gregory*, 8 Neb. 422; *Haral v. Gray*, 10 Neb. 186.

Under this statute it is not enough to defeat a prior unrecorded conveyance that one is simply a creditor of the grantor but it must appear that his claim or lien is evidenced by some instrument required to be recorded. *Galway v. Malchow*, 7 Neb. 285, overruling *Bennet v. Fooks*, 1 Neb. 463.

By the Minnesota statute an unrecorded conveyance is expressly declared void as against any judgment obtained against the vendor prior to the recording of such conveyance and while the vendor has the record title. *Dutton v. McReynolds*, 81 Minn. 66; *Windom v. Schuppel*, 89 Minn. 35; *Coles v. Berryhill*, 87 Minn. 53.

Prior to this provision of the statute a judgment became a lien on the judgment debtor's actual interest in the land regardless of what interest the record showed was apparently his. *Greenleaf v. 16 L. R. A.*

Edeas, 2 Minn. 264; *Johnson v. Robinson*, 20 Minn. 180; *Base v. Arper*, 6 Minn. 220.

A judgment takes precedence of a prior unrecorded deed by the judgment debtor and also of an equity against him to have a recorded deed reformed so as to include other land, the judgment creditor having no notice of the error. *Wilcox v. Loominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259.

Under the Michigan statute creditors may avoid an unrecorded mortgage who have during its absence from the record done anything material which they may be fairly considered to have done on the basis of its non-existence. *Root v. Harl*, 63 Mich. 420.

Effect of notice on rank of lien of judgment.

If a judgment creditor have actual notice of a prior unregistered mortgage it is the same to him as though registered, and when registered will relate back to the time of its execution and delivery of which the judgment creditor had notice. *Morris v. White*, 38 N. J. Eq. 324, citing *Priest v. Rice*, 1 Pick. 164; *Jackson v. Van Valkenburgh*, 8 Cow. 200; *Jackson v. Winslow*, 9 Cow. 13.

The lien of a judgment is subordinate to the equitable title of a vendee in possession under an unrecorded contract where the judgment creditor had notice, actual or constructive, of the rights of such vendee, at the time of the entry of his judgment. *Baker v. Thompson*, 35 Minn. 814.

Although the statute making the lien of a judgment superior to prior unrecorded conveyances is silent on the question of notice, still notice to the creditor of such a conveyance prior to the entry of his judgment will postpone his judgment, to the unrecorded conveyance. *Daniels v. Sorrells*, 9 Ala. 438, 445; *Woods v. Legg*, 31 Ala. 511; *Lamberton v. Merchant's Nat. Bank of Winona*, 24 Minn. 281; *Byers v. Engles*, 16 Ark. 543.

But under the Virginia statute notice of the unrecorded conveyance to the creditor prior to the recovery of his judgment does not postpone the lien of the judgment to the conveyance. *Eldson v. Huff*, 29 Gratt. 338.

Notice of an unrecorded mortgage intermediate the perfection of judgment and sale on execution will not postpone the lien of the judgment to that

sold the land, and also, on the day of sale, Deveureux made the same statement in the presence and hearing of said Hendrix." The court further finds "from this evidence that defendant had notice of the sale of the land and the existence of the note of Schwartz & Co., and that it was a lien on the land." Defendant was not a party to the suit of Schwartz & Co. against Chenoweth & Cox. The court found that there was no evidence of the payment of a valuable consideration by defendants for the land, except that contained in the recitals in the sheriff's land. From the foregoing statement it will be seen that on the 31st of March, 1888, when Blum levied on the land, the bond for title which Dannanbarg had executed was not recorded. He had acquired by virtue of the levy a fixed, certain interest in the land from the date of the levy.

The question whether the lien and rights secured under such levy of the execution by appellant are superior to those of appellees, holding under the unrecorded bond for title of which appellant had notice at the sale of the land, but of which he had no notice when the judgment was obtained and the levy made, has been thoroughly discussed in several well-

considered and frequently cited cases in this state. *Grace v. Wade*, 45 Tex. 524; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Grimes v. Hobson*, 48 Tex. 417; *Borden v. McRae*, Id. 400; *Senter v. Lambeth*, 59 Tex. 262. An execution lien, it is well settled, is superior to an unrecorded conveyance previously made to a third party by the judgment debtor; and, where such lien has been fixed or acquired without notice, the purchaser at the execution sale is protected, without regard to any knowledge he may have of an unrecorded conveyance at the time of the purchase. *McKamey v. Thorp*, 61 Tex. 651. In *Grace v. Wade*, *supra*, it was held that the lien of the judgment creditor, who, without notice, had caused a levy to be made by virtue of his judgment, was superior to the unrecorded deed of the vendee of the defendant in execution. By reason of our Registration Laws, it was said in that case an unrecorded deed was void against a creditor who had acquired a specific lien or interest in the land by the levy of the execution. In *Grimes v. Hobson*, *supra*, citing *Grace v. Wade*, it was, with reference to the question of notice, held that "the creditor or any one else who might purchase the land un-

of the mortgage. *Guiteau v. Wisely*, 47 Ill. 433; *Reichert v. McClure*, 23 Ill. 518.

By the Louisiana statute an unrecorded deed is void as against third persons, and under it the lien of a judgment rendered intermediate the execution and recording of a deed of the judgment debtor's land is not abrogated by the recording of the deed. *McCoy v. Rhodes*, 22 U. S. 11 How. 131, 13 L. ed. 634.

If a deed is not recorded until after a judgment is rendered against the vendor, the subsequent registration of the deed does not relate back so as to defeat the lien of the judgment rendered without notice of the deed. *Pollard v. Cocke*, 19 Ala. 188, 195.

A deed executed before judgment against the grantor, under which the purchaser had paid the purchase money and had been put in possession but which was not recorded until after the judgment was obtained, is void as against such creditor and the land thereby conveyed is subject to satisfy the judgment. *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

The title of an execution creditor under a levy upon his debtor's real estate is not affected by notice of a prior unrecorded conveyance of which he had no knowledge at the time of the attachment upon his writ. *Emerson v. Littlefield*, 12 Me. 143.

The lien acquired by the levy of execution upon lands is superior to that of a prior unrecorded mortgage, even though the mortgage be subsequently recorded before sale. *Hawkins v. Files*, 51 Ark. 417; *Cleveland v. Shannon* (Ark.) Nov. 23, 1890. *Contra*, *Righter v. Forrester*, 1 Bush, 278.

Priority of right of purchaser at sale under judgment.

Although the rights of judgment creditors are not protected by the statute against prior unrecorded conveyances, yet when a sale is had under the judgment the purchaser is protected as a bona fide purchaser. *Jackson v. Chamberlain*, 8 Wend. 630; *Jackson v. Post*, 15 Wend. 588; *Vaughn v. Schmalzle*, 10 L. R. A. 411, 10 Mont. 186; *Jackson v. Dubois*, 4 Johns. 216; *Harrison v. Hollis*, 2 Nott & McC. 573.

In New Jersey the lien of a judgment is superior to a prior unrecorded mortgage and a sale under the judgment operates, in equity, as an assignment to the purchaser of the judgment creditor's inter-

est in the land. *Wait v. Savage* (N. J.) Aug. 6, 1888.

A purchaser at a sheriff's sale is within the protection of the Registry Act the same as purchasers at private sale. *Scribner v. Lockwood*, 9 Ohio, 184; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Draper v. Bryson*, 26 Mo. 108; *De Vendell v. Doe*, 27 Ala. 156, 164; *Barker v. Bell*, 37 Ala. 364; *Woods v. Legg*, 91 Ala. 511.

A purchaser at a sale on execution, who has his deed first recorded gains the same preference over a prior unrecorded conveyance as if he had bought directly from the debtor himself. *Ellis v. Smith*, 10 Ga. 253.

The title of one other than the judgment creditor who bona fide purchases land at a sheriff's sale is unaffected by a prior unrecorded conveyance by the judgment debtor, of which such purchaser had no notice. *Doe v. Hall*, 2 Ind. 556.

In *Duke v. Clark*, 58 Miss. 465, 478, it is said: "We regard it as the settled doctrine in this state that purchasers at execution sales are, to the same extent as other purchasers, entitled to the benefit of the statutes requiring instruments affecting the title to lands to be registered."—citing *Henderson v. Downing*, 24 Miss. 106; *Harper v. Tapley*, 35 Miss. 506; *Taylor v. Lowenstein*, 50 Miss. 278; *Humphreys v. Merrill*, 52 Miss. 92; *Loughridge v. Bowland*, Id. 548.

When judgment creditor purchases at sale.

If the creditor is not expressly protected by the statute as against prior unrecorded conveyances when he purchases with notice at a sale under his judgment he takes subject to such conveyances even though he had no notice thereof when his lien attached. *Norton v. Williams*, 9 Iowa, 523.

It seems that the result would be the same if he purchased utterly without notice. It is there said: "The ordinary purchaser pays a new consideration. Not so with the judgment creditor. Such creditor comes in under the debtor, and not as does the purchaser through him. The consequence is that the creditor is entitled to the same rights as the debtor had, and no more. By his purchase he stands in the place of the debtor, and the same rule applies to a third person purchasing at the sheriff's sale, with notice of the outstanding title." But see cases next following.

der the execution would get title against the unrecorded deed, notwithstanding he might have full notice of the deed when he purchased, provided the creditor had no notice prior to the levy of the execution." To the same effect is *Borden v. McKee*, 46 Tex. 899. If there was no question of the right of a judgment creditor entering into this case, and if, instead of the purchase by appellant at the execution sale against Dannanbarg under the levy made in March, 1888, without notice of the conveyance of the land by bond for title, then unrecorded, appellant had bought directly from Dannanbarg, and, instead of the sheriff's deed, had received one from Dannanbarg, it would, by virtue of the Registration Laws, have been superior to the rights accruing under the unregistered bond for title executed by Dannanbarg. In such case, however, proof of the payment of a valuable consideration would have been necessary by the junior purchaser, which we do not understand to be the rule in the present case. This results from our Registration Laws, which render conveyances void as against subsequent purchasers for value without notice, and creditors having liens of a certain character on the property. The distinction between this class of cases, where the party whose rights are affected by the unrecorded instrument acquires the legal title, and that class where such party's rights coming through the judgment debtor are of an equitable character, and are not, in their nature,

susceptible of registration, and therefore do not come within these acts, is very clearly stated in *Parker v. Coop*, 60 Tex. 111; *McKamey v. Thorp*, 61 Tex. 651; *Senter v. Lambeth*, 59 Tex. 268. In the former class, the purchaser at the execution sale, whether plaintiff in execution or not, by the lien which his levy (made without notice) secures, is protected, and his title is not affected or disturbed by subsequent notice. *McKamey v. Thorp*, *supra*. "But as resulting trusts are not within the registration statutes, and the holder of such equity cannot spread his title on record, these rules are not applicable to them." *Ibid*. "Hence an execution or judgment lien, obtained without notice of the resulting trust, cannot inure to the benefit of one buying at the sheriff's sale made under the execution." *Parker v. Coop*, *supra*. In such case, "the title of the purchaser, as against the resulting trust, is determined without reference to any notice of it at the time the judgment is obtained or the levy made. It depends on whether he had notice at the time of the sale. If not, then whether he was a purchaser for value." It is unimportant in this case to determine, and it is wholly unnecessary to do so, whether the court erred in finding that the statement of A. Devereux to Hendrix, appellant's agent, made after the levy of the execution, to the effect that Dannanbarg had sold the land, was, in contemplation of law, notice. It may be admitted that this was notice. The court

A judgment creditor purchasing at the sheriff's sale under his judgment is protected against prior unrecorded conveyances of which he has no notice the same as any other purchaser. *Evans v. McGlasson*, 18 Iowa, 150; *Butterfield v. Walsh*, 36 Iowa, 534; *Gower v. Doheney*, 33 Iowa, 36; *Walker v. Elston*, 21 Iowa, 529.

A purchaser at a sheriff's sale under his own judgment and who parts with no money is not a bona fide purchaser for valuable consideration. *Williams v. Hollingsworth*, 1 Strobb. Eq. 103, 47 Am. Dec. 527; *Wright v. Douglass*, 10 Barb. 97; *Ayres v. Duprey*, 27 Tex. 593, 606; *Orme v. Roberts*, 33 Tex. 768. *Contra*, *Hunter v. Watson*, 12 Cal. 363, 377.

In *Wood v. Chapin*, 13 N. Y. 509, 519, 67 Am. Dec. 62, *Denio, Ch. J.*, says: "I am, moreover, of opinion that a purchaser, under judicial proceedings instituted by himself, though the purchase be made on account of the debt for the recovery of which the proceedings were had, is a bona fide purchaser within the statute. The legal expenses necessarily incurred, which have to be advanced by the party promoting the proceeding, are something in addition to the existing debt which the purchaser has parted with as a consideration for the conveyance which he received."

"The reason that an unrecorded deed is given the preference over the judgment lien is that the judgment creditor is in no more unfavorable position than he was before he obtained his lien. This reason must apply with equal force, when he takes a sheriff's deed, without advancing a new consideration. If, however, he bids for the property more than the amount of his judgment, and pays the excess to the judgment debtor, there can be no doubt, as we understand the law, that he would occupy the position of any other purchaser. In such a case he does advance a new consideration on the faith of the purchase, and should accordingly be repaid as a bona fide purchaser. Nor would it, in our opinion, make any difference how small the amount was over the judgment." *Devlin, Deeds*, § 642.

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Effect of notice to purchaser at judgment sale.

The equity of a purchaser by an unrecorded deed is superior to that of a purchaser under execution with notice. *Morton v. Roberts*, 4 Dana, 258.

The recording of a prior deed at any time before the sale under a judgment is notice to the purchaser at such sale. *Wilcoxson v. Miller*, 49 Cal. 193.

Under a statute providing that "no such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record," it is held that the lien of an unrecorded mortgage is superior to that of a subsequent judgment, and if the mortgage is recorded after levy but before sale under the judgment, the purchaser buys subject to the lien of the mortgage. *Holden v. Garrett*, 23 Kan. 38; *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105.

The lien of a judgment does not take precedence of a prior unrecorded mortgage, and if the mortgage be recorded before sale under the judgment the purchaser is affected with notice. *Chapman v. Coats*, 26 Iowa, 238.

The same is true if the purchaser have actual notice of the unrecorded conveyance. *Hoy v. Allen*, 37 Iowa, 208.

The Missouri and Kansas Registry Acts are identical. See *Holden v. Garrett* and *Davis v. Ownsby*, *supra*. The statute does not mention creditors, and as the lien of the judgment is by statute confined to the land of the judgment debtor, if he has previously conveyed it, although the deed is unrecorded, it is no longer his and the lien does not attach, and if notice is given before an actual bona fide purchase at sale, the vendee in the unrecorded deed is protected.

In *Sappington v. Oeschli*, 40 Mo. 244, 247, it is said: "Ever since the decision in the case of *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105, it has been the settled law of this state that the title of a bona fide purchaser or mortgagee under a deed or mortgage not recorded is good against creditors at large and is also good against sales under judgments and ex-

found as a fact that he had no notice before the levy. So, then, if it be conceded that Devereux's statements were of that character and emanated from that source which would unquestionably be sufficient to charge appellant with notice after the levy, it would be immaterial; because, however complete and adequate may have been the notice in law at the sale or after the levy, under the authorities cited it could not have affected or impaired appellant's rights. Since the case of *Blankenship v. Douglas*, 26 Tex. 228, the rule there announced has been frequently cited in this state, that a judgment lien on the land of the debtor is subject to every equity against the land in the debtor's hands when the judgment was rendered. Our Registration Laws ingraft on this rule the qualification that, if the judgment lien attaches before the creditor has notice of the existence of an unrecorded conveyance, then the unrecorded instrument is subordinated to the lien, and subsequent notice would not have the effect to change the rights of the party. *Calvert v. Roche*, 59 Tex. 464; *Catlin v. Bennett*, 47 Tex. 170; *Simpson v. Chapman*, 45 Tex. 564. Hence we do not think that the suit brought on the notes of September 17, 1883, subsequent to appellant's levy, in March, 1888, could have impaired his rights. Where, as in this case, the rights of the parties are determined by the proper construction of the Registration Laws, two classes are protected,—

creditors who, without notice, have fixed their liens; and subsequent purchasers for a valuable consideration, without notice. In this case, there was no proof of the payment by appellant of a valuable consideration for the land, independently of the recitals contained in the sheriff's deed; and it is claimed by appellees that, although the appellant may not have had notice prior to the levy, he could not recover in the absence of proof of payment of a valuable consideration. If this be correct, the protection afforded the judgment creditor who secures his lien by a levy is unimportant. The court held that it was essential that appellant should prove the payment of a valuable consideration for the land, and that the recitals alone in the sheriff's deed were not sufficient for that purpose. Where this fact is necessary to be established to secure or protect a right it is required to be shown by evidence independent of the recitals in the deed. *Watkins v. Edwards*, 28 Tex. 448. But if appellant was protected by reason of the fact that he was a judgment creditor with his lien secured by levy without notice, it was not necessary that he should have been a purchaser for value, as that term is usually understood. In the class of cases to which we have referred, as not embraced within our registration statutes, because the equities or rights of the party were not susceptible of registration, we have seen that notice at the time of the sale is sufficient.

executions, if the deed or mortgage is duly recorded before such sales." *Valentine v. Havener*, 20 Mo. 138; *Stillwell v. McDonald*, 39 Mo. 232; *Potter v. McDowell*, 43 Mo. 98; *Reed v. Ownby*, 44 Mo. 204.

By the Minnesota Recording Act judgment creditors are placed on an equality with bona fide purchasers as to prior unrecorded conveyances, and the title of the creditor obtained by sale under the judgment is not affected by notice of the unrecorded conveyance after the docketing of the judgment and before execution was levied. *Lash v. Hardick*, 5 Dill. 505.

The protection of the Alabama Recording Acts is expressly extended to creditors. If a creditor secures a judgment lien without notice of an unrecorded mortgage, although he purchases the land at a sheriff's sale under his judgment with notice of the mortgage, his title is unaffected thereby. *Fash v. Ravestee*, 32 Ala. 451.

Notice to the purchaser at an execution sale of an unrecorded conveyance prior to the judgment is immaterial if by virtue of lack of notice to the creditor the lien of the judgment is superior. *Daniel v. Sorrells*, 9 Ala. 436; *Pollard v. Cooke*, 19 Ala. 188.

Under a statute avoiding unrecorded conveyances "as to all creditors, and subsequent bona fide purchaser and mortgagees, without notice," an attaching creditor levying an attachment without actual notice of an unrecorded deed acquires a lien, which if perfected by judgment, execution, sale, and deed will hold the legal estate, against the purchaser in the prior unrecorded deed, though at the time of the levy of his execution and sale he had notice of such deed. *Martin v. Dryden*, 6 Ill. 187.

The Mississippi statute declares unrecorded conveyances void as against creditors without notice, and it is there held that knowledge of the conveyance acquired subsequent to the attachment of the lien will not affect it or displace it. *Henderson v. Downing*, 24 Miss. 108; *Harper v. Tapley*, 35 Miss. 306; *Humphreys v. Merrill*, 52 Miss. 62; *Loughridge v. Bowland*, Id. 846; *Mississippi Valley Co. v. Chil-16 L. R. A.*

cago, St. L. & N. O. R. Co. 58 Miss. 846; *Heimann v. Stricklin*, 60 Miss. 234.

The lien of a judgment in the hands of an assignee thereof without actual notice of a prior unrecorded conveyance by the judgment debtor is superior to that of such conveyance although the assignor of the judgment knew of such conveyance before the rendition of the judgment. *Duke v. Clark*, 68 Miss. 463.

In *Low v. Blinco*, 10 Bush, 381, with reference to a statute providing that no unrecorded conveyance "shall be good against a purchaser for a valuable consideration, not having had notice thereof, or any creditor," it is said, p. 334: "Reconciling as far as practicable the various reported cases, we deduce from them the following views:

"1. A purchaser at an execution sale, who has no notice of a title bond or deed that has not been recorded within the prescribed time, will be protected in his title even in a court of equity.

"2. A purchaser with notice will also be protected, in case the execution creditor acts in good faith and without notice. Under such circumstances the creditor has the right to sell, and the purchaser necessarily takes all the title that the creditor can require the sheriff to sell.

"3. That notice to the purchaser after his purchase does not affect him. He is by his purchase invested with an inchoate legal title, which he has the absolute right to perfect by procuring a conveyance from the sheriff, and this right does not depend upon his being a stranger to the execution. In such cases the execution creditor is as much entitled to protection as a stranger.

"4. That notice to the creditor at any time before he may purchase affects his conscience, and he may be compelled, in obedience to the equity evidenced by the bond or unrecorded deed, to transfer the legal title to the party against whom he ought not in good conscience to hold it."

In support of the principal case, see *Stevenson v. Texas & P. R. Co.* 105 U. S. 703, 23 L. ed. 12, 15.

J. G. G.

If not, then it must be determined whether he is a purchaser for value. In *McKamey v. Thorp*, the question was discussed whether one who paid the amount of his bid by crediting it on the judgment against the defendant in execution was a purchaser for value. The cases were reviewed by the court, and it was held that, while there were "intimations" in a few cases to the effect that one buying under such circumstances might be a bona fide purchaser, still the rule had been distinctly laid down to the contrary in other cases; and, in the case cited, it was held that a creditor buying at his own sale, and crediting his bid upon the judgment, is not a purchaser for value. But in a case like the present, which is governed by our Registration Law, and under the authority of the cases of *Grace v. Wade*, *Grimes v. Hobson*, *Borden v. McRae*, the judgment creditor is only required to fix his lien by the levy of the execution, without notice of the prior conveyance by the defendant in execution, to entitle him to protection. He is not required as in the case of a subsequent purchaser at the sale, without notice, to pay a valuable consideration. Under our Registra-

tion Laws, as construed, "Then creditors who have no notice of adverse rights at the time their lien attaches, may be protected as purchasers, who are not bona fide purchasers, as these terms are ordinarily understood." *Parker v. Coop*, *supra*. If he is only protected as a purchaser, it is said, "it would destroy competition in bidding, and compel the creditor to take property for his debt when he is entitled to money." He is not protected because he is a purchaser, but because he is a creditor whose lien is fixed by a levy, without notice; and it is not necessary that he should pay a valuable consideration, in the sense contended for. There is no finding in this case showing that appellant credited the amount of his bid on the judgment against the defendant in execution, and it is not important that there should be.

Because, as we have before said, the appellant's rights are not dependent on the amount paid by him, nor the character of the consideration, we think the judgment should be reversed, and the cause remanded.

Adopted by Supreme Court, June 14, 1892.

OHIO SUPREME COURT.

CINCINNATI, HAMILTON & DAYTON
R. CO., *Pff. in Err.*,

v.

Henry KASSEN, Admr. of Joseph J. Kassen,
Deceased.

(.....Ohio.....)

*1. It is a well-settled rule of the law of negligence that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware, or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured.

2. Where the employees of a railroad company engaged in operating one of its trains have notice, such as a person of ordinary prudence would believe and act upon, that a passenger had stepped or fallen from the train, while moving at a high rate of speed, onto the track, where he is exposed in a helpless condition to the danger of injury from another of its trains, the company owes him the duty of observing due care to prevent his being so injured, although he was guilty of negligence in so stepping or falling from the train, and this was known to the employees thereon; and in such case the company should, in the exercise of proper care, stop the train from which the passenger fell, and remove him from the track, if that could be done without danger to the passengers or employees on the train, or notify those in charge of the train from which he was in danger of receiving injury, and cause it to be operated with a due regard for his safety, or adopt some other reasonable pre-

caution to avoid injury to him. The omission to use such care, if injury in consequence ensue, is actionable negligence.

3. The rule that the negligence of the injured party, which proximately contributes to the injury, precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him.

(March 23, 1892.)

ERROR to the General Term of the Superior Court of Cincinnati to review a judgment affirming a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed*.

Statement by **Williams, Ch. J.**:

On the evening of the 23d of October, 1883, the defendant below ran an excursion train over its road, from Hamilton to Middletown, returning to Hamilton about 12 o'clock that night. The distance between the two points is twelve miles, and the time occupied in running it, each way, was about thirty minutes. Joseph Kassen, who was a passenger both ways, while on the return trip, and when the train was in rapid motion, walked through the rear car, onto the platform, and stepped or fell off onto the railroad track, where, about two hours afterwards, he was run over by another of defendant's trains, and was thereby, it is claimed, killed. The action below, to recover damages for wrongfully and negligently causing his death, was brought by the administrator of his estate, against the defendant, in the Superior Court of Cincinnati. The petition

*Head notes by the COURT.

NOTE.—As to the right of a negligent person to recover when injured by one aware of his danger, see *Kelley v. Missouri Pac. R. Co.* 8 L. R. A. 783, and *note*, 101 Mo. 67.

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See also 21 L. R. A. 316; 44 L. R. A. 823; 45 L. R. A. 783.

charges that, by reason of the negligence of the defendant and its servants, there was no light upon the platform, nor was there any barrier or guard there placed to prevent passengers falling from said platform, so that without any fault on his part he fell upon the track of the railroad, and was greatly and permanently injured thereby, and he was unable by his own exertion to move from the track; that the agents of the defendant in charge of the train were at once notified of the falling of Kassen from the train, but they failed and refused to stop the train or to care for the fallen passenger, but permitted him to remain on the track, where he had fallen; and that within an hour or two after Kassen had fallen upon the track, and while he yet remained there, injured as aforesaid, another train, owned and controlled by the defendant, passed over the road at this place, where Kassen was lying, and, notwithstanding the notice which defendant had received, and by reason of the negligence of the defendant and its agents, the said train ran over the said Kassen, and he was thereby killed." These allegations were denied by the answer. A trial of the issues to the jury having resulted in a verdict for the plaintiff, upon which judgment was rendered, and afterwards affirmed in general term, the defendant prosecuted error to this court.

The record shows that on the trial the plaintiff gave evidence tending to prove that the cars of the excursion train on which the plaintiff's intestate was a passenger were crowded with people, and that he was passing through looking for a seat; that the night was dark, the door of the rear car through which he passed was open, and the platform from which he stepped or fell was unprovided with any guard or light; that he was seen to fall upon the railroad track, immediately after which the alarm was raised, the brakeman in that car was notified, and he was requested to stop the train; that nothing was done, the train was not stopped, but passed on to the next station, and finally to Hamilton; that the train could have been stopped without danger to the passengers or the train, and without great inconvenience; that there were telegraph offices, which were open, at each of the stations where the train stopped before reaching Hamilton, and also at the latter place, which was reached in time to have given notice of the accident by telegraph to those in charge of any subsequent train coming from the direction of Middletown, before leaving that place, and that no notice was given or attempted. The evidence further tended to prove that by the fall Kassen was rendered unconscious and disabled, but was not killed; and, while lying upon the track in that condition, another train passed over the road from Middletown to Hamilton, an hour or two after he had fallen, and ran over and killed him, which train did not reach Middletown until nearly an hour after the train from which the deceased fell had arrived at Hamilton.

At the conclusion of the evidence, and before the argument, the defendant requested the court to give in charge to the jury the following instructions, which were given: "(1) Kassen was guilty of negligence in falling or stepping off the train, and if he was killed

thereby, or injured so that he would have died from such injuries, your verdict must be for the defendant. (2) There is no evidence of negligence on the part of the persons operating the train which ran over Kassen. (3) If Hess [the brakeman] was not told that a man had fallen off the train, or if Hess did not hear such statement, your verdict must be for the defendant." The defendant also requested the court to instruct the jury as follows: "(4) It was Kassen's own fault that he fell or stepped off the train, and the railroad company was under no obligation to stop the train simply for the purpose of picking him up and carrying him as a passenger to Hamilton." The court gave this instruction with the following modification: "But if the employees running the train, or any of them, had such notice at the time of the fall as would lead a man of ordinary average prudence to believe that by the fall Kassen was thrown unconscious or helpless upon the track, and so exposed to danger from a train following, then it was their duty to stop their train, and rescue him from such danger, if such stop might have been made without danger to themselves or to the passengers of their train; and failure to discharge such duty would render the company liable if death was caused by the following train, while Kassen lay unconscious or helpless on or near the track." The court in its general charge, after the argument, instructed the jury as follows: "I have already stated in the special charges which were given you before the argument that the evidence in this case shows that the young man in falling or stepping off the car was himself not acting with ordinary care, so that for the falling off the car he has no right of action against the company. Again, I have charged you that there is no evidence of negligence in the employees of the company who were running the train which ran over the man. The only question left in this case, therefore, for you to determine, is whether or not the company had notice, through the employees of the train from which he fell, that the man had fallen upon the track, and was there in an unconscious or helpless condition, such that his death or injury would be likely to occur from a following train." Exceptions were taken by the defendant to the refusal of the court to give in charge the fourth instruction above set forth, without modification, and also to the modification given by the court. These exceptions present the questions in the case.

Messrs. Ramsey, Maxwell & Ramsey, for plaintiff in error:

The claim of the plaintiff is really this: that every time a drunken passenger negligently falls, or willfully jumps, from a train, it devolves upon the brakeman to stop the train, abandon the duties for which he is employed, get off and walk back over track and bridges, it may be for miles, and in the dead of night, to see if perchance the man has added trespass to negligence. If that be the law this judgment can be sustained; otherwise, not.

In *McClellan v. Louisville, N. A. & O. R. Co.*, 94 Ind. 276, plaintiff's intestate, being a passenger upon the defendant's train, was, owing to his drunken condition, carried past his destination, and then, failing to comprehend

his liability to pay further fare or get off the train, the train was stopped and he was removed by the conductor and assistants, and placed at a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train, at a point where those in charge of the latter train did not and could not see him in time to prevent the accident. It was held that the company was not liable for his death, and was not chargeable with notice of his condition or whereabouts.

See also *Henderson v. Louisville & N. R. Co.* 123 U. S. 61, 31 L. ed. 92.

Kassen by his own act had ceased to be a passenger, and had become a trespasser upon the defendant's roadway. It is immaterial that he had been a passenger. The case is the same as if he had come upon the track from an adjoining field, or fallen upon it from a crossing wagon.

Com. v. Boston & M. R. Co. 129 Mass. 500, 37 Am. Rep. 383.

It is sought to raise corporate liability by imputing to the engineer of the second train the knowledge of the brakeman of the first, and in that way and by that fiction, making culpable that which was in fact innocent. By some artful sophistry, a wrong is to be deduced from what two persons did, neither of whom committed a wrong. But two rights cannot possibly make a wrong.

McClellan v. Louisville, N. A. & O. R. Co. *supra*; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164.

Mr. C. W. Baker, for defendant in error:

Notice to the brakeman was notice to the company.

Pittsburgh, C. & St. L. R. Co. v. Ranney, 37 Ohio St. 665.

The notice given to the brakeman in this case was vastly more certain and specific than the notice claimed to have been given the conductor in the case of *Cleveland, C. C. & I. R. Co. v. Manson*, 80 Ohio St. 451, a case that not only upon this point, but we submit upon all the points involved in this case, is authoritative and decisive.

Williams, Ch. J., delivered the opinion of the court:

The instructions of the court relieved the jury from the inquiry whether there was any negligent omission of duty on the part of the railroad company with respect to providing a light or guard for the platform of the car from which Kassen fell, and exonerated the company from any blame for his fall. The single question submitted to the determination of the jury was whether the company, through its employes, had notice that Kassen "had fallen upon its track, and was there in an unconscious or helpless condition, such that his death or injury would be likely to occur from a following train;" and upon that question the jury was instructed that, if the company had such notice, its duty was to exercise due care to prevent such death or injury, and its failure to do so would render it liable, "if death was caused by the following train, while Kassen lay unconscious or helpless on or near the track." As no motion for a new trial was made, the finding of the jury upon the issues of fact 16 L. R. A.

submitted to it is not open to review. *Westfall v. Dungan*, 14 Ohio St. 276; *Randall v. Turner*, 17 Ohio St. 262; *Boerett v. Sumner*, 33 Ohio St. 562. But, if it were, we cannot say there was no evidence to sustain the verdict. In the disposition of the case here, therefore, it must be accepted as established by the verdict that the death of Kassen did not result from his fall, but was caused by the train which subsequently ran over his body; and also that the defendant had due notice of Kassen's fall, in time to have prevented his death, by the exercise of ordinary care, either by stopping the train from which he had fallen, and removing him from the track, or by such notice to those in charge of the following train as would have enabled them, by proper precaution, to prevent injury from it. Assuming, then, that by his own negligent act Kassen was on the defendant's track, in a disabled and helpless condition, likely, if not removed, to be run over and killed by a train operated by the defendant, and of this the defendant, through its employes, had such notice as a person of ordinary prudence would believe and act upon, was it under any obligation to use proper care to prevent the destruction of his life, which otherwise probably would, and in fact did, result from the movement of one of its trains? or did Kassen's own negligence relieve the defendant from the observance of ordinary care to prevent the injury which ensued, or so contribute to it as to deprive his representative of a right of action on account of that injury?

The court properly instructed the jury that the employes operating the train which ran over Kassen were without fault. They had no notice that he was on the track, and were not required to anticipate his presence there. Until they discovered him, they were justified in running the train as if the tracks were clear, and it is not contended that after his discovery they omitted any precaution for his safety. If those employes had received notice of Kassen's situation in time to have avoided the injury, it is clear that it would have been their duty to exercise due care in the management of the train to do so, notwithstanding he was there through his own fault, which was known to them, and for their omission to use such care the defendant would be liable. While they were ignorant of the situation, the defendant was not; and, though the injury might have been easily averted, no means were employed for that purpose. The train from which Kassen fell might have been stopped, and he removed from the track. It is not contended that to have done so would have endangered the passengers or employes on the train, or caused any considerable inconvenience. The defendant's servants in control of the train which ran over Kassen could have been notified by telegram at Middletown of his exposed condition, and they, by the use of ordinary care in the operation of the train, could have saved him from the injury. Either precaution would have prevented the injury; and a reasonably prudent person, under the circumstances, would, we think, have adopted one or the other. A proper appreciation of human life would dictate as much to a person of ordinary prudence. It is a well-settled rule of the

law of negligence that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after he became aware, or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him. The danger to which Kassen was exposed while on the railroad track, after his fall, was that of injury from a train belonging to the defendant, operated by machinery and agencies under its control, for which it was responsible, and not from some independent cause; and, though the defendant may not have been under any obligation to use care to prevent his injury by others, it owed him the duty of observing ordinary care to avoid injuring him in the use of its own property. And, in the exercise of such care, it should have stopped the train from which he had fallen, and removed him from the track, or notified those in charge of the train which followed it, or would first pass over that part of the road, and cause it to be run with a due regard for his safety, or adopted some other reasonable precaution to avoid the injury. The omission to do so was actionable negligence; and Kassen's death having been caused by such negligence, as found by the jury, the defendant is liable, unless the negligence of Kassen so contributed to his death as to defeat the action, and we

think it did not. The rule that the negligence of the injured party, which proximately contributes to the injury of which he complains, precludes him from recovering, does not apply, where, as in this case, the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. In *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172, 63 Am. Dec. 246, it is held that, "when the negligence of the defendant, in a suit upon such ground of action is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action for reparation is maintainable." And such is the well-settled law. The negligence of the plaintiff's intestate, in stepping or falling from the train while moving at a high rate of speed, was only the remote, and not the proximate, cause of his death; the proximate cause being the omission of the defendant to use proper care after having become aware of the danger to which the negligent act had exposed him. We find no error in the charge of the court or in the refusal to charge as requested.

Judgment affirmed.

IOWA SUPREME COURT.

Margaret LEWIS *et al.*
v.
James M. ARBUCKLE *et al.*
Margaret LEWIS *et al.*
v.
Frank MILLER *et al.*

(.....Iowa.....)

1. An apparent absence of consideration is only a circumstance to be taken into account with other facts and circumstances in the

case in determining whether or not a conveyance was procured through fraud and undue influence.

2. A belief in spiritual manifestations and in having had communication with deceased persons is not necessarily evidence of such a disordered mental condition as to make one incompetent to make a conveyance of real estate.

(May 19, 1892.)

CROSS-APPEALS from a decree of the District Court for Delaware County setting aside a portion of certain conveyances by which

NOTE.—*Belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed.*

A belief in witchcraft does not invalidate a will. *Re Veider*, 6 Dem. 22; *Re Forman's Will*, 54 Barb. 297; *Van Guysling v. Van Kuren*, 35 N. Y. 70.

It is not sufficient to invalidate a will that the testator's imagination was generally controlled by a belief in witches, devils, and evil spirits which he fancied continually worried him. *Lee v. Lee*, 4 McCord, L. 183.

In *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81, the court said that there might be cases where a belief in witchcraft as well as in Millerism, or the doctrine of predestination if permitted to constantly occupy the mind, might have the effect to obscure its perceptions, destroy its balance in regard to the ordinary transactions of life, make the believer in short a monomaniac; but it was held that a belief in witchcraft is not of itself sufficient evidence of insanity to disable a person to make a will.

In *Kelly v. Miller*, 30 Miss. 19, the court refused to recognize a belief of the testator in witchcraft as a ground for disturbing a verdict sustaining the will.

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See also 40 L. R. A. 256.

The belief that the souls of men after death pass into animals, although so strong as to cause one to leave his property by will to the society for the prevention of cruelty to animals, is not such evidence of insanity or insane delusion as to render the will invalid. *Re Bonard's Will*, 16 Abb. Pr. N. S. 123.

Belief in spiritualism will not invalidate the will. *Re Smith's Will*, 52 Wis. 548.

The fact that one is a spiritualist is not of itself sufficient ground for setting aside his will for want of capacity to make it. *Otto v. Doty*, 61 Iowa. 23.

A belief in spiritualism cannot be held as matter of law or fact to be evidence of insanity. *Re Keeler*, 12 N. Y. 8. R. 157.

In *Turner v. Hand*, 3 Wall. Jr. 88, Greer, J., charged the jury, "that although a man should believe in spiritualism his deeds could not be avoided on that account; neither would it prove that he was not of disposing mind and memory, so as to set aside his will.

In the *Chafin Will Case*, 32 Wis. 560, the court refused to set aside the will although testator had faith in the statements of professed clairvoyants, fortune tellers, and spiritual mediums.

the land of one Margaret Walsh, since deceased, had come into the possession of the defendants Arbuckle and Miller. *Reversed.*

Statement by Kinne, J.:

These two causes were consolidated and tried together in the court below. They are actions in equity to set aside certain deeds executed by Margaret Walsh to Michael Walsh, her son, and to Mary Ann Adams, her daughter; also deeds made by the said Michael and Mary Ann to defendants Arbuckle and Miller, —on the ground that the deed from Margaret Walsh was procured by undue influence. It is averred that Arbuckle and Miller took their deeds with knowledge of the fact that their grantors had acquired title by undue influence and fraud practiced on their mother. Defendants Miller and Arbuckle claim to have purchased in good faith, and for a valuable consideration, and without knowledge or notice that the title of their grantors was obtained by fraud or undue influence. The defendant Walsh was not served with notice, and made no appearance. The defendant Adams denies the allegations of fraud and undue influence, and avers that the conveyance was made to her and Michael Walsh in pursuance of an oral contract, whereby they were to pay certain indebtedness then existing, maintain their mother (the grantor) through life, and at her death erect a monument for her and her husband, pay her funeral expenses, and pay each of the plaintiffs \$50. That said contract has been carried out on their part except the payment to the plaintiffs of \$50 each, which sum is paid into court for their use. The district court set aside the deed of Margaret Walsh in so far as the same conveyed any interest to Michael Walsh; also set aside the deeds from Michael Walsh and Mary Ann Adams and her

husband to James Arbuckle and Frank Miller, so far as they convey any interest of Michael Walsh to Arbuckle and Miller. In all other respects it confirmed title in Arbuckle and Miller to the land conveyed to them, ordered that the money tendered by defendant Adams be turned over to plaintiffs, and taxed the costs to Mary Ann Adams. Mary Ann Adams, James M. Arbuckle, and Frank Miller, defendants, each separately appeal.

Messrs. Blair, Dunham & Norris, for plaintiffs:

The grantees sold the land a few days after they got it for \$8,000 cash. The consideration in the deed to them of \$1 is certainly inadequate as a consideration. And unless they can show some other valid consideration, it is upon its face a fraud against the rights of plaintiffs. Such a deed cannot be supported, even if Mrs. Adams did keep her mother part of the time; she was under a natural obligation to do so, and the deceased was under no obligation to compensate her.

See *Elsie v. Kennedy*, 67 Iowa, 376, and other cases there cited.

The testimony of Mary Ann Adams shows that her mother did not intend to give her the land. And yet we find an absolute deed made out and signed by the deceased, no mortgage given back to her, and no binding agreement of any kind to support her, nor to pay a penny to the heirs, or do anything else for the land.

That such a fraud would vitiate the deed, there can be no doubt.

Williams v. Collins, 67 Iowa, 413; *Harper v. Kissick*, 52 Iowa, 733; *Tucke v. Buchholz*, 43 Iowa, 415.

The deed from decedent to defendants is void because of the want of capacity to execute the same.

Where the testator before his death was perfectly competent to, and did, transact business, to a very large extent for himself and as trustee for others, and as a director of several incorporated institutions his will was held valid notwithstanding he exhibited many eccentricities and claimed to be more or less influenced by spiritual manifestations. *Thompson v. Thompson*, 21 Barb. 107.

Where a testator believed in spiritualism and in making his will appeared to be influenced by the request of his departed wife, made through a spiritualistic medium, to make provision for her mother in his will, the will was held valid, the court saying that it cannot be said that a person who believes in the reality of spiritual manifestations is, because of such belief, of unsound mind or subject to an insane delusion. *Middleditch v. Williams*, 4 L. R. A. 738, 45 N. J. Eq. 723.

So it was held in *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422, that a belief in spiritualism does not incapacitate from making a valid will, even where the testatrix acted under supposed instructions from the spirit of her deceased brother, unless actual unsoundness of mind is found.

A belief in modern spiritualism is not evidence of mental unsoundness unless it appears that the will was the offspring of that delusion. *Labau v. Vanderbilt*, 8 Redf. 384.

Evidence that one believes in ghosts and supernatural influences is admissible in a will contest as having some tendency to show unsoundness of mind or such weakness of mind as to be easily imposed upon. *Woodbury v. Obear*, 7 Gray, 470, 16 L. R. A.

Belief in spiritualism is compatible with a disposing mind but the fact of its existence is proof to be considered with reference to the question of the susceptibility of the testator to the arts of those who would mislead him for purposes of their own. *Re Storey*, 20 Ill. App. 198.

If spiritual communications dictated the will it is void. If they influenced the mind but did not control it in making the will, or any part of it, then the will will not be void because of undue influence. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473.

Where the medium used his power to procure a conveyance of a person's property, the conveyance will be set aside. *Lyon v. Home*, L. R. 6 Eq. 655.

If because of testator's belief in spiritualism the medium artfully succeeds in alienating the testator from his only child and getting possession of his property, the will will be set aside as made under undue influence. *Thompson v. Hawks*, 14 Fed. Rep. 902.

Where, prior to making the will, the testatrix accompanied the legatee to a seance where a pretended letter from her husband was read, advising her to fix her property so that her son could not get it, the court held the facts were evidence of an attempt to unduly influence the testatrix, and went to impeach the will. *Greenwood v. Cline*, 7 Or. 17.

In *Leighton v. Orr*, 44 Iowa, 601, the court set aside conveyances made by a man to a woman with whom he was living in adultery and who professed to be a medium, but just what influence the latter fact had, does not appear.

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She was on account of extreme old age, and nearness to dissolution, of weak, infirm and disordered mind.

She had for a long time an hallucination that she could see fairies; conversed with them. Knowing this condition of mind, the defendants, Mary Ann Adams and Michael Walsh, were constantly teasing her to make her property over to them, and Mike even went so far as to threaten her if she did not do so.

Deeds made under such circumstances have been invariably set aside.

Fitch v. Reiser, 79 Iowa, 84; *Leighton v. Orr*, 44 Iowa, 679; *Smith v. Hickenbottom*, 57 Iowa, 787; *Spargur v. Hall*, 62 Iowa, 498.

The deed should be set aside on account of undue influence exercised over deceased, by defendants, Mary Ann Adams and Michael Walsh. The last-named defendant was with his mother, the decedent, for the last year before she died, and he had won the confidence of his mother to the extent that as soon as he came back and commenced living with her, she signed a note with him for \$140; she gave a mortgage at his instance.

Mary Ann Adams was ready the moment Michael suggested a deed to them, to accept it, and then began to plan for it; was present when Lewis was sent for, and brought over to talk with the decedent about deeding to them. She led her mother to believe, as her testimony shows, that she was going to be fair. All this shows such an undue influence that the deed in question should be set aside.

Bispham, Eq. 288; *Owings Case*, 1 Bland, Ch. 370, 17 Am. Dec. 311; *Allore v. Jewell*, 94 U. S. 506, 24 L. ed. 280; *June v. Wilks*, 80 Fed. Rep. 11; *Samson v. Samson*, 67 Iowa, 258; *Churchill v. Scott*, 8 West. Rep. 818, 65 Mich. 485; *McDaniel v. McCoy*, 12 West. Rep. 664, 68 Mich. 382; *Greene v. Roworth*, 113 N. Y. 462; *Norton v. Norton*, 74 Iowa, 161.

Benefits obtained by undue influence cannot be held by third parties.

Bispham, Eq. 302.

Where a purchaser is put upon his inquiry, he must pursue it or he is not an innocent purchaser.

Wade, Notice, § 17, p. 12.

Messrs. Yoran & Arnold, for defendants: Arbuckle and Miller had no notice, such as would charge them with knowledge of infirmity of title in their grantors, if such existed.

All the notice (if such it can be called) that was given to either Arbuckle or Miller, is the opinion of two strangers, Mrs. Moreland and Elias Faust, that Mrs. Walsh was not insane, but of such weak mind that she was incompetent to make a conveyance of land.

It is not shown that either witness was competent to express such an opinion. Neither seems to have been possessed of any knowledge of facts which they have detailed that made them competent.

The opinion of each was wholly incompetent.

Re Norman, 72 Iowa, 84. See also *Ashcraft v. De Armond*, 44 Iowa, 229.

The information must come from some one who is interested in the estate, or from some authoritative source. Mere rumors are not notice, nor do they impose upon a purchaser the duty of inquiry.

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Satterfield v. Malone, 85 Fed. Rep. 445; *Wilson v. Miller*, 16 Iowa, 115.

It does not lie in plaintiff's mouth to say that possible inquiry in every direction would have revealed such and such conditions.

Wade, Notice, § 29.

Few purchasers could ever be better fortified with evidences of good faith on honest inquiry than are these defendants.

Wade, Notice, § 34.

Evidence to set aside a deed should be clear, distinct, and satisfactory.

Hjfield v. Gaston, 12 Iowa, 218; *Parker v. Pierce*, 16 Iowa, 227; *Ray v. Teabout*, 65 Iowa, 157.

As neither of the grantees in her deed were present when it is alleged the declarations of the old lady as to threats against her were made, it is clear they are utterly incompetent.

De France v. Howard, 4 Iowa, 524.

As an essential element in this case it is important that the consideration of the deed receive due attention.

Where fraud is charged, the latitude is generally enlarged to negative as well as to establish fraud.

Wharton, Ev. 2d ed. § 1046.

Where the consideration proposed to be proven is not repugnant to the deed, it is competent.

Trayer v. Reader, 45 Iowa, 272.

Preferment by parents does not always take the line of mathematical calculation as to relative merit.

The law recognizes the right of the parent to distribute at will, and we believe the distribution made by this old lady is about as near equitable as is usually found, and certainly plaintiffs have no just cause for complaint.

Malcomsen v. Graham, 75 Iowa, 54. See also *Johnson v. Johnson*, 52 Iowa, 586.

Where a contract accompanied by a conveyance is reasonable, and performed in good faith by the grantee, the deed will be upheld.

See *Marshall v. Marshall*, 75 Iowa, 182.

If a contract is partly performed and the parties cannot be placed *in statu quo*, it will be upheld.

Gardner v. Lightfoot, 71 Iowa, 577.

Where witnesses differ so widely in their opinions as in this case, the acts of the party are the best test of capacity.

Des Moines Nat. Bank v. Chisholm, 71 Iowa, 675.

Conduct that is consistent with reason and previously declared intentions as to disposition of property is invariably upheld.

Campbell v. Campbell, 51 Iowa, 713; *Brookway v. Harrington* (Iowa) Jan. 29, 1891.

Something must be done by the stronger mind to influence the weaker.

Gardner v. Lightfoot, *supra*.

Even were we to concede what is against the preponderance of the evidence that there was "mental unsoundness," as to Mrs. Walsh, the defendants, Arbuckle and Miller, at least, would still be entitled to prevail.

Abbott v. Creal, 56 Iowa, 175.

Kinne, J., delivered the opinion of the court:

1. The plaintiffs and the defendants Mary Ann Adams and Michael Walsh are children

of Margaret Walsh, deceased. Less than two months prior to her death she conveyed 80 acres of land to the defendants Mary Adams and Michael Walsh, the consideration named in the deed being \$1. Plaintiffs insist that this conveyance was procured by undue influence and false promises, and on the representation of the grantees that they would give the grantor a mortgage on the land for its full value, which said grantees did not do. Defendants' contention is set out above. The facts disclosed by this record are that Margaret Walsh was 80 years old or over, the evidence as to her exact age being indefinite; that her husband died about a year before she executed this deed; that Margaret Lewis, one of the daughters, had resided in Floyd county, Iowa, for two years or more. She visited her mother after her father's death, and wrote her two letters. Catherine McQuirk, another daughter, lived in Sioux county for twelve years, and never visited or saw her mother during all of that time. There is nothing to show that during this time she ever wrote to or in any way communicated with her mother. Ella Merry, another daughter, lived in O'Brien county for six years; visited her parents four years ago. Martin Walsh has lived in California for about thirty years. He has never visited his mother, and, so far as appears, he did not write her for years before her death. Michael Walsh lived with his mother for about a year prior to her death, and cared for her and assisted her in her housework. For several years prior thereto he had been absent, and his whereabouts were unknown to his relatives. Mary Ann Adams had for the last nine years of her mother's life lived just across an alley from her. While the testimony is somewhat conflicting, it is clear that Mrs. Adams helped provide for her mother, assisted her in her house, and in every reasonable way ministered to her comfort and support. We have stated the situation of these children with reference to their mother quite fully, as to our minds it has an important bearing upon the question we must determine. It is clear that for the last nine years of her life the daughter Mrs. Adams was constantly relied upon by her mother for aid and support.

2. A material question is as to the intention of Mrs. Walsh as to selling the land in controversy. It seems that at the time her husband leased the land to Miller she was not satisfied with the amount of rent to be paid. She and her husband wanted to sell the land at least three years prior to her death. She then complained that they were not getting enough out of it to support them. The plaintiff Lewis, in October, 1888, thought her mother had better sell the land, take the money, and use it. After her husband's death Mrs. Walsh borrowed money on the land to pay debts which had accumulated. During the holidays in 1888, she told John Lewis the farm did not bring enough to live on, and that she and Mike had tried to sell it, and could not find any one to buy. In January, 1889, she offered to sell it to defendant Miller, but he thought her price too high. There is no question from the testimony that the intent to sell this land had been in Mrs. Walsh's mind for several years,

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and it was not the result of the influence of any one. It is equally clear that originally she intended to give this land to the defendant Adams. She told Grimes so, and gave as a reason the absence in the west of the other girls, the fact that they paid no attention to her, did not help her, nor write to her. In a conversation with Mrs. Sloan the fall before her death Mrs. Walsh spoke of Mrs. Adams' kindness in providing for her, and said she was going to give Mary Ann the biggest part of her property on account of her kindness.

3. Was there any undue influence? We may say that much evidence was introduced which is incompetent, and cannot be considered. Mrs. Moreland testifies that deceased told her that Mike had threatened to kill her if she did not fix the property as he wanted, and that he and defendant Adams were worrying her about the property. Mrs. Strader also testifies that Mrs. Walsh told her of Mike's threats. There is some testimony as to the desire of Mike to get the tenant, Miller, off of the place, and that he and Mrs. Adams wanted their mother to sell the land. The force of Mrs. Moreland's testimony is much weakened by the unhappy relations existing between her and Mrs. Adams. Clearly there is no evidence which would justify a court in saying that Mrs. Adams, so far as she was concerned, obtained the conveyance through the exercise of any undue influence. It is insisted, however, that Michael, after he came home, won his mother's confidence to such an extent, and by such means, that the conveyance as to him was properly set aside. There are, it is true, some circumstances which, in and of themselves, would seem to point to the exercise of improper influence on his mother by Michael in procuring this conveyance, but viewed in the light of the circumstances surrounding the execution of the conveyance, we do not think they are sufficient to justify us in setting the deed aside as to him. Wilson, the justice who made the deed, says Mrs. Walsh was cheerful, like any lady of her age; that it appeared to be her voluntary act and deed,—her own choice. He was in the house an hour, and he says during this time she took part in the conversations, talking intelligently and rationally. He says: "There was not the least apparent effort on the part of Mrs. Adams or Michael to induce her to make this conveyance." If this deed had been procured by undue influence, if the grantees were attempting to induce their mother, against her will, to part with the title, we do not think they would have proceeded in the manner shown by the testimony. The scrivener was not advised that there was anything wrong about the transaction. It does appear that Michael and Mrs. Adams were present during all the time that the justice was in Mrs. Walsh's house, talking with her, and preparing the deed. Decedent got up from her chair, and looked in her bureau drawer for an old deed to get the description from. This was done on her own motion. From these and other facts we conclude that there was no undue influence used which resulted in the procurement of the deed from Mrs. Walsh. The question of consideration is only a circumstance to be taken into account with other facts

and circumstances in determining whether the conveyance was procured through fraud and undue influence.

4. Had the decedent the capacity to execute the deed? She was at least eighty years old, and infirm in body and mind. "She had for a long time an hallucination that she could see fairies; conversed with them; set the table for them; thought sticks of stove wood fairies; wanted to keep on the good side of them; imagined she could see departed spirits, particularly of her children; imagined she could see their whitened bones, and could not be led to believe but that some of them were dead; called people's attention to seeing their spirits out in the road. She was illiterate; could neither read, write, nor count money." It is insisted with much confidence that these and other facts show that decedent was not competent to execute the conveyance in question. This question may be determined from the testimony of those witnesses who are not interested in the event of this suit. The record shows that many of the witnesses gave an opinion as to decedent's mental unsoundness without disclosing any sufficient facts as a basis therefor. The rest of them based their opinions chiefly on the facts above stated. The physician who attended the deceased in her last illness, and who had been her family physician for years, says she did not appear different from what people always do when suffering as she was. He never observed anything in any manner indicating mental unsoundness. Joseph Grimes, a citizen of excellent repute, had known deceased since 1846. He had for years been her trusted adviser. He had frequently drawn papers for her and her husband. He says they were both believers in spirits. He was present January 2, 1889,—about two months before her death,—when a settlement was had with the tenant. His testimony shows she evinced a lively interest in the matter of the settlement, and called the attention of the tenant to certain things which he had agreed to do and had not done. He saw her also about a month before she died. She always did her own business. He says she always, in her business affairs, exercised judgment and reason, and he never heard her capacity to transact business called in question until after her death. This testimony is corroborated by several other persons well qualified to speak with accuracy concerning her mental condition. We cannot doubt, in view of the evidence as to the interest, activity, and knowledge of the deceased as to her business matters, that she possessed the capacity to make the deed. Many persons believe in spiritual manifestations, insist that they have communication and conversations with deceased friends, and the like; yet such things are not necessarily evidence of such a disordered mental condition as to show that those who hold such opinions are unfit to make a disposition of their property.

5. It follows from what we have said that the conveyance from Mrs. Walsh to Michael Walsh and Mary Ann Adams was valid, and hence we need not consider the questions raised as to whether defendants Arbuckle and Miller purchased in good faith and without notice of Mrs. Walsh's mental condition. Even 16 L. R. A.

if Mrs. Walsh's mental condition was such as to render her incompetent to make the deed, still these defendants had no actual knowledge of it; and, if it be conceded that they had sufficient knowledge to put them upon inquiry to ascertain the facts, it is shown that they investigated the facts disclosed to them in good faith and with diligence, and from such investigation they were warranted in believing Mrs. Walsh capable of conveying the real estate. *Wade, Notice*, §§ 28, 29, 81; *Wilson v. Miller*, 16 Iowa, 111. The evidence, to justify us in setting aside these deeds, should be clear, satisfactory, and conclusive. It is not of that character. *Fifield v. Gaston*, 12 Iowa, 218; *Parker v. Pierce*, 16 Iowa, 227; *Ray v. Teaboul*, 65 Iowa, 157.

The judgment of the district court will be reversed, except as to the amount tendered and paid into court, which will be paid over as directed by the district court, and plaintiffs' bill will be dismissed at their costs. The cause will be remanded for judgment and decree in the lower court in conformity with this opinion.

Reversed and remanded.

Re Guardianship of Mary and Maggie LALLY, Minors.

Michael LALLY

v.

Nellie FITZ HENRY, *Appt.*

Michael LALLY

v.

James SULLIVAN and Wife, *Apptes.*

(.....Iowa.....)

1. **The statutory right of a parent to the custody of his children** is not absolute. Whether or not he shall have it in case he is intemperate and shiftless will be determined by a consideration of their best interests.
2. **A widower, intemperate, without work, and with no property but a homestead, loses all right to the custody of his child** in favor of one who legally adopts it, by leaving it at a neighbor's, substantially without clothing, with the promise to send for it in a few days and then leaving the city and remaining away ten weeks without contributing anything toward its support; especially where his only resource for its support is the indefinite promise of the tenant or his homestead, a poor man, to support the child for the use of the property, which is not adequate compensation for the service.
3. **The alleged reformation of an intemperate widower is not sufficient to cause the restoration to him of his child**, which has been adopted and given a good home by relatives, when such reformation, if it exists at all, must have occurred within a few weeks of his application for the child.
4. **A promise by an intemperate father to quit drinking is not sufficient to cause the**

NOTE.—As to the father's right to the custody of his child, see *Sheers v. Stein*, 5 L. R. A. 784, and *note*, 75 W. A. 44.

withdrawal of his children from the custody of a competent guardian, and their restoration to him.

(May 11, 1892.)

APPEAL by defendants from a judgment of the District Court for Lee County restoring to the custody of plaintiff his minor children which had been placed by the court in the control of the defendants. *Reversed.*

Statement by **Kinne, J.:**

The first cause stated is a proceeding to annul and set aside the appointment of appellant as guardian of the minors Mary and Maggie Lally. The second is a suit in equity to annul and set aside the articles of adoption whereby James and Mary Sullivan, appellants, hold possession of the minor Lizzie Lally. The court below ordered the children turned over temporarily to their father, Michael Lally, and continued the cause for final determination. From this order both the guardian and James and Mary Sullivan appeal. Both causes were tried below to the court without a jury, and it is agreed that both shall be tried together here on the same evidence.

Messrs. Parsons & Dolan, for appellants

This court in *Farrar v. Farrar*, 75 Iowa, 125, condemns in forcible language a woman who left her child only ten days as evincing a want of affection, and for that alone deprives her of its custody. Then ten weeks surely ought to be enough to convince the court below that appellee had no regard for his children.

Neither father nor mother has any absolute rights to the custody of their children.

Bonnett v. Bonnett, 61 Iowa, 202, 47 Am. Rep. 810; *Sturtevant v. State*, 15 Neb. 459; *United States v. Green*, 8 Mason, 482; *Corrie v. Corrie*, 42 Mich. 509; *Jones v. Darnall*, 1 West. Rep. 233, 103 Ind. 569; *Sheers v. Stein*, 5 L. R. A. 781, 75 Wis. 44; *Giles v. Giles*, 80 Neb. 624.

Whatever rights the parents have may be lost or forfeited by abandonment, misconduct, misfortune, or by voluntary act and absence.

State v. Bratton, 15 Am. L. Reg. N. S. 362; *Bonnett v. Bonnett* and *Jones v. Darnall*, *supra*; *Heinemann's App.* 96 Pa. 112.

Where the custody of children is in controversy the controlling fact to govern the court the law declares is their welfare.

Re Bort, 25 Kan. 310.

The matter of primary importance is the interest of the child. To this the right of the parents must yield.

Bonnett v. Bonnett, *supra*; *Jenkins v. Clark*, 71 Iowa, 556; *Fouts v. Pierce*, 64 Iowa, 73; *Drumb v. Keen*, 47 Iowa, 437; *Shaw v. Nachtwey*, 43 Iowa, 653; *Corrie v. Corrie*, 42 Mich. 509; *Re Stockman*, 71 Mich. 180.

Regarding the people with whom the father wishes to place the children the language of Maxwell, J., in *Giles v. Giles*, *supra*, is apt: "We have no means of knowing the qualifications of this family to care for and train a child of tender years; nor, indeed, is there any evidence of a valid contract for the support of

the child. For aught that appears, they might at any time—in a day, a week or month—abandon the care of the child, without bad faith or a violation of the agreement."

The home offered by the guardian is superior in every respect, to say nothing of its permanency to the one the court below would consign them. The best interests of the children require that the order so made be reversed.

Drumb v. Keen, *Fouts v. Pierce*, *Bonnett v. Bonnett*, *Sturtevant v. State*, *Jones v. Darnall*, and *State v. Bratton*, *supra*.

The court erred in sustaining said motion by giving any weight to the promises of reform.

All the world knows that promises made by a drunken man are always broken.

York v. Ferner, 59 Iowa, 490.

Mr. D. F. Miller, Sr., for appellee.

Kinne, J., delivered the opinion of the court:

1. March 18, 1890, Nellie Fitz Henry was appointed and qualified as guardian of the minors Mary Lally, aged six years, and Maggie Lally, aged four years, on the grounds that Michael Lally, their father, had abandoned them; that he was an habitual drunkard, and an unfit person to have the control and custody of said children. On the same day Lizzie Lally, then two years old, and a daughter of said Michael Lally, was adopted by James and Mary Sullivan, his wife. Articles of adoption were duly filed for record, being signed by James and Mary Sullivan and the mayor of Keokuk, where said minors then resided. March 18, 1890, Michael Lally instituted these proceedings for the revocation of the appointment of a guardian on the grounds that he had resided in Keokuk for seventeen years; that his wife died August 5, 1889; that he owned a homestead in the city; that he had made arrangements for the care of said children; and that the grounds alleged for the appointment of said guardian were untrue. At the same time he began his suit against the Sullivans, making substantially the same allegations, and attaching thereto the articles of adoption heretofore referred to, and praying that they might be annulled. The guardian appeared and admitted the residence of plaintiff; that he had a homestead, which it was averred he acquired by descent. She further avers that he abandoned said children and left the state while under the influence of liquor, making no provision for their support; that they were not in good condition, and showed evidence of want of proper care; that, after such abandonment, the child Lizzie was adopted by the Sullivans, and had a good home; the plaintiff, though absent for over two months, did not contribute anything towards the support of said children; that plaintiff had been left with ample means by his mother, which he had squandered by excessive drinking and continual intoxication, and that when he left the state he had no property except his homestead and furniture; that he has no means; that the guardian had provided a permanent home, in fulfillment of the wishes of the ward's mother, at the Immaculate Conception Academy of Davenport, Iowa, an educational institution, where they are to be cared for, supported, and educated

free of expense. She also avers that said wards have no estate. She states that plaintiff has for a long time been given to the excessive use of intoxicants, whereby he had lost his position, and was unfit to have the care and control of said children; that the best interests of the children will be attained by leaving them where they are, and that plaintiff did not intend to care for said children, but intended to turn them over to the care of others who are irresponsible, and of a different religious belief from said children and their parents. James and Mary Sullivan answer plaintiff's petition by a general denial, and also state that they are only blood relations of the child Lizzie; that they give her a good home, and the same care and love as their own children. They also make the answer of the guardian their answer herein, and plead that they hold the child by the articles of adoption heretofore referred to.

2. The only question involved in these cases is the custody of the three minor children, all under seven years of age. Our statute provides that the parents "are the natural guardians of their minor children, and are equally entitled to the care and custody of them." Code, § 2241. Also that on the death of one parent the survivor becomes the guardian. Id. § 2242. Notwithstanding the statutory provisions, the weight of modern decisions is clearly favorable to the holding that the right of the parent to the custody of the child is not absolute. It must be determined, in a case like this, in view of the best interests of the child. That is the controlling consideration. *Bonnett v. Bonnett*, 61 Iowa, 301, 47 Am. Rep. 810; *Shaw v. Nuchtoey*, 43 Iowa, 658; *Drumb v. Keen*, 47 Iowa, 437; *Fouts v. Pierce*, 64 Iowa, 73; *Jenkins v. Clark*, 71 Iowa, 556. It is said in *Joab v. Sheets*, 99 Ind. 328, that "the question of the custody of the child was one in which the rights of the child were primarily involved, and where those of the parents were of secondary consideration." In *United States v. Green*, 8 Mason, 485, Story, J., says it is an entire mistake to suppose that the father has an absolute vested right in the custody of an infant. In *Corrie v. Corrie*, 42 Mich. 509, it is said: "In contests of this kind the opinion is now nearly universal that neither of the parents has any right that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests." In *Re Bort*, 25 Kan. 310, the doctrine announced is that "the best interest of the children is the paramount fact. Rights of parents sink into insignificance before that." *Sturtevant v. State*, 15 Neb. 459; *Re Stockman*, 71 Mich. 180. See also Code, § 2301. This just rule may now be regarded as settled.

3. Now, it is clear that a parent may lose the right of custody by his own voluntary act, by misconduct, and even sometimes by misfortune. He may lead such a grossly immoral and profligate life, may become so habituated to the use of intoxicants, as to be utterly unfit to have the custody of a child, or may by neglect to provide for it justify a court in refusing to place it in his custody. *State v. Bratton*, 15 Am. L. Reg. N. S. 359.

Applying the law to the facts first of the

equity case, we find that Lizzie Lally was two years old when this proceeding commenced; that she was then adopted by appellants James and Mary Sullivan, with the consent of the mayor of Keokuk, as provided by Code, §§ 2308, 2309; that the child was treated as having been abandoned by her father, and it was also alleged he was an habitual drunkard. It will serve no useful purpose to refer in detail to the evidence, but, after a careful examination of it, we think it fully appears that at the time Lizzie was adopted by the Sullivans plaintiff had abandoned all his children. Before going to St. Louis he took his children to Mrs. Connor's, stating that he would send for them in a few days. The children then showed that they had not been properly cared for. They were substantially without clothing. Plaintiff had no money. He was gone ten weeks, and did not send or contribute anything towards their support. He wrote, proposing to distribute the children around to three different persons. Now he wants the Browns to have them, and expects them, for the rent of his house, —\$7 per month, —to keep and properly support the children, which service is shown to be worth \$20 per month. It appears that Brown earns \$1.50 per day, and has a family of his own to support. Nor do the Browns agree to keep the children for any definite time. Surely these and other facts appearing justify us in the conclusion that plaintiff lost all right he had to have the custody of his children.

In *Giles v. Giles*, 30 Neb. 62, the court, in a case in some respects much like this, said: "The testimony shows that he [the father] has no home of his own; that he proposes to place the child in the family of a friend. . . . For aught that appears, they might at any time —in a day, a week, or a month—abandon the care of the child," etc. So in this case there can be no assurance that the Browns will, under the circumstances, keep these children for any length of time, even if plaintiff's prayer be granted. It will not do to take this child from a good home, and put her in a position of such uncertainty. What assurance is there or can there be from the evidence in this case that this child of tender years will not, if plaintiff's wish be granted, be thrown by him on the charities of the world, with no protector, no one to provide her with the necessities of life, or to look after her education and moral training.

4. If, however, it should be conceded that the acts of plaintiff would not amount to an abandonment of his right of custody, there is yet another reason why he ought not to have the control of this child. It is charged, and, we think, fully established, that plaintiff is a man of dissolute habits, an habitual drunkard; that he was so long prior to his wife's death, —August 5, 1889,—and since; that by reason of these habits he was forced to seek employment in some place outside of Keokuk; that he was drunk at a funeral; that he had mistreated his children; that on July 4, 1889,—but a month prior to his wife's death,—he was driving through the streets with them at a dangerous rate of speed; that his wife had expressed the wish that the children should be placed in a convent, away from their drunken father.

Against this testimony and this record we have the assurance of the plaintiff that he had reformed. We are unable to so find from the evidence; and, even if it were so, the reformation is of so recent a date that we should not feel justified in taking this child from a good home with her relations; and turning her over to her father, in view of the experience of mankind as to the probable permanency of such reformation. If this plaintiff had for a reasonable length of time shown his ability to keep sober and to provide for his children, the case might be different. But his dissipation continued after his wife's death, and the court below found that, unless there was a reform as promised on plaintiff's part, he would have no legal or moral right to the custody of his children. To our minds, the habits and conduct of plaintiff bar his right to the custody of this child. The interest of the child being the controlling question, and in view of the fact that Lizzie is now well cared for, and has a good and permanent home with the only relatives she has other than her father, it seems certain that we shall promote her interest by letting her remain with those who have adopted her.

This case between the plaintiff and guardian was tried as a law action, and the court found, among other facts, that plaintiff had quit

drinking; that the guardian was a worthy and proper person to direct the education and moral training of the minors; that plaintiff had contracted an unfortunate habit of dissipation, and to such an extent as to render him unfit to properly care for his children; that, unless there is a reform as promised, the father would have no legal or moral claim to the custody of his children. It is evident that the learned judge below was led to believe that plaintiff had quit drinking, and that he relied on plaintiff's promised reformation. In this, we think, he was in error. The testimony shows plaintiff continued his dissipation up to the very day he left his children and went to St. Louis. There is not the slightest thing in the case to hang a hope of reformation on except his naked promise to quit. The findings of the court below stand as the verdict of a jury, and we should not disturb them if they find support in the evidence; but it seems to us that the evidence does not support the findings of the district court. We may also add that we see no reason for taxing any part of the costs to appellants. For the reason heretofore given both cases are reversed, and, as the law action must go back to the district court, they will both be remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

ILLINOIS SUPREME COURT.

PEOPLE of the State OF ILLINOIS,
Appts.,
v.

James M. BRIDGES.

(.....ILL.....)

1. A lake wholly upon lands of a private owner and connected with an unnavigable river only during times of high water, is included within a statutory prohibition against fishing with a seine during a certain part of the year in "any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, and other watercourses" within the state.
2. A statutory prohibition of fishing with a seine during a part of the year is not unconstitutional even as applied to a lake wholly upon lands of a private owner and connected with an unnavigable stream only in time of high water.

(May 11, 1892.)

APPEAL by prosecutors from a judgment of the Appellate Court, Third District, reversing a judgment of the Circuit Court for Sangamon County, which convicted defendant and imposed upon him a fine for alleged violation of the statutes concerning the protection of fish. *Reversed.*

The facts are stated in the opinion.

Messrs. John C. Mathis, A. J. Lester and E. S. Smith for appellants.

Messrs. Palmer & Shutt for appellee.

NOTE.—As to the power of the Legislature to regulate the right of fishery, see *Lawton v. Steele*, 7 L. R. A. 184, and note, 119 N. Y. 223, 16 L. R. A.

Bailey, J., delivered the opinion of the court:

This is a prosecution commenced in the name of the people of the state of Illinois against James M. Bridges before a justice of the peace of Sangamon county for a violation of the provisions of the Act entitled "An Act to Encourage the Propagation and Cultivation and to Secure the Protection of Fishes in All the Waters of This State," approved May 31, 1887, as amended by an Act approved June 3, 1889. Laws 1887, p. 189; Laws 1889, p. 168. The trial before the justice of the peace resulted in a judgment in favor of the defendant. The cause was thereupon removed to the circuit court by appeal, where a trial *de novo* was had, resulting in the conviction of the defendant, and the imposition upon him of a fine of \$10. From that judgment the defendant appealed to the appellate court of the third district, where said conviction was reversed, and a final judgment rendered in favor of the defendant. The present appeal is from said judgment of reversal, the judges of the appellate court having granted a certificate that the case involves questions of law of such importance, on account of principal and collateral interests, that it should be passed upon by this court.

The trial in the circuit court was without a jury, the facts being all admitted by the following stipulation: "Jacob Miller is the owner of the southwest quarter of section 8, in township 15 north, range 8 west of the 8d P. M., in Sangamon county, Illinois, in which what is known as 'Sand

Prairie Lake,' is situated. The small body of water known as 'Sand Prairie Lake' is about one quarter of a mile in length, and its width ranges from about twenty-five to one hundred yards. It is situated in the bottom of the north fork of the Sangamon river, and is distant from said river only a few yards at the furthest point. There is a low place or depression in said northwest quarter of said section 8, reaching from the north end of said lake or pond to the bed of said river at most seasons of the year, but in case of high water this depression or slough fills with water, and connects directly the waters of this pond or lake with the waters of said stream or river, and at times this connection lasts for a period of several days or weeks. The rises of said river or stream generally occur in the spring of the year or the early summer, and again in the fall. When there is no high water in the river or stream, the said lake or pond is entirely shut in, and its waters do not mingle at all with the waters of said stream. In July, 1889, the defendant, James Bridges, obtained the consent of said Jacob Miller to fish with a seine in said body of water so situated on said premises, and to catch and kill fish in said pond with a seine. After consent was given defendant by Jacob Miller so to do, the defendant, with the help of others, went in and upon said pond, and with a large seine, with meshes of one and one half inches, and about seventy yards long, (not a minnow seine) dragged said pond or body of water, and caught and killed thereby a large number of fish of different kinds, of the varieties common to the waters within the state of Illinois. The north fork of the Sangamon river is not a stream or river used for navigation." The foregoing being all the evidence offered at the trial, the circuit court held as matter of law, in substance, that the catching and killing of said fish by the defendant, in manner and form as shown by said stipulation, was unlawful, and rendered the defendant guilty of the offense charged in the complaint.

The statutory provisions for the violation of which the prosecution was instituted are to be found in the sixth section of said amendatory Act, and are as follows: "That it shall be unlawful for any person to catch or kill any fish with any seine or other device used as a seine in or upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, or other watercourses wholly within or running through the state of Illinois; nor shall the meshes of any weir, basket, or trap, or any device for catching fish in such waters not above prohibited, except for catching minnows for bait, be less than two inches square: provided, however, that seining shall be lawful and allowed between the first day of July in each year and the first day of April in the following year, with seines, the meshes of which shall not be less than two inches square, in such rivers, or streams as are used for navigation, wholly within the state, and not above or beyond any private or corporate dam on said rivers or streams, and also in the navigable bays or lakes connected with such navigable streams, wholly within

the state, and not extending beyond the overflowed bottoms of such rivers or streams; . . . and any person offending shall be deemed guilty of a misdemeanor, and fined as provided in this Act." Rev. Stat. 1891, chap. 58, § 6. The questions presented are, (1) whether this statute applies to the lake or pond in controversy; and (2) whether, as applied to said lake or pond, it is valid. The first of these questions is solely one of construction, and has no dependence upon the second, except so far as it involves the rule that a statute should, if possible, be so construed as to sustain its provisions, by avoiding, where that can be done, all conflict with the fundamental law. Do the provisions of said statute apply, and were they intended by the Legislature to apply to bodies of water of the character of the one in question here? The object of the statute, as expressed in its title, is "to encourage the propagation and cultivation and to secure protection of fish in all the waters of this state," and section 6 of the amendatory Act prohibits the catching or killing of fish with any seine, etc., "in or upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, and other watercourses wholly within this state, or running through the state of Illinois." The body of water in question, as the stipulation admits, is a lake or pond of considerable dimensions, lying wholly within this state, and one which, in its natural state, is stocked with a considerable amount of fish of the varieties common to the waters of this state. The language of the statute is certainly broad enough to include it, and we are unable to yield our assent to the reasons which are urged in favor of the construction which would exclude it.

It is contended that the general words, "other watercourses," should be held to operate as a limitation upon the scope or meaning to be given to the more specific enumeration of different classes of streams or bodies of water, so as to exclude all waters which do not properly fall under the designation of watercourses. It is true that, where several words susceptible of an analogous meaning are coupled together, the maxim *notumtur a sociis* is often applied; that is to say, they take, so to speak, color from each other, but that is usually, if not uniformly, by way of restricting the more general to a sense analogous to the less general. *Re Swigert*, 119 Ill. 88, 6 West. Rep. 725; *Endlich*, Interpretation of Statutes, §§ 400-411. The rule, however, does not seem to have the converse operation. Thus, where various specific terms are associated with words of a more general character, and the ordinary signification of the general words is more restricted than that of all the specific terms taken collectively, the meaning of the general words may be enlarged, but the scope of the specific words used will not be restricted, or their force practically nullified, by their association with general words of that character. To constitute a watercourse, according to the ordinary signification of that term, there must be a stream usually flowing in a particular direction, and in a definite channel, and it must usually discharge itself into

some other stream or body of water. *Palmer v. Waddell*, 22 Kan. 352; *Robinson v. Shanks*, 118 Ind. 125. If, then, the words "other watercourses" should be given their ordinary signification, and should be allowed to control the more specific words of the statute, they would practically eliminate from it the words "ponds" and "lakes," and perhaps also the words "sloughs" and "bayous," as the first two of these words most usually, and the last two very frequently, are not included within the ordinary meaning of "watercourses." It is manifest that this latter term was used, not by way of restricting anything which had already been mentioned, but for the purpose of including any other watercourse of the same general nature as those specified, if such there should happen to be in the state, which were not sufficiently described in the specifications already made. Whether or not there were such in fact is not material. The general words were obviously used by way of precaution, so as to render it certain that no waters of that general nature should be omitted.

Again, it is contended that the body of water in question cannot be deemed to have been within the contemplation of the Legislature when it passed said statute, because the land covered by said water, as well as all the lands by which it was surrounded, are the private property of Miller, and that said body of water, by reason of its situation, is subject to no right of navigation in favor of the public, and no right of easement in favor of other riparian proprietors. It has no outlet, and during the greater portion of the year it is cut off from and has no communication with the watercourse near which it is situated. It is said that Miller's rights in said body of water are so paramount and exclusive that, if he choose to fill it up, and thereby destroy it as a lake or pond, no rights of any private party or of the public would be infringed; and this is put forward as the test of the legislative intention to include said lake among the waters enumerated by said Act. It seems to us to be a sufficient answer to this contention that the statute itself, neither expressly nor by implication, has established any such test. There may be, and doubtless are, various, and perhaps many, lakes, ponds, sloughs, and bayous in the state, which are so far private property that the owner may drain them or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in their natural condition, are places where fish common to the waters of the state are propagated and raised. And, while this is so, the statute makes no distinction between bodies of water thus situated and those in respect to which public rights or private easements exist. Its language applies to all alike. Nor would there seem to be any reason why the legislative policy in relation to the protection and preservation of fish in rivers and streams should not apply to waters of this character, especially where they have such connections, either permanent or during occasional periods of high water, with streams or other bodies of water in which fish abound, as to draw therefrom

their stock of fish. Indeed, the power to protect and preserve the fish in the waters of the state would be practically nugatory, if, as is contended, it was confined to streams and watercourses, and was excluded in case of all bodies of water which were so far subject to private ownership that the owners would have a right to drain them or fill them up, and thus destroy them as bodies of water. It is well known that lakes, ponds, sloughs, and bayous, many, if not most, of which are thus subject to private ownership, are the very places which are most sought by the various species of migratory fish for the purpose of depositing their spawn, and which are therefore of the highest importance in the propagation and multiplication of those varieties of fish. If the power of the Legislature to make provision for the protection and preservation of fish depended upon the existence of some other right, like that of navigation, or of some private easement, such as usually belongs to riparian proprietors, a different conclusion might follow. But we do not understand that to be the case. The power, where it exists, rests upon other grounds. It is because of the great importance of fish as an article of human food that their protection and preservation has been regarded as a matter of public concern, and it is upon that ground that Legislatures have assumed the right to interpose their authority by way of preventing any undue or improper hindrance in the way of their natural increase and of prohibiting the use of improper means for their extermination.

It being clear, as we think, that the statute is broad enough to include the pond or lake in question, and that bodies of water of that character are within the legislative intent, the inquiry involving the greatest difficulty is whether, as applied to such bodies of water, the statute is obnoxious to any constitutional objection. The only objection of that character which seems to be suggested is that it is an undue and unwarrantable interference with the property rights of the owner of the land upon which said pond or lake is situated. Fish, in streams or bodies of water, have always been classed by the common law as *ferae nature*, in which the riparian proprietor or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in such waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters. We are unable to see that there is anything in the situation or character of the pond or lake in question that takes it out of the rule. While said body of water has no continuous connection with the river situated but a few yards away, such connection is established during all periods of high water, and continues for a sufficient length of time to allow fish to pass into it, or the fish in the lake to escape therefrom. During such periods of high water, which occur once or twice, if not oftener, every year, and continue sometimes for several weeks, said lake, so far as the passage of fish to and from it is concerned, becomes, for all practicable purposes,

a part of the river. During these periods, as we may presume, migratory fish, passing up the river in search of proper places for depositing their spawn, are liable, for such purpose, to pass into this as into other bayous where the waters are quiet, but with this difference: that while, in case of ordinary bayous which maintain their connection with the stream, the fish, after accomplishing their purpose, are at liberty to leave and go elsewhere, here by the receding of the water, their exit is for the time being cut off, and they, as well as their progeny, are compelled to remain. As soon, however, as another flood occurs,—a thing which may happen at any season of the year,—the fish thus impounded are at liberty to escape, and if they do so any qualified property the owner of the lake may have in them is at once devastated.

We are unable to see how the mere fact that said lake, instead of having a continual connection with the river, has such connection only during periods of high water, can have any essential bearing upon the rights which the owner of the soil has in the fish that happen for the time being to be in the lake. It undoubtedly greatly increases his opportunities for obtaining an absolute title by catching and reducing them to possession, but until he does so he has only the same and no better title to them than he would have if the lake were merely a bayou having uninterrupted connection with the river. It is impossible, therefore, to distinguish the present case from those arising in relation to other waters in the state to which the statute is applicable. The public interest is involved in both in the same way, if not to the same extent, and the public interest in both is such as to justify legislative interposition. The power of the Legislature to pass laws for the protection and preservation of fish in the waters of the state has been so frequently exercised in this and other states, and such exercise has been so long and so uniformly acquiesced in, that the existence of the power, at the present day, is scarcely open to question. Thus in *Weller v. Snoger*, 42 N. J. L. 341, the court reviews various authorities bearing upon the question, and says: "The great interest of the general government and the government of our state, in protecting fisheries, in stocking them with fish, in guarding them as a supply of food for our people, and in fostering and raising game fish, has been manifested by frequent legislation and appropriations for these purposes. The right of the state thus to legislate cannot be disputed." See also *Doughty v. Conover*, 42 N. J. L. 193. In *People v. Reed*, 47 Barb. 285, which was an indictment for taking fish with a net in violation of a statute prohibiting the taking of fish in that manner within the waters of the state, the court says: "There is no force in the objection to the power of the Legislature to pass a valid law to prevent taking fish, at certain seasons, within the waters of this state. It is a power which the Legislature has always exercised, and the right is founded in considerations of public policy." In *Gentile v. State*, 29 Ind. 409, which was a criminal prosecution for a 16 L. R. A.

violation of a statute prohibiting the trapping, netting, or seining of fish, it is said: "We find nothing in the Constitution restricting the powers of the Legislature over the subject, and therefore hold the statute constitutional." In *Drew v. Hilliker*, 56 Vt. 641, a similar statute was held constitutional. Legislation of this character is directly or incidentally sustained in the following decisions: *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *State v. Roberts*, 59 N. H. 484; *State v. Beal*, 75 Me. 289; *State v. Blount*, 85 Mo. 543; *Maney v. State*, 6 Lea, 218; *Com. v. Look*, 108 Mass. 452; *Com. v. Richardson*, 142 Mass. 71, 2 New Eng. Rep. 53; *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 183; *State v. Franklin Falls Co.* 49 N. H. 240; *State v. Boone*, 30 Ind. 225; *Vinton v. Welsh*, 9 Pick. 87; *State v. Hockett*, 29 Ind. 302. These are but a few of the numerous cases to be found in the reports bearing on the subject, but, as the general power of the Legislature to pass laws for the protection of fish and the regulation of fisheries does not seem to be questioned, further reference to the decisions of other states is unnecessary. In none of these cases, so far as we have been able to examine them, has the fact that a particular individual has the sole and exclusive fishery right been held to exclude the legislative power to control and regulate the exercise of such right. In *Beckman v. Kreamer*, 48 Ill. 447, 92 Am. Dec. 146, such exclusive fishery right is defined and limited as follows: "By the common law a right to take fish belongs essentially to the right to the soil in streams or bodies of water, where the tide does not ebb and flow, that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate." It may be observed that under this definition the fishery right of the landowner in the case before us is no more exclusive than is that of a riparian proprietor on one or both sides of a stream above tide water, and both are equally subject to such rules as may be imposed by law or usage under its exercise.

Laws regulating the exercise of fishery rights stand, so far as the questions now under consideration are concerned, upon substantially the same footing with ordinary game laws, and we think the rule will not be questioned that a general statute regulating the killing of game, or restricting the right to kill it, to certain portions of the year, apply as well to the game which a particular landowner may chance to find on his own premises as to that which may be found on the land of others, or upon lands belonging to the public. Precisely the same considerations of public policy prevail in the one case as in the other. The object of laws restricting the killing of certain game birds to particular seasons of the year is to

favor their increase and prevent their undue extinction, and that object may be quite as successfully thwarted by each proprietor killing them on his own premises as by hunting and killing them on the land of others. In *Magner v. People*, 97 Ill. 820, this court, in affirming the validity of certain laws restricting the killing of game, said: "No one has a property in the animals and fowls denominated 'game' until they are reduced to possession. Whilst they are untamed and at large the ownership is said to be in the sovereign authority,—in Great Britain in the king, but with us in the people of the state. The policy of the common law was to regulate and control the hunting and killing of game, for its better preservation; and such regulation and control, according to Blackstone, belong to the police power of the government. . . . The ownership being in the people of the state,—the repository of the sovereign authority,—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt or kill game, or qualify or restrict it, as, in the opinion of its members, will best subserve the public welfare. Stated in other language, to hunt or kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority; not a right inhering in the individual; and consequently nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is

in trust for all the people of the state, and hence, by implication, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. But, in any view, the question of individual enjoyment is one of public policy, and not of private rights." What is here quoted applies with equal appropriateness to laws having for their object the preservation of fish in the waters of the state, and such application is made in said opinion, by way of argument, in the following language: "So far as we are aware, it has never been judicially denied that the government, under its police powers, may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older states since the organization of the Federal government. On the contrary, the constitutional right to enact such laws has been expressly affirmed, in regard to fish,"—citing several of the cases to which reference has already been made, in which the constitutionality of such acts is affirmed, and adding, "Upon principle, the right is clear."

Testing the case, then, in the light of both reason and authority, we are of the opinion that the statute under consideration was intended to and does apply to the lake or pond in question, and, as so applied, it is constitutional and valid. In reaching a contrary conclusion the Appellate Court erred, and its judgment will therefore be reversed, and the judgment of the circuit court will be affirmed.

INDIANA SUPREME COURT.

STATE of Indiana, *ex rel.* Richard H. HARTFORD *et al.*, *Appts.*,

Riley H. CRAIG.

(.....Ind.....)

1. The removal of a councilman from the ward for which he was elected to another ward of the same city will not of itself create a vacancy in his office where the only constitutional provision as to the residence of municipal officers provides that they shall reside "within their respective counties, townships, and towns," while the statutes provide that a councilman must at the time of his election "be a resident of the ward and in case of removal therefrom" the common council shall have power to declare his office vacant and order a special election to fill the vacancy.

2. A member of a city council is not an officer of the ward from which he is chosen, but of the entire city.

(May 24, 1892.)

APPEAL by relators from a judgment of the Circuit Court for Jay County in favor of

NOTE.—The above appears to be a pioneer case upon the point involved.

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defendant in a proceeding to have the office of councilman of the City of Portland, which had been held by defendant, declared vacant because of his removal from the ward for which he was elected. *Affirmed.*

The facts sufficiently appear in the opinion.

Meems. R. H. Hartford and D. H. Taylor for appellant.

Meems. Frank H. Snyder and George W. Beryman for appellee.

McBride, Ch. J., delivered the opinion of the court:

The appellee was duly elected a councilman for the third ward of the city of Portland. He qualified and entered upon the duties of the office. He was at that time a resident of said ward and was otherwise qualified. Afterward he removed from the third to the second ward, where he resided when this suit was commenced, which was a proceeding against him in the nature of quo warranto. Since his removal he has still assumed to be councilman for the third ward and has been acting in that capacity. The only question we are required to decide is, Did his removal from the third ward vacate the office? The court below held that it did not. The precise question has never heretofore been before this court. In

deed, no authority is cited and counsel presents the question as one of first impression.

The law providing for the incorporation of cities requires that the city shall be divided into wards, and that two councilmen shall be elected from each ward, by the legal voters of their respective wards. Rev. Stat. 1881, § 3043.

The section referred to contains the following provision: "No person shall hold the office of councilman unless, at the time of his election he is a resident of the ward from which he is elected, and in case of the removal of any councilman from the ward from which he was elected, the common council shall have power to declare his office vacant and order a special election to fill the vacancy."

It is conceded that the city council has never taken any action in the matter. The only constitutional restriction upon the residence of officers of municipal corporations is found in section 6, article 6, of the Constitution, which provides that "all county, township, and town officers shall reside within their respective counties, townships, and towns." The word "town" is generic, and includes cities. *Flinn v. State*, 24 Ind. 286.

It is, however, competent for the Legislature to impose additional conditions and restrictions not in conflict with any express provision of the Constitution. It may, without doubt, as is done in the statute now under consideration, prescribe that only those shall be eligible for election as councilmen who are at the time residents of the ward for which they are elected. We think it equally clear that it may provide that removal from that ward will of itself operate as a vacation of the office. We do not think, however, that it has done so. In

our opinion, it has not only committed to the city council the power to declare a vacancy in such a case, but it has also left the exercise of that power to the discretion of the council. Until that body has acted, the mere fact of removal to another ward will not of itself have the effect to create a vacancy.

The law providing for the organization and election of boards of county commissioners provides for the division of counties into districts, and that a commissioner shall be elected from each district, who shall reside in the district. Rev. Stat. 1881, § 5732.

In the case of *Smith v. State*, 24 Ind. 101, it was held that the statute did not require that a commissioner should continue to reside in the district for which he was elected. It is true, the statutes are unlike in this, that boards of county commissioners are elected by the vote of the entire county and not by the vote of the district which they represent, while members of a city council are elected by the votes alone of the voters of their respective wards. But when they are once elected and enter upon the discharge of their official duties, these duties are such as affect alike all portions of the city and are in no sense local. As is said of the county commissioner in *Smith v. State*, *supra*, when he assumes the duties of his office, "at that time he takes an oath of office and assumes duties and a jurisdiction co-extensive with the limits of the county."

So the member of the city council, when he takes his oath of office, assumes duties and a jurisdiction co-extensive with the limits of the city. He is not an officer of the ward, but an officer of the entire city.

Judgment affirmed.

UTAH SUPREME COURT.

Elwood N. JENKINS, *Appt.*,

v.

Jedediah BALLANTYNE, *Respnt.*

(.....Utah.....)

1. A dog is "property" within the meaning of the constitutional provision against taking property without due process of law.

2. An ordinance making a dog liable to be killed by any person unless registered and collared as provided by the ordinance is not in violation of the constitutional provision against depriving a person of property without due process of law, but is a valid police regulation.

(August 4, 1892.)

APPEAL by plaintiff from a judgment of the District Court for Weber County in favor of defendant in an action brought to recover damages for the alleged wrongful killing by defendant of plaintiff's dog. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. L. R. Rhodes*, for appellant:

NOTE.—As to the right to kill dogs, see *Hubbard v. Preston* (Mich.) 15 L. R. A. 240, and *note*.

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In the American courts dogs have generally been held a species of property and an action for injury may be maintained by their owners.

Woolf v. Chalker, 81 Conn. 121; *Dunlap v. Snyder*, 17 Barb. 561; *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355.

The following courts have held that dogs are subject to larceny and are property:

Dodson v. Mock, 20 N. C. 146, 32 Am. Dec. 577; *State v. Brown*, 9 Baxt. 53, 40 Am. Rep. 81, *note*; *Harrington v. Miles*, *supra*; *Mullaly v. People*, 86 N. Y. 365.

This ordinance provided a penalty to be inflicted upon the person who neglected to pay license for his dog. That was the proper punishment; not the killing of the dog by a private person.

See *Heisrodt v. Hackett*, 84 Mich. 283, 22 Am. Rep. 529.

Messrs. Kimball & Allison, for respondent:

It was admitted by the plaintiff upon the witness stand that he had not complied with the provisions of sections 1 and 4 of the Ordinance. The Ordinance was valid, and its admission in evidence was not error.

State v. McDuffie, 84 N. H. 523, 69 Am. Dec. 516; *Blair v. Forehand*, 100 Mass. 186, 1

Am. Rep. 94, 97 Am. Dec. 82; *Morewood v. Wakefield*, 138 Mass. 240; *Heisrodt v. Hackett*, 84 Mich. 283, 22 Am. Rep. 529; *Carpenter v. Lippitt*, 77 Mo. 242; *Marshall v. Blackshire*, 44 Iowa, 475.

Zane, *Ch. J.*, delivered the opinion of the court:

This action was instituted to recover the value of an Australian kangaroo hound, killed by the defendant while at large on his premises in Ogden city. The evidence on the trial tended to establish that the hound was worth \$800, the value alleged in the complaint. The defendant claims that the facts proven and the ordinance in evidence authorized the killing. The ordinance is as follows: "Sec. 3. It shall be the duty of the recorder to register any dog on application of the owner or keeper, and issue a certificate of registration, under the corporate seal, on payment by such owner or keeper to said recorder, for the use and benefit of the city, the sum of three dollars. Such certificate shall be numbered in the order of issue, and shall be in force for one year only from and after the date of the same; but may be renewed annually, on the payment of the sum of three dollars, as aforesaid. Sec. 4. All dogs so registered shall wear a suitable collar, with the name or initials of the owner or keeper, and the number corresponding with that of the certificate of registry inscribed thereon; and all dogs found running at large within the limits of the city, not so registered and collared, shall be liable to be killed by any person." The provision of the charter of Ogden city authorizing the ordinance is as follows: "The city council shall have power to license, tax, regulate, or prohibit the keeping of dogs, and to authorize the destruction of the same when at large contrary to ordinance."

The question is presented, Had the Legislature the power to authorize the city to provide by ordinance for the registration and collaring of dogs within its limits, and to authorize their destruction when at large contrary to such provisions? Though the common law recognized dogs as property, it extended to them less legal regard and protection than to more harmless and useful domestic animals. They were not the subject of larceny at the common law. Later cases, however, in the United States hold that such property is also the subject of larceny. The Fifth Amendment to the Constitution of the United States declares that "no person shall . . . be deprived of life, liberty, or property without due process of law," and dogs being property, as we have seen, their owners cannot be deprived of them without due process of law. The question is, Was the killing of plaintiff's dog by the defendant, in view of the facts in evidence, under the ordinance "due process of law?"

The term "law," as used in this Constitutional provision, embraces all legal and equitable rules defining human rights and duties, and providing for their enforcement; not only as between man and man, but also between the state and its citizens. The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property; it includes all the forms and acts essential to its application and to give effect to it. The 16 L. R. A.

means that may be employed to accomplish the purpose of the law is the process; in other words, "process" is the mode by which the purpose of the law may be effected. And this mode as to similar subjects, under similar circumstances, must be the same to all persons. This is "due process of law." Judicial action is usually required to determine property rights against its owner, but in some cases administrative or executive action is sufficient. The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action or process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such, as to render judicial inquiry and consideration impracticable. If a man is assailed under circumstances inducing in him a reasonable belief that it is necessary for him to take his assailant's life to save his own or to prevent great bodily injury, he may lawfully do so. The destruction of houses is lawful to prevent the spread of a conflagration. The killing of a horse or other valuable animal, if necessary to prevent serious injury from his attacks, is lawful. In such emergencies, and under such circumstances, the deprivation of life or liberty or the destruction of property is lawful, and not without due process of law. The purpose of municipal laws is the protection of life, liberty, and property; and, in order that they may afford such protection, they should be adapted to all situations and emergencies. The police power of the state has been used to regulate and control property in dogs to a greater extent than property in any other class of domestic animals. It is a peculiar kind of property. Such animals increase rapidly; they are usually of little expense to their owners when allowed to run at large; and in a domestic state they retain to a considerable degree their wild, mischievous, and ferocious natures. Their trespasses and invasions of rights not belonging to their masters are often such as are impossible to prevent, and when the mischief is done sometimes it is impossible to identify the dog or his owner, and when found the latter is sometimes as irresponsible as the former; in fact, judicial process and inquiry is altogether inadequate to redress such wrongs. Hence such laws and ordinances as those in question are adopted, requiring the owners of dogs to register and collar them. By such means the owner is ascertained and made responsible, and all dogs not deemed worth the trouble and expense of registration are outlawed when at large, and liable to be killed. Such was the law regulating the right of property in dogs at the time the constitutional provision in question was adopted. That provision was not intended to abrogate or add to the laws then in force. The purpose of its authors was to secure each and all impartially the benefits of such rules and regulations as had been established for the protection of life, liberty, and property, and such as experience and reason might suggest to the law-making department of the state and be enacted in the future. In *Weimer v. Bunbury*, 80 Mich. 201, the court said: "We are therefore of necessity driven to an examination of the previous condition of things, if we would

understand the meaning of 'due process of law,' as the Constitution employs the term. Nothing previously in use regarded as necessary in government and sanctioned by usage can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. The words, it has very justly been said, 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' Per Johnson, *J.*, in *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 285, 4 L. ed. 559."

The enactment of the provision of the charter above quoted by the Legislature was an exercise of the police power of the territory,

and the ordinance in question was authorized by that provision. "By this general police power of the state, persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state." Tiedeman, *Pol. Powers*, p. 2, § 1; *Id.* p. 507, § 141; *Morewood v. Wakefield*, 183 Mass. 240; *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82; *State v. McDuffie*, 84 N. H. 523, 60 Am. Dec. 516. The court is of the opinion that the ordinance relied upon is valid, and that it justified the defendant in killing plaintiff's dog while running at large without being registered according to its provisions. Other errors are alleged on the record, but we do not think them well assigned.

The judgment of the court below is affirmed.

Anderson and Blackburn, JJ., concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* Carrie OLSON,
Appt.,

J. W. BROWN, Supt. of State Reform
School, *Resp't.*

(.....Minn.....)

*1. The statutes (Gen. Stat. 1878, chap. 35, § 44, etc.), and the various Acts amendatory thereto, which con-

*Head notes by COLLINS, J.

fer upon justices of the peace power to commit infants, in consequence of incorrigibly vicious conduct, to the care and guardianship of the board of managers of the state reform school for terms exceeding a period of three months, are not repugnant to section 7 of article 6 of the Constitution, relating to the jurisdiction of probate courts, or to section 8 of the same article, relating to the jurisdiction of justices of the peace.

*2. The mode of procedure pointed out in this legislation is not in violation of that

NOTE.—Commitment of minors to reformatories without conviction of crime.

A statute authorizing a magistrate to commit to the reform school any minor "who he has reason to believe is a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness, or vice," is unconstitutional because such commitment is not by "due process of law." *People v. Turner*, 55 Ill. 281, 5 Am. Rep. 645.

This was a habeas corpus proceeding by a father to liberate his minor son, who had been committed under this statute. *Thornton, J.*, said, p. 287: "Even criminals cannot be convicted and imprisoned without due process of law,—without a regular trial, according to the course of the common law. Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness, and vice, are misfortunes, not crimes. In all criminal prosecutions against minors for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without 'due process of law?' It cannot be said that in this case there is no imprisonment. This boy is deprived of a father's care, bereft of home influences, has no freedom of action, is committed for an uncertain time, is branded as a prisoner, made subject to the will of others, and thus feels that he is a slave. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood."

Another statute authorizing the commitment of minor girls for similar reasons, which provided for the ascertainment of the facts by a jury, upon 16 L. R. A.

notice to parents, was upheld in *Re Ferrier*, 103 Ill. 387, a distinction being taken on the less summary procedure and the more liberal character of the confinement prescribed.

Of this latter Act it is said in *McLean County v. Humphreys*, 104 Ill. 878, 388: "We perceive no force in the objection that the Act in question is an infringement upon the personal liberty of the citizen as guaranteed by the Constitution. The restraints which the Act imposes are only such as are essential to the comfort and well-being of the unfortunate class of persons who are brought within its provisions."

In *Mason v. Barnett* (Wash.) Jan. 21, 1892, it is said that homeless and incorrigible minors committed to the state reform school "are not subject to the penal laws of the state, have no right to trial by jury, . . . and do not come within pardoning power, any more than persons committed to the insane asylums. They are wards of the state, which stands to them *in loco parentis*, and whose courts are its agents to make commitments, after which the trustees take full charge and control of them."

The summary commitment by virtue of a statute of an incorrigible minor to a house of refuge is not imprisonment without "due process of law." *Ex parte Crouse*, 4 Whart. 9.

The court said: "The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who else would be committed to a common gaol; and, in respect to these, the constitutionality of the Act which incorporated it stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of a court, a magistrate, or the managers of the alms-house, that a doubt is entertained."

portion of the fundamental law of the state which provides that the right of trial by jury shall remain inviolate.

3. Other questions, raised on habeas corpus proceedings, as to the regularity of certain proceedings which resulted in the commitment of an infant to the care and guardianship of said board of managers, considered and disposed of.

(July 1, 1892.)

A PPEAL by relator from an order of the District Court for Goodhue County dismissing her proceeding in habeas corpus to procure the release of her son from the custody of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sawyer, Abbott & Sawyer, for appellant:

The jurisdiction of justices of the peace is defined and limited by the Constitution.

Minn. Const. art. 6, § 8.

It is not an industrial school, a benevolent institution to which the convict is committed under the Act.

See Wis. Stat. Providing Industrial Schools, § 3208; Kelly Stat. Minn. Act Providing Home for Dependent & Neglected Children, §§ 3234, 3251.

Inmates of state reform school are transferable to reformatory at will of managers.

Kelly Stat. § 8214.

The same convict is transferable from reformatory to state prison at the will of managers of reformatory.

Ibid.

Confinement in a reform school as above constituted is a disgrace not a misfortune, imprisonment and not adoption by the state. If a justice of the peace has the constitutional power to commit to a reform school for a period of more than three months, there is no logical reason why he cannot be granted the power to commit to the state reformatory for a series of years.

A justice of the peace has no jurisdiction over matters of guardianship.

Minn. Const. art. 6, § 7.

And again: "As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare."

The decision in *Both v. House of Refuge*, 81 Md. 329, is based entirely upon and follows *Ex parte Crouse*, 4 Whart. 9.

In *Jarrard v. State*, 116 Ind. 98, it is said: "We think it settled in accordance with principle that the Legislature has power to provide for the reformation of boys who are entering upon a career of wickedness, by prescribing measures for committing them to a reformatory institution."

The Indiana Constitution expressly empowers the Legislature to establish "houses of refuge for the correction and reformation of juvenile offenders," and warrants an Act for the commitment of boys thereto which provides a method for ascertaining by a judicial investigation, in a court of general superior jurisdiction, whether there is cause for taking bad boys from the control of parents and placing them in charge of such reformatories. *Jarrard v. State*, *supra*.

The Ohio statute authorizes a grand jury to whom any accusation is made against a minor under sixteen years to return to the court that such minor is a proper subject for commitment to the house of refuge, and provides that the court shall thereupon order such commitment. It is held that such commitment does not infringe upon the constitutional right of trial by jury, or the rights of an accused in criminal prosecutions. *Prescott v. State*, 19 Ohio St. 184. But see *State v. Ray*, 1 New Eng. Rep. 68, 63 N. H. 406.

The provision for the commitment of homeless children is valid although no notice is required to be given to parents, but the necessity of detention can be inquired into at any time on habeas corpus. *House of Refuge of Cincinnati v. Ryan*, 37 Ohio St. 497.

In this case it is said: "The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison."

In *Farnham v. Pierce*, 2 New Eng. Rep. 225, 141 Mass. 203, 55 Am. Rep. 452, a statute authorizing the summary commitment of minors who are made to 46 L. R. A.

appear to any magistrate to be without salutary control is held to be not in conflict with the Declaration of Rights, but that such commitment is subject to be terminated by a showing by the parent that cause for it does not exist.

An amendment since the last decision made provision for notice to the parent, but under this it is held that the parent is not concluded from showing that cause for further detention does not exist. *Re Kelley*, 152 Mass. 438.

The California statute provides for the ascertainment by the court prior to conviction, with the consent of a youthful offender, of the fact whether he is a suitable person to be committed to the state reform school. *Ex parte Liddell* (Cal.) March 12, 1892.

The court says that the power of the state is clear "to arrest the downward tendency of those who have offended against its laws and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education and discipline necessary to prepare them for honorable citizenship."

A minor sentenced in the alternative to the state reform school during his minority, or to imprisonment in the workhouse for six months, and who, because of his incorrigibility, has been removed to the workhouse from the reform school, in pursuance of R. L. Pub. Stat., chap. 254, § 2, authorizing the state board of charities and corrections to make such removal for the term of his sentence to the school, or until he may be returned thereto without detriment, and not under section 8, providing for removal in pursuance of the alternative sentence, is not entitled to discharge after six months' confinement in the workhouse. *Re Bonn*, 17 R. L. —.

A statute authorizing a justice of the peace to commit to the industrial school minors under the age of seventeen, who are charged with certain felonies, for a term not less than a year nor extending beyond their majority, instead of requiring such minor to recognize for his appearance at the supreme court, conflicts with the Bill of Rights, prohibiting the deprivation of a citizen's liberty "but by the judgment of his peers or the law of the land." *State v. Ray*, 1 New Eng. Rep. 68, 63 N. H. 406.

This case expressly repudiates *Prescott v. State*, 19 Ohio St. 184, *supra*, which arrived at a different conclusion as to a similar enactment.

J. G. G. :

Said Act contemplates that the parent should be made a party to the proceedings.

Milwaukee Industrial School v. Milwaukee County Supra, 40 Wis. 389, 22 Am. Rep. 702; *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645.

The very object of the statute is to foreclose such parent or guardian of future claim upon the infant by making him a party to the action, otherwise the act is clearly unconstitutional and void on the ground that the Act provides for no proceedings on the part of the parent for the recovery of the infant, in case of the removal of the disability.

Ibid.

Appellant was deprived of his constitutional right of a jury trial.

Minn. Const. art. 1, § 4.

Where the Constitution itself prescribes the manner in which a jury may be waived no other form of waiver can be had.

Ward v. People, 30 Mich. 116; *State v. Lockwood*, 48 Wis. 408; *Re Staff*, 63 Wis. 285; *Dillingham v. State*, 5 Ohio St. 280.

Mezra. Moses E. Clapp and H. W. Childs, for respondent:

The proceeding is purely statutory, and the commitment is not punishment.

Prescott v. State, 19 Ohio St. 184; *House of Refuge of Cincinnati v. Ryan*, 87 Ohio St. 197; *Farnham v. Pierce*, 2 New Eng. Rep. 225, 141 Mass. 208, 55 Am. Rep. 452.

Such legislation is savagely assailed by *Justice Thornton* in *People v. Turner*, 55 Ill. 281, 8 Am. Rep. 645.

But such views are said to be "unsound" in a note in 7 Crim. L. Mag. 85.

And they are not adhered to by the same court in *Re Ferrier*, 103 Ill. 367; *McLean County v. Humphreys*, 104 Ill. 378. See also *Mankato v. Arnold*, 36 Minn. 62.

The proceeding being purely statutory, it was unnecessary to make the parent or other person in behalf of the relator a party defendant.

Fitzgerald v. Com. 5 Allen, 509; *Milwaukee Industrial School v. Milwaukee County Supra*, 40 Wis. 389, 22 Am. Rep. 702.

For the same reason relator was not entitled to a jury trial.

Re Ferrier, supra.

Collins, J., delivered the opinion of the court:

Appeal from an order dismissing a habeas corpus proceeding wherein the writ was directed to the superintendent of the state reform school, commanding that he produce one Oscar E. Olson, a minor son of the relator, said to be unlawfully restrained at said school. Young Olson and one Conolly were brought before the municipal court of the city of Waseca on the charge of incorrigibly vicious conduct, and were committed to the guardianship of the board of managers of the reform school at the same time and on the same testimony. The proceedings had in the municipal court and as they were certified to the district judge, in so far as we were then advised, fully appear in a statement found in *State v. Brown* (Minn.) 60 N. W. Rep. 920. But the technical points upon which the latter case was decided and the relator released from the reform school do not now arise; for the record in this case, as we

view it, affirmatively shows that all the evidence introduced before the municipal court was reduced to writing, and transmitted to the judge of the district court, who approved the commitment. The additional evidence upon this hearing in the district court was competent, and in no way tended to impeach the record of the municipal court. There is nothing in the point that the municipal judge did not reduce to writing the questions propounded to the witness, but simply took the testimony in a narrative form. Neither is there anything in the point that he transmitted a typewritten copy of the evidence to the district judge, instead of the original. In proceeding to commit infants to the care and guardianship of the board of managers of the reform school, the right of the municipal court in question is derived through the statute under which it was organized, conferring upon it the authority, powers, and rights of a justice of the peace, under the general laws of the state. It follows that, if a justice has no power to commit to the reform school, the municipal court for the city of Waseca has not, and the claim is made by the relator that the statute by which this power is given to justices is unconstitutional and void. We are therefore obliged to consider the relator's contention that the legislation of this state, whereby justices are authorized and empowered to commit infants to the care and guardianship of the board of managers of the reform school in consequence of incorrigibly vicious conduct, and for a time exceeding three months, is not a valid exercise of legislative power, under the Constitution of this state. Two propositions are laid down in support of this contention—*First*, that the authority is conferred upon a justice of the peace to punish a criminal by imprisonment for a period exceeding three months, contrary to section 8, art. 6, of the Constitution; and *second*, that jurisdiction in the matter of "persons under guardianship" has been conferred on such justices, contrary to the provisions of section 7 of the same article, by which jurisdiction over such persons is granted unto another constitutional tribunal, the probate court.

The questions raised by the first of these propositions have often been discussed by the judicial tribunals of this country. Legislation which, brushing aside and disregarding the views, wishes, or supposed rights of natural guardians, has had for its object the future welfare of the minor children of incapable and unworthy parents, or the care, custody, and proper training of incorrigible and vicious youth by the state, has occasionally been denounced with great vigor by the courts. A notable example of this species of denunciation may be found in the opinion in *People v. Turner*, 55 Ill. 281, 8 Am. Rep. 645, written by *Mr. Justice Thornton*. But legislation of this character has been adopted in nearly all of the northern states, and its validity has often been upheld. We do not propose to add to the very many pages which, in the Reports and textbooks, have been devoted to the support of the position, now taken almost universally by the courts, that a person committed to the care and custody of a board in charge of an institution of the character of the Minnesota state re-

form school is not "punished," nor is he "imprisoned," in the ordinary meaning of those words. Hence the constitutional provision which regulates and limits the jurisdiction of justices of the peace in criminal matters has no application. We can do no better than to call attention to some of the leading authorities on this subject, and to quote from the case first cited the clear language used therein by the late Chief Justice Ryan: *Milwaukee Industrial School v. Milwaukee County Supra*, 40 Wis. 328, 22 Am. Rep. 702; *Farnham v. Pierce*, 141 Mass. 203, 2 New Eng. Rep. 225, 55 Am. Rep. 452; *Prescott v. State*, 19 Ohio St. 184; *House of Refuge of Cincinnati v. Ryan*, 37 Ohio St. 197; *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. 9; *Re Ferrier*, 103 Ill. 387; *McLean County v. Humphreys*, 104 Ill. 378; Tiedeman, Pol. Powers, chap. 13.

In the Wisconsin case, commencing on page 337, Judge Ryan thus expressed his views: "And in the first place, we cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poorhouse, — any more than the detention of any child at any boarding school, standing, for the time, *in loco parentis* to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of parental power of restraint over children committed to it. And when the state, as *parens patriæ*, is compelled, by the misfortune of a child, to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not, indeed we might say could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children. This seems too plain to need authority; but the cases cited for the respondent and others amply sustain our view."

We pass to an examination of the claim that, under the Constitution, a justice has no power to place a person under the guardianship of this board of managers, because jurisdiction has been conferred solely upon the probate courts in all matters of guardianship. When committing an infant to the care and custody of the board of managers of the reform school, the magistrate is not appointing a guardian for him, nor does such officer or the board of managers assume any control over his estate, if

he has one. A proceeding of this nature would not stand in the way of, nor would it be prevented by, the appointment of a statutory or testamentary guardian, — the only guardian coming within the purview of the Constitution. It is no more a violation of the fundamental law for the magistrate to commit a child to the guardianship of the managers of an institution of this kind than it would be for a competent court to appoint a guardian *ad litem* for him. The language of the Constitution does not apply where the state acts as the common guardian of the community, exercising its power whenever the welfare of an infant demands it, or where the state acts in the legitimate exercise of its police power. Therefore the law-makers were not prohibited from conferring jurisdiction in such cases upon any of the judicial officers of the state.

The mode and method of procedure, as fixed by statute and followed in this case, is also attacked by relator's counsel. The proceeding is wholly statutory, and the party proceeded against is not punished or imprisoned. What has been said heretofore in regard to the nature of the proceedings, as well as the views expressed in *Mankato v. Arnold*, 36 Minn. 62; *State v. Brown*, 52 N. W. Rep. 387, (this term), — disposes of the claim that Olson was deprived of his constitutional right to a jury trial.

It is not necessary for us to pass upon a further claim made by the relator, that in all such cases the parent or guardian or next friend must be made a party, and that because such parent or guardian or next friend stands charged in the complaint (Gen. Stat. *supra*, chap. 35, § 44, subd. 2), with moral depravity, or of being incapable or of unwillingness to care for and discipline the infant, the justice has no right to proceed until he has obtained jurisdiction over the parent or the guardian or the next friend, as the case may be. There may be a stronger reason than the one suggested why the natural or legal guardian of the infant should be made a party to the proceeding in question, but the statute does not seem to contemplate it, and it is possible that it is not necessary. *Milwaukee I. School v. Milwaukee County Supra. supra*; *Fitzgerald v. Com.* 5 Allen, 569.

But from the record in this case it affirmatively appears that the relator herein, the only living parent of the boy, did appear in his behalf in the municipal court, and did take part in the proceedings which resulted in his commitment. She has no cause for complaint on that score.

This disposes of such of the assignments of error as are of importance, and our conclusion is that Olson is not improperly held at the reform school.

Order affirmed.

WISCONSIN SUPREME COURT.

City of COLUMBUS, *Appt.*,
v.
Town of COLUMBUS *et al.*, *Respts.*

(.....Wis.....)

The control of a cemetery which has been acquired by a town solely for public use and in which it has no beneficial interest may lawfully be taken from it by the Legislature and vested in a city which has been organized within its limits and which embraces the cemetery within its boundaries, if the rights and beneficial interests in the property of the inhabitants of both city and town are saved to them.

(May 24, 1892.)

A PPEAL by complainant from an order of the Circuit Court for Columbia County dissolving a preliminary injunction restraining defendants from interfering with complainant's control of a certain cemetery and granting an injunction restraining complainant from interfering with defendants' control of the same. *Reversed.*

Statement by *Lyon, Ch. J.*:

By chapter 57, Laws 1874, the city of Columbus, consisting of territory taken from the

town of Columbus, was organized, with the usual powers of such municipal corporations. Included within such territory is a town cemetery, which the town of Columbus had theretofore acquired, partly by dedication and partly by purchase. It contained about ten acres of land, the legal title to which was in the town. The city charter provided that the right of the citizens of the town and city, respectively, to the use of such cemetery for burial purposes, shall not be impaired, and that the citizens residing in the city "shall always have and enjoy the same rights and privileges in said cemetery as the citizens of the town of Columbus, and the said city shall contribute its just share of the expenses of maintaining said cemetery." Chapter 57, Laws 1874, subchap. 18, § 19. Chapter 266, Laws 1878, provides by way of amendment to the statutes concerning town cemeteries, that, "whenever any such town cemetery is or shall become embraced within the limits of any city, the duties and powers of the town board relating to such cemetery shall be exercised by the common council of such city, and the conveyance of lots shall be executed by the mayor thereof in the name of the town, and attested by the city clerk, but the right of burial in such cemetery shall not be changed nor im-

NOTE.—Authority of Legislature to remove municipality from trusteeship.

While the purposes for which a municipal corporation may act as trustee have not been definitely determined, the tendency is to hold that the object for which the trust was established must be within the corporate or administrative purposes of the municipality. See *notes to Cary Library v. Bliss* (Mass.) 7 L. R. A. 765; *Smith v. Wescott* (R. I.) 18 L. R. A. 217; *Dailey v. New Haven* (Conn.) 14 L. R. A. 69.

The general rule is that so far as the corporate or administrative functions which have been delegated to a municipality are concerned the Legislature may resume them at any time.

So a municipal corporation, trustee of a charity, cannot set up any vested right to maintain its organization in the form in which it was when the trust was organized and prevent the state from changing it as the best interests of the trust may require. *Philadelphia v. Fox*, 64 Pa. 170.

A township trustee may be abolished. *Montpelier v. East Montpelier*, 28 Vt. 12, 67 Am. Dec. 748; *Bass v. Fontleroy*, 11 Tex. 698.

In *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 53, the court said: "It cannot be pretended that the Legislature had not the power to appoint a trustee if it had dissolved the municipality which had been invested with the trust."

What the Legislature had power to do thus indirectly it may do directly by simply providing for a change of trustee.

Where the school property is held in trust for school purposes by a corporation authorized to control it, the Legislature may at its pleasure provide for a change in the trustee. *Allen School Twp. v. Macy School Twp.* 109 Ind. 559.

The Legislature may at any time change the trustee of school funds or property. *Carson v. State*, 27 Ind. 460.

An act changing the trustee of school property is proper if the trusts upon which the fund was held are all preserved. *McGurn v. Chicago Board of Education*, 138 Ill. 123.

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Where a fund was given to a school society for the benefit of schools upon a division of the district, the fund may properly be divided between the two portions. *Williamantic School Soc. v. Windham First School Soc.* 14 Conn. 458.

The Legislature may transfer the control of streets from the city to park commissioners if the purpose of ordinary travel is not interfered with. *People v. Walsh*, 96 Ill. 232.

Some limitations are found upon this absolute power.

The rights of the beneficiaries cannot be interfered with. *State v. Springfield Twp.* 6 Ind. 96.

No diversion of the fund can be made. *Greenville v. Mason*, 53 N. H. 512; *Caledonia County School v. Burt*, 11 Vt. 632.

Where the trustees were incorporated to hold the fund for school purposes it could not be diverted from them and given to other trustees. *Plymouth v. Jackson*, 15 Pa. 44.

So the power of the Legislature to change the trustees of a school fund was denied in *New Gloucester School F. Trustees v. Bradbury*, 11 Me. 118, 26 Am. Dec. 515, on the ground that the Act incorporating trustees and authorizing the transfer of the property to them constituted a contract which was protected by the Constitution. See also *Yarmouth v. North Yarmouth*, 34 Me. 411, 56 Am. Dec. 666.

In Indiana it has been held that one corporation cannot be given control of property outside of its own limits and within those of another corporation. *State v. Shields*, 56 Ind. 530.

In Michigan under an application of the doctrine of local self-government it has been held that the control of city parks cannot be given to state agents. *People v. Detroit*, 28 Mich. 223, 15 Am. Rep. 202.

Where the municipality is not simply trustee but has both the legal and beneficial title to the property the principles upon which the above decisions rest do not apply. See *Helzer v. Yohn*, 87 Ind. 415; *Reckert v. Peru*, 60 Ind. 472.

H. P. F.

paired." Rev. Stat. § 1489. The common council of the city attempted to exercise the powers and perform the duties in respect to the cemetery expressed in chapter 266 of 1876, but were prevented to some extent from doing so by the active opposition and resistance of the town authorities. The foregoing facts are practically undisputed. Thereupon this action in equity was brought by the city against the town and its supervisors, to restrain them from interfering with the control and management of the cemetery by the common council of the city. The complaint contains an elaborate history of the dealings by the city and town officers, respectively, with the cemetery, from the organization of the city in 1874, down to the time this action was commenced, in 1891, and the struggles of each, from time to time, during that period to maintain or obtain control thereof. A preliminary injunction was granted by a court commissioner, *ex parte*, restraining the town as prayed in the complaint. The town answered the complaint, going still more extensively into the history of the controversy, and denying many of the averments of fact in that behalf in the complaint. The answer also contains a counterclaim, repeating the averments in the defensive portion thereof, and demanding the same relief against the city which the city demanded against the town. The city interposed a reply to such counterclaim, traversing with much particularity of statement many of the averments of fact therein concerning the acts and doings of the town and city authorities. This closed the somewhat voluminous pleadings. The town then obtained an order to show cause why the preliminary injunction against it should not be dissolved, and an injunction against the city granted as prayed in the counterclaim. The order was based upon the pleadings and certain affidavits served with the order. On the hearing of the order to show cause several affidavits were read on behalf of the city, and the court permitted additional affidavits to be read on behalf of the town. These affidavits cover over one hundred regulation pages in the printed case. They relate mainly to the controversy between the city and town authorities for the control of the cemetery, which controversy occupies so large a space in the pleadings. The circuit court found as a fact that the town never surrendered its right to manage and control the cemetery, and never conceded that the city had such right, and for that reason alone granted the motion of the plaintiff by dissolving the injunction obtained by the city, and granting an injunction against the city and its officers restraining them from interfering with the management and control of the cemetery by the town and its officers, but saving the rights of burial therein to the inhabitants of the city, and the right to enforce therein reasonable police regulations of the city.

The city appeals from the order of the circuit court in that behalf.

Messrs. George W. Bird and A. G. Cook, for appellant:

The lands were acquired for a specific public purpose, and could be used for no other, 16 L. R. A.

and the town had no interest in them, under the statute, except, as the representative and trustee of the public, to apply them to that purpose.

The town was simply the instrument employed by the state to enable the public to enjoy them.

M. E. Church Trustees v. Hoboken, 83 N. J. L. 18; *Darlington v. New York*, 81 N. Y. 164; *Stockton v. Newark*, 7 Cent. Rep. 458, 42 N. J. Eq. 581; *Montpelier v. East Montpelier*, 27 Vt. 704; *Re St. Pancras Burial Ground*, L. R. 8. Eq. 178; *Reed v. Stouffer*, 56 Md. 258; *Woodlawn Cemetery Assn. v. Everett*, 118 Mass. 854; *Gilman v. Milwaukee*, 55 Wis. 328.

Where lands have been conveyed to a public corporation for burial purposes, they become public property devoted to a public purpose, and subject to state and municipal control.

Evangelical Church Trustees v. Walsh, 57 Ill. 368; *Sohier v. Trinity Church*, 109 Mass. 1; *Cooley*, Const. Lim. 594; *Dwenger v. Geary*, 118 Ind. 106, 12 West. Rep. 691; *Page v. Symonds*, 68 N. H. 17; *Patterson v. Patterson*, 60 N. Y. 588.

Where property is held and acquired for a specific public purpose to which it is unalterably devoted, it is competent for the Legislature to change the officers or agents charged with its control, and designate others as the representatives of the public to apply the property to such purpose.

Allen School Twp. v. Macy School Twp. 109 Ind. 558; *Carson v. State*, 27 Ind. 465; *Leesburgh School Twp. v. Plain School Twp.* 86 Ind. 582; *McGurn v. Chicago Board of Education*, 183 Ill. 122; *Philadelphia v. Fox*, 64 Pa. 169.

The Legislature, by the city charter, chapter 57 of the Laws of 1874, has intrusted to the city the care, control, and management of this cemetery, and designated its officers as the representatives of the public to apply the property to the purposes for which it was acquired.

This Act is a valid exercise of the legislative power, for upon the division of a town, the Legislature may apportion its property among the parts into which it is separated or even assign all to one of those parts.

North Yarmouth v. Skillings, 45 Me. 183, 71 Am. Dec. 580; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 807, 23 L. ed. 552; *Willimantic School Soc. v. Windham First School Soc.* 14 Conn. 457; *Greenville v. Mason*, 53 N. H. 515; *Granby v. Thurston*, 23 Conn. 416; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Depere v. Bellevue*, 81 Wis. 120; *Knight v. Ashland*, 61 Wis. 288; *Seymour v. Seymour*, 64 Wis. 16.

Under charter provisions even less comprehensive than those of plaintiff, the city may pass and enforce ordinances, not only regulating the manner of burial in cemeteries, but entirely prohibiting interments therein, and closing them as cemeteries.

New York v. Slack, 3 Wheel. C. C. 237; *Com. v. Goodrich*, 18 Allen, 546; *New Orleans v. Wardens of Church of St. Louis*, 11 La. Ann. 244; *Charleston v. Wentworth Street Bapt. Church*, 4 Strobb. L. 306.

Chapter 266 of the Laws of 1876, in express terms confers upon the city, and charges it with, the care, management, and control of

the cemetery, and fully authorizes it to exercise all powers relating thereto.

This is a valid statute. It does not impair the obligation of any contract, nor disturb or interfere with any vested rights.

Philadelphia v. Fox, 64 Pa. 169; *People v. Pocer*, 25 Ill. 187; *Willimantic School Soc. v. Windham First School Soc.* 14 Conn. 457; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191.

Chapter 266 may be sustained also as an exercise by the Legislature of the police power of the state.

Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637; *Com. v. Tewksbury*, 11 Met. 55; *Com. v. Carter*, 182 Mass. 12; *Boston & M. R. Co. v. County Comrs.* 4 New Eng. Rep. 657, 79 Me. 886; *Regents of the University of Md. v. Williams*, 9 Gill & J. 865; *Campbell v. Kansas City*, 10 L. R. A. 598, 102 Mo. 826.

Messrs. John S. Maxwell and Olin & Butler, for respondents:

The purchase of each of the three parcels of land vested in the town the absolute title in fee, free from any condition annexed to the grant as to the purpose to which the land should be devoted.

Board of Suprs. v. Patterson, 56 Ill. 111; *Beach v. Haynes*, 12 Vt. 18.

There is nothing in the circumstances of the acquisition of this property, or its subsequent use, which unalterably devotes it to cemetery purposes, and on the contrary the most ample powers were and are conferred upon the town to dispose of the property, or such part of it at least as has not been actually appropriated for burial purposes.

It does not follow that because the town purchased this land with the intention of using it as a cemetery ground, and has in fact treated it as such, that it would not be proper for the town, if the interests of its inhabitants demanded it, to make some other disposition of it, at least of that portion of it not already conveyed away for burial purposes. In so doing it would simply be exercising the powers expressly conferred upon it by the Legislature.

Milwaukee v. Milwaukee, 12 Wis. 98; *Beaver Dam v. Frings*, 17 Wis. 398.

This court has sustained the right of a municipality to dispose of its property in a case where the provisions of the law under which such disposition was sought to be justified were more narrow and restricted than in the case at bar.

Konrad v. Rogers, 70 Wis. 492.

It would clearly have been within the power of the town board to have leased, had it desired to do so, such unappropriated portion of the land, or otherwise to have obtained a revenue from it, and this income, following the ownership of the property, would have gone into the treasury of the town, and lightened the burden of taxation upon the citizens of the town.

Bell v. Platteville, 71 Wis. 139; *Stone v. Oconomowoc*, Id. 155; *Bolling v. Petersburg*, 8 Leigh, 224.

The town remained the owner of the cemetery in question after, the same as before, the incorporation of the city.

Windham v. Portland, 4 Mass. 384; *Lamarie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *Montpelier v. East Mont-*

pelier, 29 Vt. 12, 67 Am. Dec. 748; *Hampshire County v. Franklin County*, 16 Mass. 76; *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

Town property does not cease to belong to the old town simply because it falls within the limits of another corporation.

Milwaukee v. Milwaukee, 12 Wis. 98; *Goodhus v. Beloit*, 21 Wis. 636; *Depere v. Bellevue*, 31 Wis. 120; *Schriber v. Langlade*, 66 Wis. 616; *Buena Vista Twp. Board of Health v. East Saginaw*, 45 Mich. 257; *Winona v. School Dist. No. 32*, 40 Minn. 18; *Greenville v. Mason*, 53 N. H. 515; *Union Baptist Soc. v. Candia*, 2 N. H. 20; *South Hampton v. Fowler*, 52 N. H. 225; *Heizer v. Yohn*, 37 Ind. 415; *Reckert v. Peru*, 60 Ind. 478; *Whittier v. Sanborn*, 88 Me. 32; *Veazie v. Howland*, 47 Me. 121; *White v. Fuller*, 33 Vt. 193; *Parish of West Carroll v. Gaddis*, 34 La. Ann. 928.

There is a line of cases often confounded with but clearly distinguishable from, such a case as the one at bar, namely, where the old corporation has been entirely abolished and the whole territory either attached to another corporation, or new corporations created out of its territory. In such cases the courts hold that the new corporations are to be deemed as the successors of the old one, and as such liable for all its debts and entitled to all its property. In such a case, in the absence of any legislation on the subject, it has been held that the new corporations will take the property that falls within their respective limits.

Stonham School Dist. No. 1 v. Richardson, 28 Pick. 62; *Danvers School Dist. No. 6 v. Tapley*, 1 Allen, 49; *Robbins v. Anoka County School Dist. No. 1*, 10 Minn. 349; *Schriber v. Langlade*, 66 Wis. 616; *North Hempstead v. Hempstead*, 2 Wend. 109.

There is no provision in the charter of the city of Columbus which divides, or attempts to divide, the cemetery in question between the town and the city, or which transfers, or attempts to, the control and management of this cemetery from the town to the city.

The most favorable view that can be taken of plaintiff's rights under its charter is, that the defendant town continues the owner, with the right to control and manage the cemetery grounds for the people both of the city and of the town. This view gives to the town the exclusive control and management of the property and with this no court will interfere so long as the town extends to the citizens of the city the same rights in the use of the cemetery as it extends to the citizens of the town.

North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530.

In *Bogert v. Indianapolis*, 18 Ind. 134, the court held that a provision in the city charter giving the common council power "to establish cemeteries or burial places," gave the city no authority to control or interfere with cemeteries lying within the city limits, but not owned by the city.

Laws 1876, chap. 266, is unconstitutional.

Milwaukee v. Milwaukee, 12 Wis. 98; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 143, 3 L. ed. 180; *Hampshire County v. Franklin County*, 16 Mass. 76; *State v. Tappan*, 29 Wis. 681, 9 Am. Rep. 622; *Grogan v. San Francisco*, 18 Cal. 590; *People v. Hurlburt*, 24 Mich. 44, 9 Am.

Rep. 108; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Louisville v. University of Louisville*, 15 B. Mon. 642; *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 478; *Aberdeen Female Academy v. Aberdeen*, 13 Smedes & M. 645; *New Gloucester School Fund Trustees v. Bradbury*, 11 Me. 118, 26 Am. Dec. 515; *Savannah v. Steamboat Co. of Georgia*, R. M. Charlt. (Ga.) 342; *Bailey v. New York*, 3 Hill, 581; *Atkins v. Randolph*, 31 Vt. 227; *Darlington v. New York*, 31 N. Y. 164, 83 Am. Dec. 248; *State v. Haben*, 22 Wis. 101; *Den v. Foy*, 5 N. C. 58, 3 Am. Dec. 672; *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Caledonia County School v. Burt*, 11 Vt. 632; *Webb v. New York*, 64 How. Pr. 10; *Benson v. New York*, 10 Barb. 228; Cooley, Const. Lim. 3d ed. pp. 290-298; 1 Dillon, Mun. Corp. 3d ed. §§ 66-68, and note.

Laws 1876, chap. 266, is not an exercise of police power.

Stockton v. Newark, 7 Cent. Rep. 458, 42 N. J. Eq. 531; *Lake View v. Ross Hill Cemetery Co.* 70 Ill. 191.

Lyon, Ch. J., delivered the opinion of the court :

It seems to us quite immaterial whether the city or the town has succeeded in maintaining the control of the cemetery in question. Chapter 266, Laws 1876, (Rev. Stat. § 1489), by its terms gives the common council of the city all the powers, and imposes upon it all the duties in respect to the cemetery, conferred and imposed upon the town board by the statutes in force when that chapter was enacted. That is to say, chapter 266 attempts to give the control and management of the cemetery exclusively to the city authorities, subject to the rights of burial therein by the inhabitants of the town. If that statute is a valid enactment, the city authorities are exclusively entitled to exercise such control and management, even though such right was never recognized by the town or asserted by the city. Hence the controlling question is whether chapter 266 is a valid law and not (as the circuit court held) whether the town ever surrendered to the city the management and control of the cemetery. The question thus to be determined is not a difficult one. The town holds the naked legal title to the cemetery grounds in trust for the inhabitants of the town and city, exclusively for burial purposes. The town has no beneficial interest whatever in the property. It is powerless to convey it for any other than burial purposes, without special legislative authority, or to appropriate to its own use any portion of the proceeds of sales of burial lots. Such proceeds must all be used to pay for the cemetery grounds, and to defray the expenses of caring for, fencing, and embellishing the same. Rev. Stat. §§ 1488-1440, inclusive. Because the town has no beneficial interest in the property, and because the use for which it holds the legal title there-

to, in trust, is purely a public use, the fact that it holds the legal title is no impediment to the exercise by the Legislature in its discretion of the power to change the trustee, saving to the inhabitants of the town and city all their beneficial interests and rights in the trust property. The Act of 1876 merely changes such trustee and saves all the rights of the beneficiaries under the trust. It is therefore a valid law. The authorities cited by council for the city in support of the power of the Legislature to change the trustee in such a case fully sustain it. These citations will not be repeated here, but will be preserved in the report of the case.

Counsel for the town place much reliance upon the case of *Milwaukee v. Milwaukee*, 12 Wis 98, as holding the opposite doctrine. We do not think it sustains the position. In that case the town held the legal title to 40 acres of land within its limits, "in trust for the sole use and benefit of said town forever." A conveyance in fee of land to A. in trust for the sole use and benefit of A. is necessarily a conveyance to him of the absolute title in fee. Hence the absolute title in fee to the land was in the town so far as the town was competent under the statute to take and hold the same. This 40 acres was afterwards detached from the town; and made a part of the city of Milwaukee, and the city took actual possession thereof. The town brought ejectment to recover the land, and succeeded in the action. This court affirmed the recovery. The real controversy was necessarily confined to the questions of legal title and right of possession, which are purely proprietary, and therefore vested rights. The case did not involve the question we have in the present case of the power of the Legislature, where one municipality holds the mere naked title, without any beneficial interest therein, to land in another municipality, in trust for the beneficial use and enjoyment of the inhabitants of both municipalities for a specified purpose, to enact that the municipality in which the land is located shall have the exclusive care and management thereof for the beneficiaries. We do not think that case negatives the power of the Legislature to enact chapter 266 of 1876. It must be held, therefore, that chapter 266 of 1876 is a valid law, and that under it the common council of the city of Columbus is vested with the management and control of the cemetery in the interest and for the beneficial use of the inhabitants, both of the town and city.

The order of the circuit court dissolving the preliminary injunction of the city and granting a similar injunction against the city and its officers, must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion. The printed case is unnecessarily voluminous. In the adjustment of costs the clerk will only allow for printing one hundred pages thereof.

WASHINGTON SUPREME COURT.

Re ESTATE OF Hiram C. McLAUGHLIN, Deceased.

Norman F. HESSELTINE, *Appt.*,

Ruth A. McLAUGHLIN, *Resp.*

(.....Wash.....)

A common-law marriage is not valid under a statute requiring a license for a marriage and providing that certain persons shall be authorized to perform the ceremony and expressly providing further that a marriage shall not be void because solemnized by a person not legally authorized to perform it if the parties to the marriage or either of them believe they are lawfully married, and also that marriages solemnized before or in any religious organization or congregation according to the ritual or form commonly practiced therein shall be valid.

(July 11, 1892.)

APPEAL from a judgment of the Superior Court for King County recognizing the right of one claiming to be the widow of Hiram C. McLaughlin, deceased, to control the appointment of an administrator for his estate, as against the right of his daughter. *Reversed.*

The facts are stated in the opinion.

Messrs. Norman F. Hesselstine and John G. Barnes for appellant.

Messrs. Trusten P. Dyer and Thompson, Edsen & Humphries, for respondent.

The statutes of Indiana and Washington are similar; in fact, we believe the statute of Washington was taken from that of Indiana, in substance, and the supreme court has recently passed upon the Indiana statute in the case of *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742, and held that a verbal marriage was good although no license was issued and no solemnization had as provided by statute.

See also *Hutchins v. Kimmell*, 81 Mich. 126, 18 Am. Rep. 164; *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826; *Dickerson v. Brown*, 49 Miss. 357; *Port v. Port*, 70 Ill. 484; *Lewis v. Ames*, 44 Tex. 819; *Dyer v. Brannock*, 66 Mo. 891; *Campbell v. Gullatt*, 48 Ala. 57; *Askew v. Dupree*, 30 Ga. 173; 2 Lawson, Rights, Rem. & Pr. § 711, and *note*; 14 Am. & Eng. Encyclop. Law, pp. 527, 528.

Scott, J., delivered the opinion of the court:

On the 12th day of December, 1891, Hiram C. McLaughlin died intestate at La Grande, in the state of Oregon. He was a citizen of this state, residing at Seattle, and left personal property to the amount of about \$5,000 in King county. He had a daughter over twenty-one years old, whose mother is not now living, and this daughter claims to be the only heir. One Ruth A. McLaughlin, with whom he was living at the time of his

death, claims to be his wife by a marriage under the common law. She was married to Hiram C. McLaughlin on the 13th day of August, 1887, by a judge of probate, at Tacoma, in this state. At that time she had another husband living, by the name of Van Every. There was some testimony to show that at the time she was married to McLaughlin she believed Van Every was dead. She continued to live with McLaughlin as his wife until July, 1890, at which time she received information that her first husband was still living; whereupon she and McLaughlin separated, and divorce proceedings were instituted by her against Van Every, wherein she obtained a divorce from him in January, 1891; whereupon she and McLaughlin resumed their former relations, although no marriage ceremony was ever performed between them subsequent to the time she obtained a divorce from Van Every. There is testimony to show that she and McLaughlin continued to live together as husband and wife up to the time of his death; that they held themselves out to the public as husband and wife, and believed themselves to be such, and believed no marriage ceremony was required to render the marriage valid. There was some testimony to contradict this state of affairs, and to show they did not regard themselves as husband and wife. It appears that at one time, while they were living together prior to her obtaining the divorce from Van Every, she left McLaughlin, and was gone some time, and he had no knowledge of her whereabouts for some weeks; that he subsequently found her at Tacoma, and instituted criminal proceedings against her for some purpose, which the evidence does not make clear. These difficulties seem to have been adjusted, however, and the parties resumed their former relationship up to the time the proof shows that she discovered Van Every was still living. Upon the death of McLaughlin, Norman F. Hesselstine, the appellant, who was holding a power of attorney from Bertha McLaughlin, authorizing him to represent her in the settlement of the estate, petitioned the superior court of King county for letters of administration. Said Ruth A. McLaughlin also petitioned said court, as the widow of said Hiram C. McLaughlin, for the appointment of one Frank A. Pontius as administrator. On the 15th day of January, 1892, said court appointed one John Fairfield, special administrator. On the 4th day of February following said court found upon a trial of the rights of the parties that said Ruth A. McLaughlin was the widow of deceased, as she claimed, and was entitled to have letters of administration issue to the person whom she had requested to have appointed in her petition, and a decree was entered granting her petition. From this finding and decree an

NOTE.—As to what constitutes and the validity of a common-law marriage, see *White v. White*, 7 L. R. A. 799, *note*, 82 Cal. 427
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As to how far cohabitation is proof of marriage where it began unlawfully, see *Collins v. Voorhees*, 14 L. R. A. 364, *note*, 47 N. J. Eq. 315.

appeal was taken to this court, the said John Fairfield continuing as such administrator pending the appeal.

Several questions are presented by the appellant, one of which is that there can be no such thing as a common-law marriage in this state; that under our statutory regulations a marriage ceremony must be performed in one of the ways pointed out by the statute in order to render a marriage valid. Another one is that the proof is entirely insufficient to establish the marriage relationship between said parties, even though they could become husband and wife by a mere agreement between themselves as at the common law, according to some holdings. Under the view we have taken of the first point raised, we do not find it necessary to pass upon the sufficiency of the evidence, as, after a careful consideration of all the authorities we have been able to find upon this subject, we have come to the conclusion that the first point made by the appellant is well taken. We find this to be the case with some hesitancy, for the greater number of adjudicated cases in this country hold the parties may contract the marriage relationship by an agreement between themselves. In most of the states the statutory provisions upon the subject of marriage have been held directory only, and where there was no express provision in the statutes declaring all marriages void, other than those contracted in some one of the ways provided by the statute, that the parties could become husband and wife by a mutual agreement. Mr. Bishop lays down the doctrine very strongly that, unless such a marriage is absolutely prohibited by the express language of the statute, it should be sustained, and that evidence of cohabitation, and of the parties holding themselves out to the public as husband and wife, should be sufficient to establish the relation in all cases. In *Hutchins v. Kimmell*, 81 Mich. 126, 18 Am. Rep. 164, Cooley, J., in rendering the opinion of the court, says: "Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts, the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated." In *Meister v. Moore*, 96 U. S. 78, 24 L. ed. 827, Mr. Justice Strong, in delivering the opinion of the court, said: "Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right, and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common-law right; but there is always a presumption that the Legislature has no such intention, unless it be plainly expressed. A

statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner, but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. . . . In many of the states, enactments exist very similar to the Michigan statute; but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages, and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the states, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed, without a license first had. So, in Massachusetts, it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. . . . In *Parton v. Hervey*, 1 Gray, 119, where the question was, whether a marriage of a girl only thirteen years old, married without parental consent, was a valid marriage, (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen, without the consent of parents or guardians,) the court held it good and binding, notwithstanding the statute. . . . As before remarked, the statutes are held merely directory; because marriage is a thing of common right; because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law." The learned judge, however, said: "It is unnecessary, however, to pursue this line of thought. If there has been a construction given to the statute by the Supreme Court of Michigan, that construction must, in this case, be controlling with us. And we think the meaning and effect of the statute has been declared by that court in the case of *Hutchins v. Kimmell*, 81 Mich. 126, 18 Am. Rep. 164, a case decided on the 13th of January, 1875. There, it is true, the direct question was where a marriage had been effected in a foreign country. But in considering it, the court found it necessary to declare what the law of the state was;"

and gives the quotation above given from that case, with a statement that it cannot be regarded as mere *obiter dicta*. In the case of *Akew v. Dupree*, 80 Ga. 173, Lumpkin, J., says: "Marriage was held to be a civil contract, and that if a contract be made *per verba de presentis*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve. . . . That acts in relation to the solemnization of marriages were not generally construed as in the case of acts relating to general subjects, because marriage was essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favor of the validity and against the nullity of marriage, but it is so on this principle: that a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed according to the acknowledged rule most strictly. . . . After the marriage relation is entered into, it is then considered in the light of a civil institution, in which the state itself has an interest as well as the parties. And the interest of the state is that these contracts shall be permanent, and not revocable at the will and pleasure of the sexes; that parents may be held responsible for the support, maintenance, and education of their offspring; and that the legitimacy of their offspring may be known and established beyond dispute. . . . The conclusions to be deduced from the whole matter are these: That marriage is founded on the law of nature, and is anterior to all human law; that in society it is a civil contract; that if the contract is *per verba de presentis*,—that is, 'I take you to be my wife,' and 'I take you to be my husband,'—though it be not consummated by cohabitation, or if it be made *per verba de futuro*, and be consummated, it amounts to a valid marriage, in the absence of all municipal regulations to the contrary; and that notwithstanding there be statutes directing a license to issue, as in this state, and inflicting a penalty on any minister or magistrate who shall unite the parties in wedlock without such license, yet, in the absence of any positive enactment, declaring that all marriages not celebrated in the prescribed form shall be void, a marriage deliberately and intentionally entered into by the parties, who are able to contract according to the rules of the common law, without conforming to the enactment, is still a valid marriage. . . . In this state no marriage, within our knowledge, has been declared a nullity because the statutory regulations were not complied with, and, while the law inflicts penalties upon the celebrator, it has cautiously abstained from interfering with the marriage itself. For myself, I approve the law as it is. True, it will be sometimes abused. What human institution is not? Rarely,

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however, will the parties forego the benefits resulting from a compliance with the statutes. It adds so much both to the respectability as well as the security of the contract. I have never known of a self-solemnized marriage. But suppose such should occur; better far for the parties, especially the female, that the law should be as it is. Her honor is saved, and this is worth more than everything, even life itself. All other contracts may be rescinded, and the parties restored to their former condition; marriage cannot be undone. Why does this law, in utter disregard of what seems to be the usual protection and restraint thrown around the inexperience and imprudence of infancy, allow infants—the male at fourteen and the female at twelve—to enter into the binding contract of marriage? It is at this age the sexual passions are usually developed; and the law, with a wise forethought, looking beyond exceptional cases, and to the general interests of society, to guard against the manifold evils which would result from illicit intercourse, declares even infants capable of forming this relation."

It was contended by the appellant that the sections of our Code which prescribe how marriages shall be solemnized, and which also make the exception that all marriages shall be deemed to be valid although the ceremony is performed by a person not authorized by law to perform it, preclude the contracting of the relationship in any other manner than as provided; that the Legislature, having made a provision especially legalizing marriages in certain excepted cases, must be held to have contemplated all others not entered into according to the manner provided by the statute, and not within the exceptions, as void. We find very similar provisions, however, in other states; and undoubtedly it is the case in the most of them where the validity of common-law marriages is recognized, and the argument loses something of its force in consequence of this.

The position taken by the appellant, however, is directly sustained in the case of *Beverlin v. Beverlin*, 29 W. Va. 732, in which state marriages at the common law were held to be abrogated; and the decision was put upon this very ground, that the Legislature had provided a method for contracting the marriage relationship, and had specially excepted those cases and declared them valid, notwithstanding the ceremony was performed by some person not authorized as by law required. In that case, Snyder, J., says: "There is much controversy as to what constitutes a common-law marriage. It always has been and still is a doubtful question in England. In the American states, where such marriages have been recognized and held valid, there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland some ceremony or celebration seems to be necessary to a valid common-law marriage, and in most or all of these states it has been questioned whether or not the statutes have not superseded common-law marriages, and that a marriage, to be valid, must be in

accordance with the statutes. . . . In New York it has been held that no religious form or ceremony of any kind is essential to the validity of the marriage; all that is required in that state is that the parties should be capable of contracting, and that they should actually contract, to be man and wife. . . . In Pennsylvania it has been decided that 'marriage is in law a civil contract, not requiring any particular form of solemnization before the officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties or by witnesses present, when made; therefore, when the evidence of the contract was the declaration of the wife, that "about thirty-one years ago she went to the house of A. S. to live and keep house for him under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together," it was held that there was not proof of a marriage in fact.' " But stating that it was unnecessary to consider the evidence in said case, the court said: "We think our statute has wholly superseded the common law, and in effect, if not in express terms, renders invalid all attempted marriages contracted in this state which have not been solemnized in substantial compliance with its provisions. The statute in force in this state in 1878, when it is alleged the marriage now in question occurred, is embraced in chapter 68 of our Code of 1866. The first section of said chapter provides for the issuance of marriage licenses, the third, fourth, and fifth sections by whom and the manner in which marriages may be solemnized, and the sixth section is as follows: 'Every marriage in this state shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of such persons so married, or either of them, that they had been lawfully joined in marriage; nor shall any marriage celebrated within this state between the 17th day of April, 1861, and the 1st day of January, 1866, be void by reason of the same having been solemnized without such license.' After stating that marriage is a natural right, which existed independent of statutes, and that ordinarily the statutory provisions regulating the contract of marriage should be held to be directory; that the general rule is that a marriage good at common law is valid notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity; but adding, however, that this rule is not universal, (1 Bishop, Mar. & Div. § 283,)—the court further said: "It seems to me, therefore, that when the terms of the statute are such that they cannot be made effective to the extent of giving each and all

of them some reasonable operation without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that 'every marriage in this state shall be under a license, and be solemnized in the manner herein provided.' It is possible that these words, standing alone, should, under the general rule just stated, be interpreted as merely directory. But the statute does not stop here. It qualified these words by provisions which would be wholly useless and unnecessary, if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not 'be deemed or adjudged void' because the persons solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not be void because they were solemnized without a license. These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriages had in this state, contrary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the Legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made."

In *Com. v. Munson*, 127 Mass. 466, 34 Am. Rep. 411, it is stated: "Under all changes in the form of the statutes, it has always been assumed in this commonwealth, and in the state of Maine, which was originally a part thereof, that (except in the single case of Quakers or Friends, whose marriages are made valid by a special provision limited to that sect, and, though not solemnized by any magistrate or minister, are witnessed, recorded, and returned by the principal officer of the meeting at which the ceremony is performed) a marriage which is shown not to have been solemnized before any third person, acting or believed by either of the parties to be acting as a magistrate or minister, is not lawful or valid for any purpose." And in *Norcross v. Norcross*, a late Massachusetts case, decided in January, 1892, to be found in 29 N. E. Rep. 506, it was said: "According to the law of New Hampshire, as declared in *Dunbarton v. Franklin*, 19 N. H. 257, if parties enter into a contract of marriage between themselves, and live together in accordance with it, such facts do not constitute a marriage. We are referred to no statute or decision which shows that the law of that state has since been changed. The finding that there was no marriage under the laws of New Hampshire was therefore well warranted. The law of Massachusetts is similar, and there was nothing to show any formal ceremony of marriage here." In that case there seems to have been some proof that no marriage ceremony was ever performed between the parties. They had cohabited as husband and wife in Massachusetts and New Hampshire, where common-law marriages are not allowed; they went to New York, and continued in the same apparent relation as husband and wife, at one

time for three days, and another time for one week, where marriages at the common law are held valid; but this was held to be insufficient, under the circumstances, to establish the relationship, there being no evidence that the parties while in New York entered into any contract of marriage between themselves. In *Holmes v. Holmes*, 1 Abb. U. S. 525, Deady, J., says: "The consent to become husband and wife—the contract out of which arises the relation—must be given as herein prescribed,—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the states of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. . . . Nor do I think that citizens of this state can purposely go beyond its jurisdiction, and not within the jurisdiction of another state,—as at sea,—and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them." In *Denison v. Denison*, 35 Md. 373, Alvey, J., says: "By the canon law of Europe, founded mainly upon the Roman Civil Law, prior to the Council of Trent, in the sixteenth century, the contract of marriage was regarded as simply of a consensual nature, only differing from other contracts in its being indissoluble even by the consent of the parties. In form, a contract *per verba de presenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage, without the offices of a priest, till the decrees of the Council of Trent, which required the intervention of the parish priest to give validity to the marriage. The promise *per verba de futuro*, when followed by carnal intercourse, was considered as equivalent in legal effect to the contract *per verba de presenti*. In the matrimonial law, as administered by the canonist, it was a maxim, *consensus non concubitus facit nuptias*; and this remains the law to the present day in some parts of Europe, where the civil and canon law prevail, and where the decrees of the Council of Trent have not been accepted,—as in Scotland."

The American doctrine undoubtedly is that the relation of husband and wife originates in contract. In most of the states, and in our own, it is so declared by statute. This contract, unlike all others, is indissoluble at the will of the parties. At common law it may be entered into by persons of proper age and mental capacity by a mutual agree-

ment or understanding. This seems to be the general doctrine, although in some of the states a ceremony of some kind is held to be necessary, even though common-law marriages are recognized. There is a considerable conflict in the authorities as to the acts which are necessary to establish a common-law marriage, some courts even going to the extent of holding that continued cohabitation alone is sufficient, while others hold that there must have been a contract between the parties, and others to the still further extent that this must have been evidenced by some kind of a ceremony, or, at least, a declaration to that effect in the presence of other parties. In *Northfield v. Plymouth*, 20 Vt. 590, and 591, in speaking of the case of *Cunninghams v. Cunninghams*, 2 Dow, 482, Redfield, J., says: "Lord Eldon and Lord Redesdale held that in cases of cohabitation the presumption was in favor of its legality; but, where it was known to have been illicit in its origin, that presumption could not be made,—and after mentioning certain cases, said: "In these states is laid upon the fact that a marriage *per verba de presenti* is valid in that state, and also at common law, if followed by cohabitation. This, I think, could hardly be regarded as law in this state, without virtually repealing our statute upon that subject. It certainly has never been so regarded under the English Statute of 26 Geo. II. and 4 Geo. IV. chap. 76; and I see no reason why it should be here, when it is clearly a dispensation with all the requisitions of the statute upon the subject. Wherever that rule in regard to the law of marriage prevails, as it does in Scotland, cohabitation as man and wife is marriage, since it implies, in the strongest sense, a contract *in presenti* to be husband and wife." In *Dickerson v. Brown*, 49 Miss. 370, Tarbell, J., says: "With reference to the consent necessary to the consummation of marriage, it is said: 'Nothing more is needed than that, in language which is mutually understood, or in any mode declaratory of intention, the parties accept of each as husband and wife.' And Swinburne lays down the doctrine that if the words do not of their natural meaning, or by common use, 'conclude matrimony,' yet, if the parties intend marriage, and their intent sufficiently appears, 'they are inseparably man and wife, not only before God, but also before men.' And this, 'consent may be either verbal or written; and where there was no ceremony, but the parties merely lived together as husband and wife for many years, they were held to be, in law, married,'—citing *Hicks v. Cochran*, 4 Edw. Ch. 107, 6 L. ed. 814. Quoting from Mr. Bishop on Marriage and Divorce, par. 12, the court also said: "The institution of marriage, commencing with the race and attending man in all periods, in all countries of his existence, has ever been considered the particular glory of the social system. It has shown forth in dark countries, and in dark periods of the world, a bright luminary on his horizon. And but for this institution all that is valuable, all that is virtuous, all that is desirable in human existence, would

long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together. Marriage, then, is to be cherished by the government as the first and choicest object of its regard. Therefore every court, in considering questions not clearly settled or defined in the law, should lean towards this institution of marriage; holding, consequently, all persons to be married who, living in the way of husband and wife, may accordingly be presumed to have intended entering into the relation, unless the rule of law which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes."

In *Lewis v. Ames*, 44 Tex. 841, Roberts, Ch. J., says: "A marriage is a mutual agreement of a man and woman to live together in the relation and under the duties of husband and wife, sharing each other's fate or fortune for weal or woe, until parted by death, which, in organized society, is subject to certain impediments, and legalized by compliance with certain forms of law. The relation itself is natural; the prescribed impediments and the forms of laws for its legal consummation are artificial, being the work of government. What was known as and called 'marriages null in law' was a real marriage according to nature, and so intended by the parties, deficient only by the existence of some legal impediment or the want of compliance with the forms of law in contracting it. Our laws relieved against the impediment and the want of legal forms, but did not make an attempt to make concubinage marriage." It is there held that a merely conventional arrangement for illicit intercourse and mutual assistance in living, making one a willing mistress and the other the protecting paramour, was not sufficient to establish a marriage. In *Jackson v. Winne*, 7 Wend. 50, it is held that the marriage is complete if there has been a full, free, and mutual consent between the parties, capable of contracting, to take each other as husband and wife, though not followed up by cohabitation. In 2 Lawson, Rights, Rem. & Pr. § 711, citing various cases, it is said: "At common law, to constitute marriage, no particular solemnization or forms were necessary. Mutual consent to enter into the relation of husband and wife was all that was essential. . . . But, a marriage will not be presumed, even where, for convenience, the parties hold themselves out as man and wife before third persons, provided their cohabitation has the elements of a purely meretricious relation. Betrothal alone, followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage. A. offer to prove that a man and woman lived together as husband and wife is not an offer to prove their marriage. At common law, the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage. The copula must have been in fulfillment of the agreement to marry. Where the beginning of a cohabitation is illicit, there can be no presumption

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of marriage from the cohabitation and reputation,"—and that "circumstances of cohabitation, acknowledgment, reputation, and recognition by the family form a presumption that a connection was matrimonial, and not meretricious."

In all cases, whether common-law marriages are recognized or not, evidences of cohabitation and repute are admissible, as tending to show a valid marriage. Holding each other out as husband and wife to the public, and continued living together in that relationship has ordinarily, if not universally, been held sufficient proof, unless contradicted, to establish it, even within those states where common-law marriages are not recognized. This presumption could always be rebutted, however, by showing that the parties intended their connection to be illicit, and, if it was so intended at its commencement, it is presumed to continue unless evidence is produced of a change of mind. In some cases it is held that although when the connection began there was an impediment, known to the parties, preventing them from marrying each other, yet if they desired or intended marriage, and this desire or intention is shown to have continued after the impediment was removed, with the continuance of cohabitation, it has been held sufficient. And in 1 Bishop, Mar. & Div. §§ 970-975, 979, citing a number of cases, it is stated: "Sec. 970. If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability,—as where there is a prior marriage, undissolved,—their cohabitation, thus matrimonially meant, will in matter of law make them husband and wife from the moment when the disability is removed; and it is immaterial whether they knew of its existence or its removal, or not, nor is this a question of evidence." "Sec. 975. Though a cohabitation was introduced by a formal ceremony of marriage, and the parties erroneously supposed the impediment of a former marriage to have been taken away, and never had their mistake corrected, still, in localities where formal solemnization is not essential, valid marriage may be presumed to have occurred after the impediment was removed. To employ words more nicely accurate, and cover a larger ground, the living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife; for here are all the elements of a contract of present matrimony." "Sec. 979. Where a woman had formally married, believing her husband to be dead, and, on his returning, still continued to cohabit under the second marriage, and kept it up for several years after he really died, a second marriage after such death was presumed. And in another case, where a married man, knowing his wife to be alive, entered into a form of marriage with another woman, who did not know of the impediment, and continued the cohabitation under this second marriage until after the death of the first wife, a marriage after such death was inferred." As an instance in which a contrary view is taken, see *Reading Fire Ins.*

& T. Co's App. 118 Pa. 207, 4 Cent. Rep. 678. The court said: "Undoubtedly they lived together for a long time under circumstances sufficient to prove intimate sexual relations. But cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. When the relation between a man and woman living together is illicit in its commencement, it is presumed so to continue until a changed relation is proved. Without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin."

Thus it will be seen that in the various cases relating to common-law marriages there is quite a difference of opinion as to just what facts and circumstances are sufficient to establish the relation. Courts undoubtedly in many instances indulge in refinements of distinction that never entered into the minds of the parties, which sometimes resulted in holding the marriage relation to have been established by the conduct of the parties where there was no real intention to take each other as husband and wife. There may have been no great harm in this in such instances, but it is clearly apparent that under similar circumstances, where the parties, or one of them, intended to assume the relationship of husband and wife, and under no other circumstances would have consented to cohabitation, believing that the relationship thus formed by the agreement between themselves, or by cohabitation as husband and wife, and so holding themselves out to the community, would be a valid marriage, have subsequently found, to the shame and sorrow of one of them at least, that such an arrangement constituted nothing more than an illicit cohabitation or concubinage, subject to abandonment by either at pleasure. In *Askeu v. Dupree*, cited, the learned judge approves the recognition of the common-law marriage, but admits that it is sometimes abused. He states, however, that "rarely will the parties forego the benefits of the statute, because it adds so much to the respectability as well as the security of the contract." Here, it seems to us, a strong argument is afforded against recognizing them at all, for it is evident, if the parties once understand they can form this relationship only in compliance with the statutory requirements, there will be no attempt to establish it in any other manner, and the instances of resorting to cohabitation for that purpose, instead of being few, would become entirely abrogated. The decision in that case is put upon the ground that marriage is a natural right, which always existed prior to the organization of any form of government, and all laws in restraint of it should be strictly construed in consequence thereof. It is held that it should be the policy of the law to sustain all such contracts and relations whenever possible, and that this should always be done unless the Legislature has expressly declared all marriages entered into

or solemnized in any form, other than the ways provided for in the statute, void. We must remember, however, that in many ways the natural rights or privileges of mankind have to be restrained in order to promote the welfare of the community and the government of the many.

This question, involving as it does the best interests of society and the preservation of the home and family,—the foundation of all society,—has ever been regarded as a most important one, but we do not think it would serve any good purpose to attempt a more full review of the many authorities bearing upon it, as the arguments advanced are pretty fully stated in the opinions quoted from. It has been a question so often before the courts, and involved in so many contradictions and shades of distinctions, it is impossible to reconcile them, and an attempt at anything more than a limited review would be profitless. Our only desire is to interpret the law as it should be, and to arrive at a conclusion best calculated to promote the welfare of society. In order to sustain the validity of common-law marriages in many of the states, the courts have practically overruled the statutory law upon the subject, and we do not feel justified in following them when it results in the violation of the most ordinary rules recognized in construing statutes, nor do we think the true interests of the people lie in that direction. It is important that publicity should be given to such contracts, to guard against deceptions and to provide accessible evidence to prove the relationship. The most important of all human contracts should not be left free from all impediments or restrictions, or with no formalities requisite for its realization. Our own statutes (sections 1881-1896, Gen. Stat. inclusive) provide how such a contract may be entered into, and the evidence thereof perpetuated. Certain persons are authorized to perform the ceremony, and it is also provided that if it be performed before an unauthorized person the validity thereof shall not be questioned, if such marriage be consummated with a belief of the persons so married, or either of them, that they have been lawfully joined in marriage. It is also provided that "all marriages to which there are no legal impediments, solemnized before or in any religious organization or congregation, according to the established ritual or form commonly practiced therein, are valid." It is clear that in making provisions for these excepted cases the Legislature was of the opinion that all attempts to establish the relationship, other than in accordance with the ways provided by the statute, would be void, and would be so held. Various safeguards are thrown around the entering into this relationship, such as the requirement of a license to be first procured before any persons can be joined together as husband and wife; and should one be a girl under the age of eighteen years, or a youth under the age of twenty-one years, it is provided that the license shall not issue except upon the consent of the parents or guardians. It is provided that marriage is a civil contract, which may be entered into by men of the age of

twenty-one years, and women of the age of eighteen years, otherwise capable; and it is provided that none under that age, respectively, shall marry, except the consent of the parents or guardians shall first be obtained,—those persons who are supposed to be the most interested in the welfare of the individuals most directly concerned, and who would carefully consult such interests before consenting. If common-law marriages are to be recognized, this provision becomes wholly powerless, as, by a simple agreement, a man, though forty years a senior, and a girl of the age of twelve years, can enter into this relationship, regardless of the will of the parents, or even a boy of fourteen years could be inveigled into this relationship by a woman many years his senior. It is true such instances are rare, but that affords no reason why they should be tolerated in any case. While the marriage state is the most commendable one, and ought to be encouraged in all legitimate ways, having, as it does, its origin in divine law, it seems to us, if the statutory requisites are dispensed with, it would to some extent set a premium upon illicit intercourse. If a mere contract between the parties, to which there are no witnesses, is to be recognized as valid, it is evident that a contract thus lightly made might as easily be repudiated, or, if cohabitation and reputation without any agreement constitute marriage, the former must precede the latter, for it is the cohabitation which raises the presumption and causes the reputation or assumption of the relationship of matrimony. If an agreement between the parties is to be required, with the further condition that it be made before some third person as a witness, without any other proof of it, or any means provided for preserving such proof, the death of the witness removes all the evidence, aside from the parties themselves. And what would be easier than for parties to agree privately to become husband and wife, and after cohabiting for a time mutually agree to dissolve the relationship, or to conceal the fact that they had ever entered into the contract, and repudiate it? It is contrary to public policy and public morals, and revolting to the senses of enlightened society, that parties could be placed in such a condition that they might mutually repudiate an arrangement of this kind previously entered into, whatever the reason might be, and yet this would follow if common-law marriages are to be recognized. By adhering to the statutory provisions all objectionable cases of this kind are eliminated, parties are led to regard the contract as a sacred one, as one not lightly to be entered into, and are forcibly impressed with the idea that they are forming a relationship in which society has an interest, and to which the state is a party. Illicit intercourse would to a great extent be prevented, and there would be no attempts upon the part of either one to form the relationship in any clandestine way, or any attempt by one to overreach the other in such a way, knowing that such attempts would be ineffectual.

There is a growing belief that the welfare of society demands further restrictions in this

direction, and that this will find voice in future legislation; that an institution of this kind, which is so closely and thoroughly related to the state, should be most carefully guarded; and that improvident and improper marriages should be prevented. All wise and healthful regulations in this direction, prohibiting such marriages as far as practicable, would tend to the prevention of pauperism and crime and the transmission of hereditary diseases and defects, and it may not be regarded as too chimerical to say that in the future laws may be passed looking to this end. Certainly it is a legitimate subject for legislation, for the state has an interest in each act, contract and relation of its individual members that in any wise affects the public welfare, or tends to the injury of the individual, and these will become regulated more and more in various ways, as the government of man approaches greater degrees of perfection, and the rights, relations, and responsibilities of one person with regard to another, and to all others, become better understood. Every thoughtful person would desire this should be so, even though in some cases it might seem to result in individual hardship. It is true the Legislature may expressly provide that all marriages not entered into in the ways pointed out by the statute, and not within the exceptions provided for, shall be held invalid, but this affords no reason for not giving effect to the clear intention otherwise expressed in the legislation existing, because the Legislature has not expressly declared all others void. Our statutes in relation hereto would, if upon any other subject, be held mandatory and prohibitive, and we see no reason why the same effect should not be given to them here, for the law could as well say that all attempted marriages should be valid, notwithstanding the statutory requisites were not complied with. However this question is decided, it may result in hardship in some cases, but we think the lesser injury will come from an adherence to the statutory requisites than otherwise, to the end that these contracts should be made permanent, and not revocable at the will and pleasure of the parties; that parents may be made responsible for the support, maintenance, and care of their offspring, and the legitimacy of the offspring established beyond dispute. Our statute, has to some extent undertaken to protect the innocent by providing that children born in unlawful wedlock shall become legitimate in case of the subsequent intermarriage of the parents, and the Legislature may go still further in this direction, should it be deemed advisable, even to the extent of conferring all the rights upon them that children born of lawful wedlock have. This, although opposed to the old doctrine of preventing the parents by punishing the issue, would seem to be more in accord with principles of justice and modern ideas thereof.

Reversed and remanded.

Anders, Ch. J., and Dunbar, Stiles, and Hoyt, JJ., concur.

MAINE SUPREME JUDICIAL COURT.

William E. MANN *et al.*

v.

Helen S. JACKSON.

-----Me.-----)

The clause "unless she shall be married, in which case her life estate shall cease," is not void as a restraint on marriage, in a will giving testator's daughter a life estate in his homestead and providing that in the event of her marriage the homestead together with the testator's other property should be equally divided among his children; where from the whole will it is apparent that the testator's intention was not to restrain his daughter from marrying, but to provide for her support until she did so.

(March 29, 1892.)

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full court of a bill in equity filed to obtain construction of a clause in the will of William Mann, deceased, by which he gave his daughter a life estate in his homestead, unless she married, in which event it was to be divided among his children. *Judgment declaring the defeasance clause valid.*

The facts sufficiently appear in the opinion.

Mr. A. W. Paine, for plaintiffs:

Can a parent make provision for his daughter to terminate on her marriage? That the negative of this question was the well-established doctrine of the old English law is admitted, but it is claimed that if not wholly otherwise now, the principle is so far overruled as not to be applicable to the case at bar. *Lord Loughborough*, chancellor, in review of the whole doctrine in *Stackpole v. Beaumont*, 8 Ves. Jr. 89, strongly criticised the same as "having no just application to the English law," his conclusion being strongly supported by the distinguished author on Wills.

2 Redf. Wills, 290, 291, 295, 298.

But when the principle is applicable, if there be a specific devise over, upon the happening of such marriage, the devise is held good. Some authorities are to the effect that if the devise over is to the heirs the same is void; but this is the case only where the devise is of the residuum. If it be special or specific the devise over is valid. This is our case.

Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107; *Rae v. Cotton*, 2 Ves. Sr. 298; *Wheeler v. Bingham*, 1 Wils. 188; 2 Jarman, Wills, 1880 ed. 570; *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745.

Bequests of personal property in such cases may be void where real-estate devises would be good.

2 Jarman, Wills, 570; *Jones v. Jones*, L. R. 1 Q. B. Div. 279.

Here there is no absolute forfeiture of an estate upon marriage, but she is simply made equal with her married sister and brother, each to have a third when she was placed in like

condition with them by matrimony. This is an important consideration.

The courts very generally agree that the principle does not apply to widows or second marriages—that specific devises over to others prevent the application of the principle—and that the principle only applies to cases where there is evidently an intention on the part of testator to discourage marriage by terrorizing the maiden party.

4 Kent, Com. 26; *Jones v. Jones*, L. R. 1 Q. B. Div. 279; *Crompton v. Crompton*, 9 East, 267; *Randall v. Marble*, 69 Me. 313, 31 Am. Rep. 281; *Mansfield v. Mansfield*, 75 Me. 509; *Nash v. Simpson*, 1 New Eng. Rep. 699, 78 Me. 148; *Parsons v. Winslow*, 6 Mass. 169, 4 Am. Dec. 107; *Gibbens v. Gibbens*, 1 New Eng. Rep. 98, 140 Mass. 102, 54 Am. Rep. 458; *Olney v. Hull*, 21 Pick. 311; *Dana v. Murray*, 122 N. Y. 604; *Meyer v. Cahen*, 111 N. Y. 270; *Muster-ton v. Townshend*, 10 L. R. A. 816, 123 N. Y. 458; *Graydon v. Graydon*, 23 N. J. Eq. 230, 25 N. J. Eq. 561; *Courter v. Stagg*, 27 N. J. Eq. 306; *Kouvalinka v. Geibel*, 40 N. J. Eq. 443; *Phillips v. Medbury*, 7 Conn. 568; *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745; 2 Jarman, Wills, 568-573; *Adams v. Mason*, 85 Ala. 452; *Re Reinhardt*, 74 Cal. 365; *Davison's App.* 19 Pitts. L. J. N. S. 258; *Phillips v. Ferguson*, 1 L. R. A. 837, 85 Va. 509; *Reuff v. Coleman*, 30 W. Va. 171; *Rowland v. Rowland*, 29 S. C. 54; *Squier v. Harcey*, 6 New Eng. Rep. 508, R. I. Index CC. 35; *Beshore v. Lytle*, 18 West. Rep. 788, 114 Ind. 8; *Coppage v. Alexander*, 2 B. Mon. 313, 38 Am. Dec. 153; *Williams v. Vancleave*, 7 T. B. Mon. 888; *Vaughn v. Lovejoy*, 34 Ala. 437; *Best v. Best*, 88 Ky. 569; *Siddons v. Cockrell*, 181 Ill. 653; *Brotzman's App.* 193 Pa. 478; *Martin v. Seigler*, 32 S. C. 267; *Leven-good v. Hoople*, 124 Ind. 27; *Doyal v. Smith*, 28 Ga. 262.

Mr. Charles H. Bartlett, for respondent:

The provision in the will by which the life estate of the testator's daughter Helen was to cease, if she married, and the homestead go to his three children, is a condition subsequent in general restraint of marriage, without a valid limitation over, and therefore void.

Both Webster and Worcester define the word "unless" as meaning "if not;" the clause which follows, "so long as she shall live and remain unmarried, etc.," is merely explanatory of the preceding clause and is only surplusage.

In a devise to trustees to pay over the net income to the testator's grandson, "so long as he shall remain unmarried," the condition was held void and the grandson was entitled to the income after his marriage.

Otis v. Prince, 10 Gray, 581.

Unqualified restrictions on marriage are void on grounds of public policy.

2 Jarman, Wills, 5th Am. ed. 572.

The condition was held void where the testator did not regard his daughter as being in a fit state of health to marry on account of a supposed nervous affection.

Morley v. Renoldson, 2 Hare, 570.

NOTE.—For a collection of authorities upon the subject of testamentary conditions in restraint of

marriage, see note to *Phillips v. Ferguson* (Va.) 1 L. R. A. 837.

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A condition subsequent annexed to a devise or conveyance of real estate, if of a general character, is void.

Randall v. Marble, 69 Me. 810, 81 Am. Rep. 281; *Otis v. Prince*, *supra*.

The limitation over to the testator's heirs is void.

Randall v. Marble and *Otis v. Prince*, *supra*; 4 Kent, Com. *506.

The condition is void because the estate limited over is incorporated with the whole residue of the testator's estate.

Parsons v. Winslow, 6 Mass. 167, 4 Am. Dec. 107.

When a subsequent condition is annexed to a gift of land, if general, it is void, and, although broken, the estate of the donee continues.

2 Pom. Eq. Jur. § 933.

Whitehouse, J., delivered the opinion of the court:

This is a bill in equity brought for the purpose of obtaining a judicial construction of the following will:

"(1) I will that the money which may come from the policy of insurance which I hold on my own life be appropriated to the payment and discharge of any and all mortgages then existing on my homestead house and lot on Cedar street, in said Bangor, so that said homestead may be free from all incumbrances, and any balance to be applied to pay any taxes then due or unpaid, on said homestead, and any balance to go with my other estate.

"(2) My said homestead house and lot aforesaid I give and devise to my unmarried daughter, Helen S. Mann, for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use, and enjoyment of said homestead, but subject to the duty of keeping it in good repair at her expense, and paying all taxes and keeping the property well insured. If all parties interested see fit to sell the property, they may do so, in which case said Helen is to receive the net income from the proceeds of sale, the same to be well invested for that purpose; and, if the buildings are burned in whole or part, the insurance money shall be applied to repair or rebuild, unless all agree to a different appropriation of the money, viz., all parties interested.

"(3) All other estate, real and personal, of all kinds, which I may own or possess at death, including the remainder of my homestead house and lot aforesaid, my farm on the 'Odlin Road,' so called, and all other property, I give in equal shares to my three children, William E. Mann, Mrs. Augusta S. Harden, and Helen S. Mann, to have and to hold the same to them, and their heirs and assigns, forever."

After the death of the testator, Helen S. Mann married, and is the defendant in this suit.

The language of the second item of the will is specially brought in question. The plaintiff says that the defendant's "life estate" in the homestead was terminated by her marriage, while the defendant contends that the clause

limiting her exclusive title by her marriage is void, as being a condition in restraint of marriage, and that she is entitled to the sole use and occupation of the homestead during her natural life.

It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety on the one hand to follow the ecclesiastical courts, and their desire on the other to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been ingrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that "the more we read, unless we are very careful to distinguish, the more we shall be confounded." The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void would seem to be involved in great uncertainty and confusion both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law. "The true rule upon the subject is," says Mr. Redfield, "that one who has an interest in the future marriage and settlement of a person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the married relation, and so be in some respect in restraint of marriage. . . . Where there are hundreds of conflicting cases upon a point, and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?" 2 Redf. Wills, *290, § 20, and *note*. See also *Id.* 297, and 2 Jarman, Wills, 569.

Beyond the general proposition first stated, the cases seem finally to resolve themselves for the most part into the mere judgment of the court upon the circumstances of each particular case. 2 Redf. Wills, *297, § 31; 2 Pom. Eq.

Jur. 988; *Coppage v. Alexander*, 2 B. Mon. 818, and *note* to same, 88 Am. Dec. 153.

But the rule was so far modified and relaxed that conditions annexed to devises and legacies restraining widows from marrying have almost uniformly been pronounced valid. 2 Pom. Eq. Jur. *supra*. From the numerous decisions upon the subject in the United States, the conclusion is fairly to be drawn that such conditions will be upheld in the case of widows, whether there is a gift over or not. 2 Jarman, Wills, p. 564, *note* 29; 2 Redf. Wills, 296; Schouler, Wills, 608. See also recent cases of *Knight v. Mahoney*, 152 Mass. 523, 9 L. R. A. 573, and *Nash v. Simpson*, 78 Me. 142, 1 New Eng. Rep. 699.

In 2 Redf. Wills, 296, the author says: "We apprehend there is no substantial reason, either in law or morals, why a man should be allowed to annex an unreasonable condition in restraint of marriage, one merely in *terrorem*, in case of a wife, more than of a child or any other person, in regard to whose settlement in life he may fairly be allowed to take an interest; but the cases certainly, many of them, maintain such distinction."

It is unnecessary, however, to enter upon an elaborate discussion of the subject. The existence of the rule as recognized in *Randall v. Marble*, 69 Me. 310, 81 Am. Rep. 281, is not here questioned. In that case the rule was applied to a "crude and ill-defined" proviso in a deed of real estate. We have no occasion to question the soundness of that decision. It was the judgment of the court upon a particular set of words in that deed. It is not an authority to control the judgment of the court respecting the construction of an entirely different set of words in a testamentary gift of real estate.

There is a recognized distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given.

In *Heath v. Lewis*, 8 De G. M. & G. 954, (1853), a testator made a gift of £30 a year to an unmarried woman during the term of her natural life, "if she shall so long remain unmarried." Lord Justice Knight Bruce said: "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that, if such a legatee shall marry, the annuity would thereupon cease. 'During the term of her natural life, if she so long remain unmarried,' is the technical and proper language of limitation, as distinguished from a condition."

Lord Justice Turner said: "It may either be a gift for life defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life if she be so long unmarried; and the question is therefore purely one of intention, in which of the two senses the words were used."

Jones v. Jones, L. R. 1 Q. B. Div. 279 (1876), is an important authority. It related to a devise of real estate, the testator's language being as follows: "Provided said Mary remains in her present state of single woman; otherwise, if she binds herself in wedlock, she

is liable to lose her share of the said property immediately, and her share to be possessed by the other party mentioned." Blackburn, J., said: "A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions were established as to whether the bequest amounted to a condition or only a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions. But this is a devise of land which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land.

"There is, I admit, strong authority that, when the object of the will is to restrain marriage and promote celibacy, the courts will hold such a condition to be contrary to public policy and void. But here there appears to be no intention to promote celibacy. Now here, I think, when one sees the scope of the testator's dispositions, it comes to this: 'I have left to three women enough to live upon, and if one of them dies I bring in *Jemima* and *Mary*. But if *Mary* (I suppose as the youngest she was most likely to change her state) happens to marry, her husband must maintain her, and her share shall pass to the rest.' Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that the limitation to *Mary* until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition, it is bad."

Lush, J., said: "We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal; and, as I read the words, the testator only meant to provide for her while she was unmarried. There is nothing in these words which compels us to think it was the testator's object that this niece should never marry at all; he probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife." See also *Hotz's Estate*, 38 Pa. 422; *Cornell v. Lovett*, 35 Pa. 100; *Graydon v. Graydon*, 28 N. J. Eq. 230; *Courter v. Stagg*, 27 N. J. Eq. 805.

It is the enlightened policy of courts of equity, when not restrained by compulsory rules, to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words.

In the case before us, the testator makes careful provision in the first item of the will for the appropriation of so much of the proceeds of his life insurance as might be necessary to discharge all mortgages on the homestead. In the second item he devises the homestead to his unmarried daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use, and enjoyment of said homestead." In case all parties interested agree to

a sale of the property, this daughter is to receive the net income of the proceeds, "the same to be well invested for that purpose;" and, in the event of the destruction of the buildings by fire, the insurance money shall be applied in rebuilding them. In the third item he gives the residue, including the remainder of his homestead, to his three children in equal shares.

Here, then, is the case of a parent who has a recognized right, and was under a moral obligation, to interest himself in the settlement of his daughter. To the ordinary mind, untrammelled by the "mediaevalism of the law," there is nothing in the will indicating any other thought or feeling than an affectionate regard for the welfare and happiness of a beloved daughter, and an anxious desire to provide for her a permanent and comfortable home. The modern court, free from the incubus of arbitrary legal dogmas, must fail to discover in the language of this will any suggestion of a purpose on the part of the father to impose a condition *in terrorem* in restraint of his daughter's marriage. It discloses no other disposition than a praiseworthy desire to secure to the daughter the continued occupation and enjoyment of the old homestead until, by reason of her marriage, she should cease to need

it; then she was to share equally with her sister and brother in the entire estate. It is manifest from the whole tenor of the will that nothing was more remote from the real purpose of the testator than the idea of discouraging the marriage of this daughter. The intention was not to promote celibacy, but simply to furnish support until other means should be provided. Because of the inadvertent use by the scrivener of the word "unless," this court is not compelled to impose upon this instrument an intention which it is manifest from the context the testator never had. There is no such inflexible rule; the rights of the parties are not to be determined by an application of such a Procrustean method. The provision is in no respect *contra bonos mores*. It is not violative of any principle of sound policy; and, if it is here necessary and proper to recognize and maintain the distinction between a limitation and a condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition.

The defendant's exclusive right to the possession and enjoyment of the entire homestead ceased upon her marriage.

Decree accordingly.

Peters, Ch. J., and Virgin, Libbey, Emery and Foster, JJ., concurred.

WYOMING SUPREME COURT.

Kinch MCKINNEY, *Plff. in Err.*,
v.

STATE OF WYOMING.

(.....Wyo.....)

1. A motion for a new trial must be made within the time fixed by the statute or all errors occurring at the trial are waived.
2. The overruling of a motion to quash the entire panel of petit jurors summoned to serve at the term, interposed before the trial began, may be considered on appeal independently of a motion for a new trial in which it was unnecessarily embodied, but which was filed too late.
3. Orders of the trial court dismissing the regular panel of jurors and summoning a new one cannot be sufficiently authenticated by affidavit of a party to the suit to justify their consideration on appeal.
4. In a criminal action against a man, the constitutional right of women "to equal civil, political, and religious rights and privileges" with men cannot be raised by him, by way of challenge to the array, because the jury is composed exclusively of men.
5. The exclusion of women from a jury on the trial of a man for crime, even if wrongful, does not deprive him of any rights or privileges under a constitutional provision giving women the right to vote and hold office and declaring that both male and female citizens shall equally enjoy all civil, political, and religious rights and privileges.

6. A continuance for the testimony of absent witnesses is properly denied if substantially the same testimony as that which is absent is offered at the trial.

7. A convict may be sentenced to a prison located beyond the state when it is authorized and required by statute.

(June 20, 1892.)

ERROR to the District Court for Laramie County to review a judgment convicting defendant of the crime of grand larceny. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry St. Rayner, for plaintiff in error:

A continuance should be granted for the absence of evidence when proper legal means to obtain it has been used.

Rev. Stat. 1887, §§ 8397-8399; *Montgomery v. Citizens Mut. Ins. Co.* 18 La. Ann. 227.

If any unforeseen accident or casualty intervenes, which puts it out of the power of the party to prevent it, a continuance will be granted.

8 Am. & Eng. Encyclop. Law, 805, and *note* 3, and cases cited. *Eldridge v. State*, 12 Tex. App. 208.

A judge cannot arbitrarily quash a venire regularly issued by the officers charged with this duty under the statute, and proceed to organize another jury under the powers conferred upon the court to do so in certain spe-

NOTE.—Attention is called to the above case as a novel application of the rule that only those who

are prejudiced by an unconstitutional law can complain of it.

cial cases. The proceedings of the body thus organized will be held void.

Thomp. & M. Juries, § 500, § 81, subd. 2, 551, and cases cited; *O'Byrnes v. State*, 51 Ala. 25; *Wright v. Stuart*, 5 Blackf. 121; *Clinton v. Englebrecht*, 80 U. S. 13 Wall. 484, 20 L. ed. 659.

The court has no right of its own motion, without any exception being taken by either party, to quash a panel and issue a new venire.

Thomp. Trials, § 89; *Cross v. Moullton*, 15 Johns. 470; *Williams v. Com.* 91 Pa. 498; *Rogers v. State*, 33 Ind. 548.

The defendant was entitled to be tried by a panel summoned in a particular way as prescribed by statute, and when the irregular action of the court compels a resort to talesmen the right is impaired.

People v. Stewart, 7 Cal. 140; *Stratton v. People*, 5 Colo. 276; *Atkins v. State*, 16 Ark. 581.

The court is not vested with the power to summon jurors upon a special venire after discharge of the regular panel.

Thomp. & M. Juries, § 93, § 81 subd. 2; *Williams v. Com. supra*; *Mosseau v. Veeder*, 2 Or. 113; *Judge v. State*, 8 Ga. 178.

Chapter 47, Laws 1888, and chap. 85, Laws 1890, of the state of Wyoming relating to the qualifications of jurors are unconstitutional and void.

Wyo. Const. art. 6, § 1.

The statutes of Wyoming in effect single out and deny to the female citizens of Wyoming the right and privilege of participating in the administration of the laws as jurors because they are women though qualified in all other respects and discriminate against them.

Strauder v. West Virginia, 100 U. S. 808, 25 L. ed. 664; *Virginia v. Rices*, 100 U. S. 814; 25 L. ed. 668; *Neal v. Delaware*, 108 U. S. 370, 26 L. ed. 567; *Williams v. State*, 44 Tex. 84; *Nashville v. Shepherd*, 3 Baxt. 378.

Mr. Charles N. Potter, Atty-Gen., for the State:

The granting of continuances in criminal cases is matter within the sound discretion of a trial court and will not be interfered with by the appellate court unless a manifest injustice has been done.

State v. Hodges, 45 Kan. 389; *State v. Emmons*, Id. 397; *Burrell v. State*, 25 Neb. 581; *Life Ins. Co. v. Gisborne*, 5 Utah, 333; *State v. Green*, 43 La. Ann. —; *Hicks v. State*, 25 Fla. 535.

The record does not show all the proceedings touching the formation of the jury. To set forth the facts in a challenge or motion is not sufficient.

Miller v. State (Wyo.) Feb. 18, 1892; *Neal v. State* (Neb.) June 29, 1891.

It does not appear that female citizens were not summoned except as we find such a statement in the challenge. The record fails to disclose it.

State v. Kennedy, 77 Iowa, 208; *State v. McGinnis*, 17 Or. 832.

The language of the sentence designating the particular place or penitentiary for the confinement of the convicted prisoner was and is no part of the sentence proper; if it was a part of it and should be erroneous it will be disre-

garded and the valid portion of the sentence be permitted to stand.

The actual judgment of the court was that the prisoner be confined at hard labor in the state penitentiary for a period named, and that was all; a designation of the penitentiary was mere matter of description.

If the sentence is wrong it does not authorize a reversal of the judgment and a new trial.

Territory v. Conrad, 1 Dak. 363; *Brantley v. State*, 87 Ga. 149; *People v. Harrington*, 75 Mich. 112; *Herrington v. State*, 97 Ala. 1; *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Van Hagan*, 25 Ohio St. 426; *Ex parte McGehan*, 22 Ohio St. 442; *Isaac v. State*, 23 Md. 410; *Armstrong v. People*, 37 Ill. 459.

It was proper legislation to authorize the state board to select a place to be used as a penitentiary.

Brown v. People, 75 N. Y. 437.

Groesbeck, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted in the district court of Laramie county, Wyo., on the 22d day of January, 1891, of the crime of grand larceny. He was indicted for feloniously stealing, taking, carrying away, leading away, and driving away, eight head of neat cattle, of the property of the Swan Land & Cattle Company, and eighteen head of neat cattle, of the property of the Laramie River Cattle Company, in the said county of Laramie, each of the value of \$15. He was sentenced by the court to imprisonment in the penitentiary for the term of eight years. The petition in error and transcript containing the journal entries and the bill of exceptions were filed in this court September 8, 1891, and the cause was heard and submitted at the present term. Under the rules of this court, criminal causes have the precedence over other causes on the docket, and this cause is therefore determined in advance of other causes submitted. The assignments of error are disposed of hereafter in what seems to be their proper order.

1. The motion for a new trial was not filed within the statutory time, as it was filed five days after the verdict of the jury was rendered, instead of within three days thereafter, as required by the statute, which reads as follows: "An application for a new trial shall be by motion upon written grounds, which shall be filed at the term the verdict is rendered, and except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be filed within three days after the verdict was rendered, unless additional time be granted by the court upon good cause shown." Wyoming Rev. Stat. § 8348, as amended by chapter 78, Sess. Laws 1890. The motion does not seek a new trial on the ground of newly discovered evidence, but upon error of law occurring at the trial, nor does any reason appear, either in the motion or in the record, why this motion was not seasonably filed, nor was there any application made to the trial court for additional time in which to file it. Even when additional time is asked to file such a motion the applicant must show reasonable grounds for the delay and the necessity for the delay, and,

further, that substantial reasons exist, in the interests of justice, requiring it. *Bulliner v. People*, 95 Ill. 394. No showing was made and no excuse was given for the delay. The rule is too firmly established to be shaken now, that the motion for a new trial must be made within the time fixed by statute, or all errors occurring at the trial are waived. A trial court may overrule the motion for the sole reason that it was not filed in time, and this may have been the ground upon which the motion was overruled. No reason for the denial of the motion is shown by the record, but this failure to comply with the imperative terms of the statute would certainly be ground for overruling it. *Eoanville v. Martin*, 103 Ind. 206, 1 West. Rep. 196; *Kent v. Lawson*, 12 Ind. 675, 74 Am. Dec. 233; *Bradshaw v. State*, 19 Neb. 644; *Ex parte Holmes*, 21 Neb. 324; *Osborne v. Hamilton*, 29 Kan. 1; *Hover v. Tenney*, 27 Kan. 132; *Lucas v. Sturr*, 21 Kan. 480; *Nesbit v. Hines*, 17 Kan. 316; *Bartlett v. Feehey*, 11 Kan. 593; *Odell v. Sargent*, 3 Kan. 80. We cannot, therefore, inquire into any matters occurring at the trial, because this motion was filed too late.

2. We agree with counsel for plaintiff in error that we should consider the motion to quash the entire panel of twenty-four jurors summoned to serve at the term. It was interposed before the trial began, and could not have been considered by the court during the trial or after it. It was unnecessarily embodied in the motion for a new trial, and must be considered independently of it, as the exception was taken at the proper time, and in due form, to the action of the trial court in disallowing or overruling the motion to quash the panel.

3. However, we cannot consider the facts set forth in the affidavit in support of the challenge to the array, purporting to be copies of the orders of the court below in relation to the dismissal and discharge of the regular panel of the petit jurors summoned for the term. The matters complained of in this respect, and the ordering and summoning of a new panel of petit jurors on an open venire, are presented only by this affidavit of the plaintiff in error. It purports to set out journal entries of the court, and these are authenticated only by the affidavit. The journal entries should have been certified by the clerk, or in case these were not full and explicit the facts should have been exemplified in the bill of exceptions certified by the trial judge or the court. We cannot substitute the authentication of the record by a party to a suit for the proper authentication of the clerk, judge or court. *State v. Shaw*, 5 La. Ann. 342; *State v. Bruington*, 22 La. Ann. 9; *Ripley v. Coolidge*, 1 Minor (Ala.) 11; *State v. Millain*, 3 Nev. 425. As there is no properly authenticated record of the court, showing its action in discharging the regular panel of the petit jury, and ordering a new one for service during the term, we must disregard the assignments of error predicated thereon.

4. In the challenge to the array of the petit jury objection is also made to the jury because it was exclusively composed of male persons. It is urged that the Constitution of this state requires that women, equally with men, shall be subject and eligible to jury duty, where they possess the same qualifications as men.

16 L. R. A.

Section 1 of article 6 of the Constitution provides that "the rights of citizens of the state of Wyoming to vote and hold office shall not be abridged or denied on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political, and religious rights and privileges." Section 9 of article 1, (Bill of Rights) providing that the right of trial by jury shall "remain" inviolate in criminal cases, also provides that a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, (not persons,) as may be prescribed by law. These provisions are borrowed from other constitutions, and were intended to maintain sacred and safe from legislative control the right of trial by jury already guaranteed. The provision relating to grand juries, found in the same section, is that such bodies may consist of twelve "men," nine of whom concurring may find an indictment, with power in the Legislature to alter, regulate, or abolish the grand jury system. It has been the settled law of this jurisdiction, ever since its organization, that male electors only were qualified to serve as jurors, although for that period women have been entitled to vote and hold office as well as men. At one time it was held by the *vis prius* courts of the territory of Wyoming that women were competent jurors, but that ruling was speedily overturned by the same courts. The question was never passed upon by the supreme court, either state or territorial. We have not much doubt that women were not eligible as jurors under the territorial statutes, as the right to vote and hold office does not include the right, if right it may be termed, to serve as a juror. It is only when the Legislature, by an unreasonable exercise of its functions in prescribing the qualifications of jurors, impairs the right of trial by jury, that its acts are unconstitutional. The constitutional provision that the "right of trial by jury shall remain inviolate" means that the right of jury trial shall not be destroyed or annulled by legislation, nor so hampered or restricted as to make the provision a nullity. "It would be obviously incompetent for the Legislature to impose so many or such disqualifications as would restrict the number eligible to jury duty to a very small or select class; for this would substantially impair the right of trial by jury as it existed at the common law,—a thing which the foregoing provisions were designed to inhibit. Subject to this general reservation the enumeration of causes of disqualification has generally been left to the Legislature." *Thomp. & M. Juries*, §24. The difficulty arises in the construction and force of the last clause of section 1 of article 6, that "both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges." Is jury service a right or privilege? The statute now in force restricts the qualifications to male citizens able to read and write the English language, having the qualifications of electors, and being of sound mind and discretion, and not being judges or clerks of any of the courts, sheriffs, coroners, jailers, or subject to any bodily infirmity disqualifying them for service as jurors, and not having been convicted of a felony. The statute exempts persons over sixty years

of age, ministers of the gospel, county officers, licensed attorneys, practicing physicians, dentists, registered pharmacists, officers and employes of the United States government, firemen and militiamen in active service. Wyo. Sess. Laws 1890, chap. 35. This Act was passed prior to the admission of the state into the Union, and has not been altered or repealed. No provision has been made, then, by statute, for the admission of female electors to the jury box, unless the Constitution can be so construed as to confer the right without legislation. It may be that jury duty is no more a civil or political right than militia service, and that is by the terms of the Constitution restricted to able-bodied male citizens between certain ages, who have "no conscientious scruples averse to bearing arms." Wyo. Const. art. 17, § 1. It may be that jury duty is a right or privilege, that of assisting in the administration of justice, as it is put by some of the courts,—an important function of government, affecting the rights and interests of both sexes. We do not feel justified in deciding a question of such grave importance on the spur of the moment, and without a full argument. We do not find it necessary to do so in this case; for the plaintiff in error complains that, by the exclusion of women from the jury that tried him, he was not accorded the equal protection of the laws of this state, and was deprived of his rights, privileges, and immunities accorded to him under the provisions of the 14th Amendment to the Constitution of the United States. He sought to have the cause removed to the Federal court for trial for this latter reason, and assigns this as error, also. He had no such right of removal, as the object of the 14th Amendment to the Federal Constitution was against discrimination because of race or color, and not because of sex. "Its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Strauder v. West Virginia*, 100 U. S. 810, 25 L. ed. 666. In this case the court said: "We do not say that within the limits from which it is not excluded by the Amendment a state may not prescribe the qualifications of jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this." This was a cause where the removal from the state to the Federal court was granted. The plaintiff in error was a colored man indicted and tried for murder in the courts of the state of West Virginia, where he was convicted. He seasonably made his motion for removal of the cause to the Federal court, but was refused this by the state courts. The Supreme Court of the United States held that he was entitled to such removal, as the statute of the state restricted jury duty to whites. Such a statute was held to be a violation of the Amendment as the state law discriminated in the selection of juries against negroes, because of their color, and amounted to a denial of the equal protection of the law to a colored man put on trial for an alleged offense against the state. This decision was fortified by the

later cases of *Virginia v. Rives*, 100 U. S. 818, 25 L. ed. 667; *Ex parte Virginia*, 100 U. S. 839, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 870, 26 L. ed. 587; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354. These cited cases held that the removal should be granted under hostile statutes. They held also that discriminations against negroes on account of color, by officers charged with the duty of selecting jurors, would be corrected on error. But there appears to be no case where a white man has asked for a removal of a cause wherein he is a party, or its reversal on error, because a statute excluded other races than his own from a jury before whom he could be or is tried, or because officials charged with the duty of selecting or summoning jurors selected or summoned those of his own race only to serve as jurors in his cause. The right has, we believe, been always demanded by the citizen whose rights, or the rights of whose race, or color were infringed or discriminated against. No statute has been declared unconstitutional, no act held unlawful, because a white man was tried by his own race or color. In the case at bar the right of removal to the Federal court did not exist, because the discrimination under the Federal Constitution and under the Federal law was prohibited as against the African race, not as against female citizens.

If the plaintiff in error can complain, it is because the Constitution of this state, and not the Constitution of the United States, was violated in the exclusion of female citizens from the jury that tried him. It was said in the case of *Strauder v. West Virginia*, *supra*, that the very idea of a jury is that the body of men of whom it is composed are the peers or equals of the person whose rights it is selected or summoned to determine, and that they must be of the same legal status in society as that which he holds. The plaintiff in error asserts a right or privilege of having members of the opposite sex, as well as those of his own sex, to determine his rights, because they are unconstitutionally excluded from enjoying a right granted to them, and not because any one of his own sex is denied the right. If women have the right, if it is a right, to serve as jurors, and to "assist in the administration of justice," thereby, it seems that no one but a woman—one of the class or sex whose rights have been invaded—can assert that right. It must be demanded by one who has been denied the equal protection of the law, and a civil or political right or privilege of which she, in common with her sex, has been deprived. The courts will not listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who therefore has no interest in defeating it. *Cooley*, Const. Lim. 164. The Supreme Court of Kentucky has passed upon the question as to whether or not a white man could complain of a statutory exclusion of colored men from a grand jury that indicted him; and as the opinion is so pertinent on this point, we quote the same *in extenso*. "In *Johnson v. Com.*, we held, in pursuance of authoritative decisions of the Supreme Court of the United States, that a state law which excluded negroes from service on grand and traverse jurors would, if

enforced, deprive colored persons of the equal protection of the law, and that such statute was therefore unconstitutional. We are now called upon to decide whether that statute deprives white persons of the equal protection of the law. In other words, whether a white person, indicted by a grand jury composed wholly of persons of the white race, can complain because negroes were excluded from the grand jury by which he was indicted. Only those who are prejudiced by an unconstitutional law can complain of it. *Cooley, Const. Lim.* 164."

In *Marshall v. Donovan*, 10 Bush, 681, Marshall, a white person, undertook to raise the question whether the exclusion of negroes from participation in the benefits of the common school system of the state was not a violation of the state Constitution. But the court refused to consider the question, because Marshall, being one of the favored race or class, could not raise it. The Act of the General Assembly which provided that only white persons should serve upon juries has been held to be unconstitutional because in the opinion of the supreme court the exclusion of negroes from juries on account of their race or color denied them the equal protection of the law, in contravention of the 14th article of Amendments to the Constitution of the United States. That conclusion was based on the ground that a race whose members are excluded from serving on juries is discriminated against as a race, and is not as well protected by the law as the race not so excluded. Surely, if this be true, it cannot be true that one belonging to the race not excluded, but from which the whole jury was required to be selected, can have been prejudiced by the fact that another race was excluded." *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 208. See also *Norman v. Boas*, 85 Ky. 557.

The principle announced in these decisions governs the case before us. As a white man cannot urge as an infraction of his rights that the rights of another race have been assailed, so a member of one sex cannot complain because the members of another sex are denied the same rights as persons of his sex. The deprivation of the rights, privileges, or immunities of a class, race, or sex, which are guaranteed by the organic law, can only be determined in a proceeding instituted by one of the proscribed class, race, or sex, where relief may be given directly to the oppressed one in his suit and upon his demand. A woman must be on trial to demand the rights of her sex, or to assert that they have been unjustly or constitutionally discriminated against. A man cannot assert her right for her in his cause. He is not the party whose rights are affected, and he has no interest in defeating an unconstitutional or invalid law affecting those of the opposite sex. Without intimating, then, what our views might be as to the meaning and force of the constitutional provision providing that the members of both sexes should equally enjoy all civil, political and religious rights and privileges, when such a question is fairly and properly presented, without passing in this case upon the right, duty, or eligibility of female citizens to serve as jurors, where they possess the same

statutory qualifications as men, without construing the various constitutional provisions bearing directly or remotely upon the matter; without attempting to say whether the constitutional provision conferring the right or privilege, if it is so conferred, requires legislation to clothe it with force and vitality,—we decide but this, and that is sufficient: that the plaintiff in error, a man, cannot claim that any civil, political, or other right or privilege of his or of his sex is infringed, invaded or annulled by a statute excluding members of the other sex from the jury which tried him, or which by its terms confines the selection of jurors trying him to those of his own sex. He has been tried by his peers. He has not been denied the equal protection of the law. He has not been discriminated against because of his sex. There was no error in the refusal of the trial court to order a removal of the cause to the Federal court, or in overruling the challenge to the array, because of the fact that the jury that tried the plaintiff in error was composed exclusively of members of his own sex, or in overruling the motion in arrest of judgment based on this ground alone.

5. A motion for the continuance of the cause was made on the ground of the absence of material witnesses for the defense, and this motion was overruled by the court. Such matters rest largely in the discretion of the trial court. The facts set forth in the affidavit for continuance do not show proper diligence. The witnesses who were absent at the trial all lived in Nebraska, and subpoenas were issued for them; but when this was done, or when they were served, does not clearly appear. Various reasons were given for their absence. One, a woman, was at the bedside of a sick child; another, a man, was attending a land contest; and the cause of the absence of the others was unknown. The testimony desired was either supplied by other witnesses at the trial, or was immaterial. The material testimony was cumulative; the same facts desired to be established having been testified to by witnesses who were examined during the trial. A continuance for the testimony of absent witnesses is properly denied if substantially the same testimony as that which is absent is offered at the trial. *Hooper v. State*, 29 Tex. App. 614; *Duncan v. State* (Tex. App.) 16 S. W. Rep. 753. When this motion for a continuance for the term was overruled a motion was made for a continuance for a reasonable time to enable the depositions of these absent witnesses to be taken, which was likewise denied. This is claimed as error, but no exception was taken to the ruling of the court thereon, and we will not consider this alleged error; yet the reasons here given for affirming the action of the trial court in refusing a continuance for the term may well apply to this ground of error.

6. The sentence and judgment of the court is in the following language: "It is therefore considered, ordered, and adjudged by the court that the said Kinch McKinney be imprisoned in the state penitentiary of the state of Wyoming, to wit, the Illinois state penitentiary, located at or near the city of Joliet, in the state of Illinois, and kept at hard labor, for a period of eight years." This is assigned as error on the ground that the court could not order the

imprisonment of a convict at a prison located without the boundaries of the state, and beyond its territorial limits. This point was directly decided in the case of *Kingen v. Kelley* (Wyo.) 15 L. R. A. 177, after an exhaustive argument and a thorough examination by this court. We affirm the power of a district court, in that case upheld, to sentence a convict to a prison located beyond the state, as well as to change the place of imprisonment when authorized and required to do so by law, for the reasons there given.

We were not required to look into the evidence, but we have done so, although the record of the testimony is voluminous, though imperfect, as none of the maps or drawings submitted to the jury, and which were necessary to fix the location of ranges, fences, and boundary lines, are here. The *locus* of the crime was proven circumstantially, as the cattle alleged to be stolen were found in the neighboring state of Nebraska, with mutilated brands, and having the appearance of being recently and rapidly driven for some distance. In Laramie county, Wyo., the range of the cattle, they had been guarded thereon by line riders performing the duty of examining fences located in the vicinity of the boundary line between this state and Nebraska. The object in keeping them in Wyoming and out of Nebraska appears to have been to prevent violations of the herd law of the latter state. One witness testified that cattle were seen driven

from this inclosed range into Nebraska in the direction of the ranch of plaintiff in error and that of Kingen, his codefendant, before the causes were separately tried. The defense claimed that the cattle might have drifted into Nebraska, and might have been taken and were taken there, or that there was no sufficient testimony on this point to overcome the presumptions in favor of the plaintiff in error on this proposition; but there was evidence of a quarrel between McKinney and Kingen, his partner or accomplice, overheard by a witness, in the course of which Kingen complained of and to McKinney that the latter had "always the best of the deal" whenever a drive was made from Wyoming. The evidence and all attendant circumstances show that these cattle were stolen by these parties from Laramie county, Wyo., with many others, their brands altered rather clumsily, and that these forays had been systematic, bold and extensive. The defense as to the ownership of the cattle was but feebly asserted. The finding of the jury was not against the weight of the evidence, but is supported by abundant testimony; and if we had the power to critically inspect it we could not disturb it. The instructions fairly present the law. The cause was on trial for seven days in the court below, and every point was fully and persistently contested.

The judgment of the District Court of Laramie county is in all respects affirmed.

Conaway and Merrell, JJ., concur.

PENNSYLVANIA SUPREME COURT.

Alan WOOD, Jr.,

v.

Patrick McGRATH et al., Appts.

(.....Pa.....)

1. The power of municipal authorities over streets extends to the granting of permission to a private person to lay an underdrain therein from his premises without consent of other persons who own abutting lots as well as the soil of the street over which the drain runs.
2. An injunction against an alleged nuisance granted against a great preponderance of evidence will be reversed.

(July 12, 1892.)

A PPEAL by defendants from a decree of the Court of Common Pleas for Montgomery

County enjoining them from maintaining a drain in the highway adjoining plaintiff's premises. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. N. H. Larselere and M. M. Gibson, for appellants:

The municipality had the power to permit appellants to construct the drain.

Smith v. Simmons, 103 Pa. 33, 49 Am. Rep. 118; *Susquehanna Depot v. Simmons*, 8 Cent. Rep. 140, 112 Pa. 884.

To sustain an injunction the right at law, if not conceded, must be clear.

Cox v. Freedley, 88 Pa. 124, 75 Am. Dec. 584; *Newville Road Case*, 8 Watts, 174; *Duncan v. Hollidaysburg & G. Iron Works*, 26 W. N. O. 479.

There was no public nuisance. It is, if anything unlawful, a mere private trespass. There

NOTE.—Power of municipality to authorize use of highway for private drain.

There has to a greater or less extent been a custom to allow persons to lay private drains in the streets, by the municipal authorities. See *Kosmak v. New York*, 117 N. Y. 367.

Laying a drain in an alley to connect a house abutting thereon with a public sewer in an adjoining street is a proper use of it. *McElhones' App.* 11 Cent. Rep. 362, 118 Pa. 609.

In *Cone v. Hartford*, 28 Conn. 373, the court said there is no doubt that the common council is not authorized to construct drains for mere private convenience or benefit of certain individuals.

16 L. R. A.

Authority to construct sewers whenever the public good requires it does not give the common council power to permit the construction of a private sewer along a public street; at least, where it is not intended to communicate with a public drain. *Hutchinson v. State*, 39 N. J. Eq. 572. See also *Glasby v. Morris*, 18 N. J. Eq. 72.

The commissioners of highways have no right to grant the privilege of placing a tiled drain along a public highway, it being an additional burden and servitude on abutting lands. *Murray v. Gibson*, 21 Ill. App. 491.

H. P. F.

was no attempt to prove any damage, let alone irreparable injury. No decree should be made to be followed by injunction unless irreparable injury be already established.

Lewis v. Jones, 1 Pa. 536, 44 Am. Dec. 138; *Minnig's App.* 82 Pa. 377.

Unless it be a strong and mischievous case of pressing necessity, or the right has been previously established at law, a party cannot ask for an injunction.

Richard's App. 57 Pa. 113, 98 Am. Dec. 202.

Messrs. James B. Holland and Henry Freedley, for appellee:

The master found that this drain was laid over and on the property of the plaintiff, Alan Wood; that it is a continuing trespass not abatable by the act of the party; that it is a private nuisance. These being facts found by the master and approved by the court below, this court will not reverse unless it be flagrant error.

Cox's App. 12 Cent. Rep. 294, 120 Pa. 106.

There can be no question of the jurisdiction of equity; for the restraint of continuing trespasses and nuisances are branches of equity jurisdiction coeval with the court.

Goodson v. Richardson, L. R. 9 Ch. App. Cas. 221; *Sterling's App.* 2 Cent. Rep. 49, 111 Pa. 85; *Earley's App.* 121 Pa. 496; *Reading Iron Works v. Boro.* 8 Lanc. L. Rev. 107; *Bispham*, Eq. 484; *Angell*, Watercourses, §§ 445, 447; *Scheetz's App.* 85 Pa. 88; *Morgan's App.* 25 W. N. C. 582.

As to the right of the courts to grant equitable relief for a trespass on a street where the abutting owner's deed describes to the side, see *Ferguson's App.* 10 Cent. Rep. 811, 117 Pa. 426.

While the borough authorities have full power to use the streets for the purpose of drainage, either above or under ground, and in the exercise of this power to adopt and construct public sewers, they cannot delegate this power to an individual and enable him to adopt and construct a system of his own and for his own benefit against the wishes or over the property of his neighbor.

Goodson v. Richardson and Sterling's App. *supra*.

Green, J., delivered the opinion of the court:

It was certainly proved, and not contradicted, at the hearing of this case before the master, that the borough council gave permission to the defendant James A. McGrath to construct the drain in question. In so far therefore, as it was in the power of council to authorize the digging and laying of the drain, the act of the defendant in doing so was a lawful act. The power of the council to dig up the surface of the streets of the borough, and to build sewers and drains, or to lay water or gas pipes thereunder, is ample under the borough charter, (Act May 15, 1860, Pub. Laws, p. 1051,) and the supplement thereto, (Act March 22, 1870, Pub. Laws, p. 522,) and is not contested by the plaintiff. But it is strenuously contended by the plaintiff, and it was decided by the master and the court below, that this right of the council is limited to public purposes only, and may not be exercised in favor of

an individual citizen for a private purpose. So far as this contention alone is concerned, it has been disposed of by the decision of this court in the case of *Smith v. Simmons*, 103 Pa. 82, 49 Am. Rep. 118, in which we held that it was competent for the authorities of a borough to grant permission to a citizen to dig up a street of the borough for the purpose of laying a water pipe to lead water from a spring to his private house, and that the digging of the necessary ditch in the street for that purpose was not *per se* a nuisance. Our Brother Gordon, in a full discussion of the subject, said, in the course of the opinion: "If the ditch dug for, and at the instance of Dr. Smith was a public nuisance, then he and all engaged in sinking it were responsible for all damages resulting from it. . . . But we do not think it was *per se* a nuisance,—such a work that the borough council had no power to permit. This ditch was dug for the purpose of laying a pipe for the conveyance of water from a spring to one of the defendant's houses on Willow street. . . . In these days, when waterworks are common to all the larger towns, pipes are laid in the streets from which the water supply is drawn, both for public and private uses, and although the right thus to lay pipes is usually accorded to a corporation, it by no means follows that it might not be done by private persons acting under municipal authority. Necessity, as was held in the case of *Com v. Passmore*, 1 Serg. & R. 217, justifies many actions which would otherwise be nuisances. No one has the right to throw wood or stones in the street at his pleasure, nevertheless, as building is necessary, building material may be laid therein for a reasonable time and in a convenient manner. So may a merchant occupy the street with his goods; in like manner may the common highways be temporarily opened for the purpose of building vaults under them, or under like regulations, private drains may be connected with the common sewers or gutters, or houses and other buildings with the streets, by alleys, doorsteps, and the like. By such things as these and many others, which are justified by necessity or custom, may public highways be occupied temporarily or permanently, and it would be strange, indeed, if, in the face of all this array of precedents a private citizen, acting under municipal license, could not, without committing a public nuisance, lay a water-pipe along a street to his house." This doctrine was repeated in the case of *Susquehanna Depot v. Simmons*, 112 Pa. 384, 3 Cent. Rep. 140, in which we said: "It is settled that the defendant [the borough] had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful."

The reasoning and the decisions in these two cases are entirely satisfactory to us; so much so that we do not think it necessary to repeat the reasoning or to vindicate the judgments. But it is too plain for argument that, if a borough has the power to grant to an individual the right to lay a water-pipe in the streets for his exclusive use, it must also, by parity of reasoning, possess the en-

tirely similar power to grant permission to a citizen to lay a drain pipe in the streets to lead off the surplus or refuse water from his building. The objection in the latter case is that the streets can only be used for public purposes, and not for those which are private. But that objection would have required us to deny the private use in the *Simmons Case*. It is perfectly plain that the municipal power to grant the license cannot exist in the one case, unless it also exists in the other. The learned court below, in their opinion, thought that the doctrine in the *Simmons Case* was not applicable in this, because in that case there was no private abutting owner involved in the contest, and the right of such owner was not adjudged. But the least consideration will show that the right of a private abutting owner has nothing to do with the question. It is the extent of the municipal authority to grant the use of the street for a private purpose that is alone in question, and that authority does not depend in any degree upon the will of the abutting owner. If the power exists at all it exists as a function of the municipal authority, and is in no sense an emanation of the will of the abutting owners.

The conclusion, both of the master and court below, was based upon the idea that the abutting owner is the owner of the fee of the land occupied by the street, and the laying of a drain pipe under the street without his consent is an evasion of his right as owner of the land. How fallacious this proposition is, is at once apparent when it is considered that the right of the public in the streets of cities, boroughs, and towns is far more extensive than the mere right to use the surface of the land for the purpose of passage. It is beyond all question that, in the municipal organization referred to, the governing authority possesses just as clear a right to make use of the subsoil as of the surface, for very many purposes for which the surface is not, and, ordinarily, cannot be, used except with great inconvenience. It may undoubtedly, either by itself, or by its delegated authority to others, dig up the soil to lay water pipes, gas pipes, sewers, drains, electric wires, telegraph and telephone wires, cables, and doubtless subterranean railways, every one of which uses is in direct and exclusive hostility to the abutting owners' right in the fee; and the grant of these privileges may be made, and is constantly made, to other corporations or associations without the least regard to the will or consent or property right of the adjoining owner. He is not consulted about such matters. He has no right to prevent such uses if the public authorities agree to it; in short, he is not the unqualified owner of the subsoil of the street; and the cases are most rare where he has the opportunity to avail himself of his reversionary right resulting from the abandonment of the highway. If the municipality, or any *locum tenens* thereof, desired to lay water pipes, gas pipes, sewers, or drain pipes in the subsoil, he has no right to compensation on account of such use, nor can he intervene in the courts to prevent it. He has no title which will enable him to do so. The argu-

ment on the part of the plaintiff proves too much. It denies entirely the right of the borough to allow a private owner, along a street which has no drain, to connect with a drain of another street, unless the consent of all intervening owners be obtained. In many towns and boroughs of the commonwealth the pipe and drains and sewers are not laid on all the streets, but on a few of the principal streets. It follows from the contention of the plaintiff that all citizens owning properties on the side streets which have no pipes or drains, cannot obtain their gas or water, and cannot connect with the sewers and drains, because the municipal authorities cannot give them permission to do so. This certainly is not the law, and it is opposed to the only decisions we have on the subject. Nor is there any good reason for holding such a doctrine. The streets and alleys of cities, towns, and boroughs are under the control and direction of these municipalities, and they have all the power over them that can lawfully exist. They are the universally recognized channels of communication between the different parts of the municipal territory, and no private interest in, or ownership of, the subsoil is permitted to interfere with the free use of both the surface and the subsoil by the municipal authorities or by their delegated substitutes. Any other doctrine would entirely frustrate all beneficial uses of the public streets and alleys of the cities, towns, and boroughs of the commonwealth. It is clear, therefore, that the adjoining owners have no interest in the subsoil of the street which will enable them to demand that their consent must be obtained before any uses of the subsoil of the streets can be made. It does not lie with them to say they admit that the borough authorities can use them for all public purposes, but cannot permit their use for the same kind of a purpose by a private citizen, because we have already decided that they can do so; and if the use permitted is of the same kind, to which the surface or subsoil of the streets may be devoted, they have no more right to object in the one case than in the other. Having determined the question of the power of the borough to grant permission to the defendants to lay the drain in question, the next subject requiring consideration is whether a nuisance to the plaintiff has been produced by the use of the drain, such as is remediable by injunction. After the drain has been in use nearly a year, one of the tenants of the plaintiff made complaint of it to the plaintiff, who thereupon informed the defendants of the complaint, and requested them to remove the outlet of the drain, which they accordingly did within a few days after receiving the notice. They extended the drain to Sansom street, which was an open surface drain to the river for the surface drainage of that part of the borough. After that no further complaint was made by the plaintiff's tenants. It is, of course very clear that no injunction can now be granted against the maintenance of the discharge from the drain in front of the house occupied by Mrs. Tierney, as it was removed before the bill in this case was filed

and that cause of complaint had ceased to exist. But whether before or after the removal of the mouth of the drain, and especially after, the testimony in the cause is entirely insufficient to warrant the granting of any injunction. After the removal, the overwhelming weight of the testimony is against the existence of any nuisance on account of the drain, and in our judgment, the case is brought within the class of decisions which hold that an injunction to restrain a nuisance will not be granted in a doubtful case, or until after the plaintiff has established his right to relief in an action at law.

In *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441, where the subject of granting injunctions to restrain private nuisances was most fully considered, we said (Woodward, J.): "From these and many more authorities which might be cited to the same effect, it is apparent that where the plaintiff's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, not only by the answer of the defendant, but by proofs in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right, when there is conflicting evidence that goes to the denial of all right. In a case so situated, the plaintiff should first establish his right in an action at law, and then come into chancery, if necessary, for the protection of the legally established right." In *New Castle v. Raney*, 130 Pa. 546, 6 L. R. A. 737, a case far stronger in its proofs than the present, we reversed a decree granting an injunction to restrain a nuisance, and dismissed the plaintiff's bill, with costs. It was alleged, and the master and court below found, that a milldam and pool had become a public nuisance by reason of the emptying of cess-pools into it, and an injunction was granted to abate the dam. Mr. Chief Justice Paxson, in the course of his opinion, said: "We do not question the power of a court of equity to restrain and abate public nuisances. This is settled by a line of decisions. But the authorities uniformly limit the jurisdiction to cases where the right has first been established at law, or is conceded. It was never intended, and I do not know of a case in the books, where a chancellor has usurped the functions of a jury, and attempted to decide disputed questions of fact, and pass upon conflicting evidence in such cases. . . . But, as before observed, this milldam is not a nuisance *per se*. Whether it is a nuisance at all depends upon the testimony, and that is conflicting. . . . Heretofore the jurisdiction of equity has been confined to nuisances *per se*, or when the right is clear, or has been settled by the verdict of a jury. We think it better to adhere to the beaten track." In the still more recent case of *Mowday v. Moore*, 133 Pa. 598, the same doctrine was applied, and we again reserved a master's report and decree of the court below granting an injunction to restrain a private nuisance. Our Brother Mitchell in stating the rule applicable in such cases said "that damage which is imminent and irreparable, or is not capable of adequate com-

pensation in money, may be enjoined without waiting for the process of law, is not intended to be questioned, but the right must be clear, and the facts upon which it rests uncontested." He then reviews the testimony, and shows that it presented only a doubtful case at the best, and therefore the remedy by injunction was inapplicable, and could not be allowed.

If we examine the testimony in the present case, we find that such annoyance as was sustained by the drain as at first constructed was remedied by the act of the defendant, and after that the annoyance ceased. This is proved by the plaintiff's witness Mrs. Tierney. One other witness for the plaintiff, William F. Smith, said he noticed an offensive odor once after the extension was made, but that was the only time, though he had passed up and down fifty times or more. George W. Evans, another of plaintiff's witnesses, testified that he had noticed an offensive odor when his attention had been called to it by Mrs. Tierney, but that was before the extension of the drain. He was asked: "Question. Have you ever smelled anything as the gutter is constructed now? Answer. No, sir. Q. The time that you alluded to is the time before the drain was extended? A. Yes, sir. Q. How long ago was that? A. I think the drain was extended some time last fall,—about last September. Q. Since that time there has been no trouble? A. No, sir." The plaintiff testified that he noticed an offensive odor once before the drain was extended, but said nothing as to how it was after the extension. Alfred Craft, also examined by the plaintiff, testified that Mrs. Tierney complained two or three times about the smell before the extension, but not afterwards, and that he himself had never smelled any disagreeable smell there. This was the whole of the plaintiff's testimony, and it proves that, excepting Smith's testimony, the only smell that was offensive was before the extension, and that by only three witnesses, one of whom, the plaintiff, only noticed it once. It also proves that after the extension only one witness, Smith, ever noticed it, and that was upon one occasion only out of fifty or more times when he passed the mouth of the drain. Against this testimony the defendants examined seven witnesses, the most of whom lived close by the mouth of the drain, and who passed by it almost every day, and all of whom testified they had never discovered any offensive smell there, and were not in the least disturbed by it. William McLaughlin, who lived three doors from the mouth of the drain where it emptied into Sansom street, and had lived there always from the time the drain was first laid, was asked: "Question. Well, now, have you ever been disturbed by any obnoxious smells or odors from that drain? Answer. No, sir." Having said he made some complaint to Smith about his own waste pipe getting stopped up, he said: "I never made complaint about the stench, because I was never annoyed by anything of that kind. Question. And, as I understand you, during all the time you lived there you had no cause?

Answer. No, sir. *Q.* What runs out of this pipe? *A.* Never saw anything, except clear water. *Q.* You very frequently saw it? *A.* Yes, sir, I have often seen it when no water was coming out of it at all,—for days at a time.” William Sommers, who lived on the opposite side, at the corner of Fayette and Elm streets, and knew when the drain was put in, and when the extension was made, was asked: “*Question.* Did you see or smell any bad effects from it?” *Answer.* I never did. I inspected it once when it was at the upper end, at the corner of Elm and Fayette. There was no water running, and no offensive smell.” Brinton Woodward was asked: “*Question.* You know where this drain was put in?” *Answer.* Yes, sir, I saw it put in. *Q.* Have you frequently seen the mouth of the drain? *A.* Yes, sir, I have visited it. *Q.* Well, describe its condition. *A.* Well, its condition is good. I never could find anything offensive about it. I have looked at the mouth of it several times. I never saw anything coming out of it.” Joseph Kindrigen testified that he was burgess one year, and that Smith made complaint to him about the drain, and they went and examined it together, and found no water coming down, and several times after he examined it, and still found no water coming down, and that all he saw was that there were some dead leaves that were caught at the mouth of the drain. He also said that Smith’s complaint was the only one that was ever made. James Tracy said his store was right on the corner of Elm street and Sansom alley, just across the street from the mouth of the drain; that he saw it every day going to his store. He was asked: “*Question.* What do you notice of its condition?” *Answer.* When it rains I have not seen much water come out of it. *Q.* What odors have you noticed coming from it? *A.* I have never noticed any. *Q.* What complaints have you heard as to its condition? *A.* I have never heard anybody complain, that I know of.” John Crimeau was a member of town council, and chairman of the street and road committee, and testified that council gave permission to McGrath to lay the drain,

and that he superintended the digging of it himself, and that it drains the rain water from the hotel and two new houses and a hotel shed into the old well under the pavement, and from there, when it overflows, down to the mouth of the drain. He said there was another well on the premises that was used for the overflow of the house and water-closets. He was asked: “*Question.* Have you noticed the condition of the mouth of this drain at any time?” *Answer.* I never saw anything come out of the drain pipe except water, and that was on two different occasions after very heavy rains. *Q.* What was the odor of the water? *A.* Nothing. *Q.* How often do you go by the mouth of the drain? *A.* Sometimes seven or eight times a week; never less than three or four times a week.” James A. McGrath, one of the defendants, testified that only rain water and water from the house ran into the old well, and that none of the offensive matter from the water-closets went into it, a separate well being provided for it.

Now, the important point of time to be considered in adjudging this case is the time after the extension, and as to that but a single witness testified to ever having perceived any offensive odor escaping from the mouth of the drain, and that was but once out of fifty or more times that he passed it. All the other witnesses, both for plaintiff and defendants, make no complaint of it after the extension; and a part of the plaintiff’s witnesses, and all of the defendants’, testify that after the extension there was no offensive odor or discharge from the drain. It is almost needless to say that in this state of the testimony the case of the plaintiff is worse than doubtful, and the great preponderance of the testimony against the allegation of nuisance requires that the bill should be dismissed on the merits. We are of the opinion that it was grave error to award an injunction in such case, and that it is our duty to correct it by reversing the decree of the court below, as we now do.

The decree of the court below is reversed, and the bill is dismissed, at the cost of the plaintiff.

TEXAS SUPREME COURT.

Theodore ROTHSCCHILD *et al.*, *Appts.*,

v.
Annie M. DOUGHER.

(.....Tex.....)

A notary who is the trustee in a deed of trust cannot take an acknowledgment thereto.

(June 25, 1892.)

A PPEAL by defendants from a judgment of the District Court for El Paso County in favor of complainant in a suit brought to restrain the sale of certain property under a trust deed. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Validity of acknowledgment of deed of trust taken by trustee.*

The doctrine of the principal case that the acknowledgment of a deed of trust taken by the trustee is void, and that the deed is to be treated as an unacknowledged deed, is supported by the following authorities in addition to those cited in the opinion: *Stevens v. Hampton*, 46 Mo. 404; *Dall v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Bowden v. Parrish*, 86 Va. 67.

16 L. R. A.

The reason assigned is that taking an acknowledgment is a judicial act and the trustee disqualified to perform it on account of his interest, which vitiates his act, although he is interested only to the extent of his commissions.

The taking of the acknowledgment of a deed of trust by the trustee avoids the acknowledgment as to all grantors, and where a valid acknowledgment by a married woman is essential to the validity of the deed her acknowledgment so taken vitiates the

Messrs. Davis, Beall & Kemp, for appellants:

The deed of trust is not invalid because acknowledged by the wife before a notary named in the instrument as trustee.

We recognize as correct the general rule that "an officer cannot take the acknowledgment of a deed in which he is interested" but, applying the reason of the rule, this is because of his interest, and not because he merely appears as a party—as in this case—neither claiming, nor having any interest that he could claim, under the instrument itself.

In the case of *Brown v. Moore*, 88 Tex. 648, the court held a similar instrument inoperative because "the trustee was interested in the conveyance to the extent of his commissions.

In *Sample v. Irwin*, 45 Tex. 578, it was held that an acknowledgment was improperly made before a notary who was the agent of the firm for whose benefit the deed was made.

In *Titus v. Johnson*, 50 Tex. 236, Judge Moore, speaking of the doctrine announced in the two foregoing cases says: "And this we think is as far as this court has ever gone or can, consistently with sound principles or due regard to public policy be asked to go."

The principle does not apply here, "that a grantee in a deed, or a beneficiary under it, is not allowed to take an acknowledgment of the deed by the grantor."

Davis v. Beaseley, 75 Va. 491.

All the cases bearing on the question in issue turn upon the interest, expressed or presumed, of the trustee taking the acknowledgment, under the deed itself, or, as in a few cases (*Withers v. Baird*, 82 Am. Dec. 757, note), on the theory that the act of taking an acknowledgment is quasi judicial and an officer ought not to act "as a judge in his own cause."

In *Bowden v. Parish*, 86 Va. 67, the acknowledgment was held invalid because "the trustee was interested at least to the extent of his commissions." In the present case there were no commissions.

Gaines, J., delivered the opinion of the court:

This suit was brought by Annie M. Dougher, joined by her husband, against W. M. Chandler, trustee, Theo. Rothschild, substitute trustee, and Charles Jacobs & Co., beneficiaries in a certain deed of trust executed by the plaintiffs, to enjoin the sale under the power in the deed of certain real estate, the property of the wife. Chandler, the original trustee, having declined to make the sale, Rothschild was appointed by the beneficiaries as his substitute, and at the institution of the suit had advertised the property for sale. The deed in trust was accompanied by the privy

acknowledgment of Mrs. Dougher, but it was taken before W. M. Chandler as notary public, who is the same person that is named as the original trustee in the instrument. Upon this ground the court below held the deed in trust void, and entered a decree perpetuating the injunction. There were other grounds upon which the validity of the proposed sale was attacked, but the conclusion at which we have arrived renders it unnecessary to consider them.

The precise question here presented has never been passed upon in this court, unless it was in the case of *Brown v. Moore*, 88 Tex. 648. In the deed of trust under consideration there is no express provision allowing the trustee any compensation for executing the trust. In the case referred to the report does not make it clear whether the instrument which was there held void contained such express provision or not. We would infer from the statement of the case that it did not. But the court, in the opinion, says: "The trustee was interested in the conveyance to the extent of his commissions, and was therefore incompetent as an officer to take an acknowledgment of the deed." Whether the court determined that a trustee was entitled to compensation in the absence of an express provision in the deed allowing it, or whether they understood the deed as containing such express stipulation, it is impossible to say. But in either event, if we should hold that without such stipulation a trustee is entitled to remuneration for his services in making the sale, the decision would be in point, and would be decisive of the question before us. But we are not prepared to so hold; and, leaving that point undecided, we will treat the question before us from the other standpoint. Conceding, for the sake of the argument, that the trustee would not have been entitled to compensation for his services in making the sale, the question is, Did he, in that case, have the power to take the wife's acknowledgment to the deed of trust? We think the case of *Sample v. Irwin*, 45 Tex. 577, approaches very nearly a decision of the question. In that case the notary who took the acknowledgment of the deed of trust had signed it as agent of the beneficiaries, and for that reason the acknowledgment was held void. The court, in the opinion, says: "If the fact of agency raises a presumption of pecuniary interest, the case of *Brown v. Moore* is in point. But, whether such be the presumption or not, we think that one who identifies himself with the transaction, by placing his name on the face of the instrument as the avowed agent of one of the parties, is not competent to give it authenticity as an officer."

A party to a deed is generally held incom-

petent to do so. *Barrett v. Tracewell*, 21 W. Va. 458, 686.

In Kentucky only county clerks and their deputies are authorized to take acknowledgments and it is there held that the Legislature intended to make the taking of acknowledgments a mere ministerial act, and that, therefore, an acknowledgment of a deed before a county clerk in which he is himself the vendee is valid. *Stevenson v. Brasher* (Ky.) 11 Ky. L. Rep. 799.

It is said in *Lynch v. Livingston*, 6 N. Y. 422, 434, that the act of taking and certifying the acknowl-

edgment of a deed is a mere ministerial act but the decision was that it is not such a judicial act that the relationship of the officer to one of the parties which would disqualify him from acting as a judge or juror in an action between the same parties would not vitiate an acknowledgment taken by him.

An acknowledgment of a deed of trust taken by the cestui que trust is void. *Wason v. Connor*, 54 Miss. 351; *Groesbeck v. Seeley*, 13 Mich. 339, 345.

J. G. G.

petent to take the acknowledgment of the grantor. The officer who took the acknowledgment of the mortgagors in the present case is a party to the conveyance. In form, at least, the instrument purports to convey the lot to him in trust, in order to secure the payment of the debt of the beneficiaries. Whether he have any pecuniary interest or not, he is identified with the transaction. We think it safe to hold that a party to a deed or mortgage is not competent to take the acknowledgment of the instrument. It is insisted, however, that because Chandler, the original trustee, declined to act under the instrument, and refused to make the sale, he was not a party to the deed of trust, and therefore was not disqualified to take the acknowledgment of the mortgagors. If it had appeared especially upon the instrument itself that he had declined to accept the trust before the acknowledgment was taken, the point would have been worthy of serious consideration. But when he took the wife's acknowledgment he was bound to know the contents of the instrument, and that he was the trustee in it, and yet it does not appear that he declined in any manner to accept under it. The presumption is that he did accept, and we therefore think that he was not competent to take the acknowledgment at the time it was taken, and that his subsequent refusal to act did not cure the original want of authority. If the deed of trust had been upon land not the separate property of the wife, and hence not dependent for its effect upon a certificate of her privy examination and acknowledgment, and if attested by subscribing witnesses, it would have been good between the parties and all persons holding under them with notice, although the acknowledgment was invalid. *Bennett v. Shipley*, 83

Mo. 448; *Dorst v. Gale*, 83 Ill. 186. But being a mortgage of the wife's separate estate, it is of no effect. In *Dorst v. Gale*, *supra*, the court says: "The trustees were empowered to act separately and in the alternative; that is to say, if by circumstances one became disqualified or was unable to act, another might act. The acknowledgment was taken by Grove, one of the parties named as trustees. This unquestionably rendered the deed void as to him; but we fail to comprehend how it affected the deed as to the other trustees. He and they had no community of interest, and his becoming disqualified had no tendency to disqualify them. But, aside from this, since the execution of the deed of trust is proved *aliunde* the acknowledgment, and the trustees had no beneficial interest in the trust, we are of the opinion that the proof of execution was sufficiency of the acknowledgment, so far as relates to the purposes of the case before us." In the last proposition we fully concur. But we will say, with due respect to the court whose opinion we quote, as we trust, that it seems to us the fact that one of the trustees took the acknowledgment did not make the deed any worse than it would have been without an acknowledgment. The fact, however, that the officer who took the acknowledgment was one of the trustees made the acknowledgment itself a nullity. And such, we think, was the effect of the same fact upon the acknowledgment to the deed of trust in the case now before us. To hold that a party to a deed is incompetent to take the acknowledgment of a party to it, we think a safe and salutary rule.

We find no error in the judgment, and it is affirmed.

MICHIGAN SUPREME COURT.

GRAND RAPIDS SCHOOL FURNITURE CO., *Appl.*,
v.

HANEY SCHOOL FURNITURE CO.
et al.

(.....Mich.....)

An injunction may be granted to restrain defendants from using a decree in a patent case which they have obtained by fraud and collusion in any way or form to influence or threaten any person from purchasing articles from the complainant on the ground that the decree is an adjudication upon the merits as to the validity of the patent.

(July 28, 1892.)

A PPEAL by complainant from a decree of the Circuit Court for Kent County sustaining a demurrer to the complaint, in a suit brought to enjoin defendants from publishing statements to the effect that complainant was

infringing defendants' patents, and from using an alleged fraudulent decree in furtherance of such claim. *Reversed.*

The facts are stated in the opinion.

Messrs. Taggart, Wolcott & Ganson, for appellant:

The better reason and the greater weight of authority sustain complainant, and recognize his right to relief by injunction.

Emack v. Kane, 84 Fed. Rep. 46; *Casey v. Cincinnati Typo. Union No. 3*, 45 Fed. Rep. 185.

A party cannot be required to remain quiescent and allow his property or property rights to be destroyed by the continuing wrongful acts of others, and await the slow and uncertain process of a suit for damages for his redress.

Pom. Eq. Jur. § 1855, *note 2*; *Doty v. Martin*, 82 Mich. 462; *Payne v. Kansas & A. T. R. Co.* 46 Fed. Rep. 546; *Lewis v. Cocks*, 90 U. S. 28 Wall. 470, 23 L. ed. 71; *Kilbourn v. Sunderland*, 180 U. S. 514, 83 L. ed. 1008;

NOTE.—Upon the question of the right to an injunction against false statements as to plaintiff's

property or business, see *Hunt v. Hutchinson S. R. Co.* (Mo.) 16 L. R. A. 342, and *note*.

Middleton v. Flat River Boom Co. 27 Mich. 538. See also *Ryan v. Brown*, 18 Mich. 212, 100 Am. Dec. 154; *Koopman v. Blodgett*, 70 Mich. 610.

The leading English cases upon the point of the jurisdiction of equity to restrain the circulation of threats of suit for infringement of patent are *Rollins v. Hinks*, L. R. 13 Eq. Cas. 855, and *Azmann v. Lund*, L. R. 18 Eq. Cas. 380 (In both of these cases injunction was granted). See also *Kelley v. Ypsilanti D. S. Mfg. Co.* 44 Fed. Rep. 19.

Messrs. Taggart & Denison for appellees.

Long, J., delivered the opinion of the court:

The bill of complaint in this case alleges that the complainant is a manufacturing corporation, having its office and manufactory at Grand Rapids. That ever since its organization, in 1887, the defendants have been engaged in circulating thousands of circulars, containing the statement that the goods of complainant infringed a certain patent, and threatening to bring suit against any and all persons purchasing or using goods of the complainant's manufacture. These claims and threats were made in bad faith, and with full knowledge that the said patent was invalid, and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for infringement of said patent. The said threats were made for the purpose of intimidating parties who were likely to be customers of the complainant, and had to a considerable extent accomplished their object; but no suits having been brought for infringement of said patent, the threats had lost their force, and hence a fraudulent and collusive suit had been instituted for the purpose of obtaining a decree which could be used to deceive and intimidate the public. Such decree had been obtained, and the defendants had begun to use it for the purpose aforesaid, and were intending to so use it continuously, and on a very large scale, to the great injury of the complainant's business, though the amount of such injury was very difficult to prove or determine by any accurate measure. The prayer of the bill is that the said defendants may be perpetually enjoined and restrained from stating, publishing, or claiming, in any manner, that the said decree is anything other or different from a decree obtained by collusion, and from claiming that it is an adjudication upon the merits as to the validity of the said Haney patent, and from using such decree in any way or form to influence or threaten any person or party against purchasing said school furniture manufactured and sold by the complainant. To this bill the Haney School Furniture Company, one of said defendants, filed a general demurrer, and, the case having come on to be heard upon said demurrer, the court held that the bill of complaint did not set up any facts giving a court of equity jurisdiction to grant relief and entered a decree sustaining the demurrer, and dismissing the complainant's bill. From this decree the complainant appeals to this court.

The English courts, by recent decisions, have exercised the injunctive jurisdiction to
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restrain injurious publications concerning property which operates as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business. Thus far, however, most of the American courts seem unwilling to follow the example of the recent English decisions, and decline to extend the jurisdiction, so as to restrain such torts as libels on business, slanders of title and the like. In Massachusetts the English decisions are expressly repudiated. *Boston Distile Co. v. Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 810; *Whitehead v. Kison*, 19 Mass. 484.

Injunctions to restrain libelous publications concerning plaintiff's business were also refused in *American Life Assn. v. Boogher*, 8 Mo. App. 173; *Mauger v. Dick*, 55 How. Pr. 182; and *Singer Mfg. Co. v. Domestic S. Mach. Co.* 49 Ga. 70. In the case of *Emack v. Kane*, 34 Fed. Rep. 46, Judge Blodgett allowed the injunction. It appears that Kane issued and widely distributed circulars in which he claimed that Emack's goods infringed his patent. He stated that he should not sue Emack, but should bring suits against all customers of Emack, and collect royalty and damages from all of them. Judge Blodgett said: "The gravamen of this case is an attempted intimidation by the defendant of complainant's customers by threatening them with suits which defendant did not intend to prosecute. . . . If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and his ruin would be accomplished before an adjudication could be reached." In the recent case of *Casey v. Cincinnati Typo. Union No. 3*, 45 Fed. Rep. 185, the case of *Emack v. Kane*, *supra*, was cited and approved by Judge Sage. It appeared in the *Casey Case* that parties had conspired together to injure the complainant in his business. Circulars were gotten out and widely distributed, containing threats of pecuniary loss and injury to those who should do business with the complainant. The claim was made in that case, as in this, that equity had no jurisdiction, because the injurious publication was merely a libel on complainant's business, and, for any loss which the union inflicted, he had a plain and adequate remedy at law. Judge Sage remarked, however, that it is idle to say that such publications are nothing more than libels, and that the only remedy for the injury inflicted was an action at law; that, while they have certain characteristics of libels, they are more than libels, and there is no plain and adequate remedy at law for such injuries.

We think the bill in this case states a case materially different from the Massachusetts cases and the other cases holding that equity has no jurisdiction to restrain a libel. Here it is claimed and alleged in the bill that Elijah Haney and the Haney School Furniture Company entered into a conspiracy with defendant Bullard to obtain a decree in favor of *Haney v. Bullard*, which might and should be used by the conspirators to injure the complainant. The fact is recited that, in pursuance of such

conspiracy, a bill was filed in the United States court for the eastern district of Michigan, and a decree obtained by fraud and collusion, for the purpose of benefitting the trade of the Haney School Furniture Company at the expense of complainant; that the defendants well knew the patent was invalid; and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of said patent. The prayer of the bill is, not that defendants be enjoined from making whatever claims they see fit concerning their patent, nor from threatening to bring suits, even though such threats be made in bad faith; but that the defendants be restrained from using a decree fraudulently and collusively obtained to the injury of complainant, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent; or from using it in any way or form to influence or threaten any person or party against purchasing said school furniture manufactured and sold by complainant. The case, as stated in the bill, is certainly more than a mere claim for an injunction arising out of a libel of complainant's business. A conspiracy is claimed to have been entered into between the defendants for the very purpose of injuring the complainant, and that by such conspiracy a false and fraudulent decree was obtained, settling the rights of the Haney School Furniture Company to the patent, under which the complainant was and is operating; that the defendants are publishing to the world, and

especially to the customers of the complainant, that such decree was valid, the defendants well knowing it to be false and fraudulent; and that, in any court where the complainant had the right to appear and be heard, it could establish the fact that such patent was absolutely void, and that Mr. Haney and the Haney School Furniture Company had no right under it, and that complainant was legally entitled to its use. Admitting that the weight of authority in this country is against the proposition that a court of equity has no jurisdiction by injunction to restrain the publication of a libel upon one's business, it is no answer to the questions here raised. The complainant has no adequate remedy at law, under the circumstances here stated. It cannot be said that it should lie by and wait the slow and uncertain processes of a suit for damages for its redress. Under the charge in the bill, which we must take as true, the complainant is rightfully operating under such patent, and it has no remedy adequate for the fraud and wrong perpetrated upon it, except as aided by a court of equity. The facts stated make a much stronger case than that of *Casey v. Cincinnati Typo. Union No. 3*, *supra*, calling for the aid of the injunctive power of a court of equity.

The decree of the court below must be reversed, with costs, and the demurrer overruled. The defendants will have twenty days to answer the bill.

The other Justices concurred.

OHIO SUPREME COURT.

Patterson A. REECE, *Plff. in Err.*,
v.

Charles H. KYLE, Assignee of James C. McMillan.

(49 Ohio St.—)

* **An agreement between client and attorney by which, in consideration of an assignment to the attorney of a judgment obtained by him for the client, the attorney agrees to render legal services in an effort to collect the judgment, to advance costs and expenses in the first instance, one half to be repaid by the client in case of failure, and the net proceeds of the judgment, in case of success, to be equally divided, is not without consideration, nor unlawful on the ground of champerty, and if otherwise valid, will be enforced.**

(June 20, 1892.)

ERROR to the Circuit Court for Greene County to review a judgment in favor of plaintiff in an action brought to procure the cancellation of a contract by which a certain judgment had been transferred to defendant

* **Head note by the COURT.**

NOTE.—For a collection of authorities upon the subject of champertous contracts between attorney and client, see notes to *Manning v. Sprague* (Mass.) 1 L. R. A. 516; *Gilman v. Jones* (Ala.) 4 L. R. A. 112; *Burnham v. Heselton* (Me.) 9 L. R. A. 22, 16 L. R. A.

and to enjoin him from proceeding to enforce such judgment. *Reversed.*

Statement by Spear, Ch. J.:

The action below was by the defendant in error, as assignee for the benefit of creditors, of one James C. McMillan against the plaintiff in error, brought to procure the cancellation of an assignment, executed by McMillan to Reece, of a judgment in favor of the former, against the West Hamilton Hydraulic Company, and to enjoin the prosecution of an action then pending in the court of common pleas of Hamilton county, which had been commenced by Reece, as assignee of the judgment, to enforce statutory liabilities against stockholders of the company.

The averments of the petition material to the present inquiry are, in substance, that at the date of the assignment to Reece, McMillan was insolvent, and that shortly thereafter he made a general assignment to plaintiff; that the pretended contract with Reece was without any consideration, paid or to be paid; that Reece was a practicing lawyer and well knew that any claim made against the stockholders would be contested by them, and that for the purpose of stirring up and maintaining a suit against the stockholders, he entered into the contract; that he caused an execution to issue on the judgment, which being returned unsatisfied, he then commenced an action in the common pleas of

Hamilton county, against the company and the stockholders, for the purpose of enforcing stockholders' liability, which suit is pending, and that unless restrained, and the champertous agreement held to be void, Reece will appropriate to his own use the one half the net proceeds realized from the suit.

In his answer, Reece denied the improper motives and purposes charged. He also denied that the contract was without consideration, and averred that the assignment of the judgment was in consideration of his services therein, and for other valuable considerations, of which were the professional and legal services in obtaining the judgment, and that one half the expense of further proceedings to collect was to be borne by defendant in case nothing should be realized from the judgment.

A copy of the contract referred to is as follows:

"Xenia, Ohio, Nov. 9th, 1885.

"It is hereby agreed by and between James C. McMillan and P. A. Reece, that

"Whereas, in consideration of valuable legal services rendered and to be rendered, and one dollar and other good and valuable consideration from said P. A. Reece proceeding, the receipt of which is hereby acknowledged; and

"Whereas, said McMillan has this day assigned and transferred to said Reece a certain judgment obtained by said James C. McMillan against The West Hamilton Hydraulic Company (an incorporation duly incorporated under the laws of Ohio) and others defendants, in a certain suit had in the Butler county common pleas court, state of Ohio: Now, therefore, said Reece is to prosecute said judgment claim as may be expedient in his judgment and proceed to collect the same or so much thereof as may be practicable, and is to receive for his services therein, the one half of the net proceeds thereof, the other half of said net proceeds to be paid to said McMillan; said Reece to advance the amount necessary for expenses of the case; and one half of said expenses is to be repaid to said Reece in the event nothing is realized from said judgment. But, notwithstanding said McMillan was a stockholder in said company to the extent of one half of all the stock of said company during the time the said liability was incurred, the said McMillan is not to be made a party defendant to any proceedings to enforce or collect said judgment claim, nor in any way to be held liable for any part of said judgment.

"James C. McMillan,
"Patterson A. Reece."

Upon trial the circuit court found the contract without consideration, champertous and void, and adjudged that the same be canceled and held for naught. Motion for new trial being overruled, the case is brought to this court upon a bill of exceptions setting out all the evidence.

Messrs. Little & Spencer, Alfred Yaple and P. A. Reece, for plaintiff in error:

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The agreement was not illegal nor contrary to public policy.

There is no statute on the subject of champerty in Ohio.

There are but six cases bearing on the subject in the reports of our supreme court.

Key v. Vattier, 1 Ohio, 132, 143; *Hall v. Ashby*, 9 Ohio, 96, 99, 84 Am. Dec. 424; *Weakly v. Hall*, 18 Ohio, 174; *Lewis v. Lewis*, 15 Ohio, 715, 716; *Reid v. Quigley*, 16 Ohio, 445; *Stewart v. Welch*, 41 Ohio St. 483, 502.

The principles which can justly be deduced from them are that where the grantor either had: (1) good title (as here claim reduced to judgment); or (2) was assigned for a valuable consideration; or (3) where assignor was liable for his expenses and costs the contract was not champertous.

See the remarks of the court upon the question of champerty in *Jeffers v. Lampson*, 10 Ohio St. 108.

Where a plea of champerty has been allowed to be made in a court of equity, it has always been allowed for the benefit and never to the injury of the original claimant or those rightfully claiming under him; the primary object of the court being the protection of the claimant or his judgment creditors, against the machinations of a champertor, and not as a means of shielding the claimant's debtors from paying their just debts.

Stewart v. Welch, 41 Ohio St. 495; *Wright v. Tebbitts*, 91 U. S. 252, 28 L. ed. 320; *Wylie v. Coze*, 56 U. S. 15 How. 415, 14 L. ed. 753, 1 Parsons, Notes & Bills, 218, 219; *Knights v. Putnam*, 3 Pick. 184.

Messrs. Charles H. Kyle, T. L. Ma-gruder and Ramsey, Maxwell & Ramsey, for defendant in error:

The agreement was clearly champertous and void. It is immaterial that it was made to take the form of an assignment of the claim.

Stewart v. Welch, 41 Ohio St. 483, 484, syllabus 2.

Reece's agreement to advance the funds for carrying on the litigation would of itself make the agreement champertous.

Meeks v. Dewberry, 57 Ga. 263; *Taylor v. Hinton*, 66 Ga. 743; *Stearns v. Felker*, 23 Wis. 594; *Thompson v. Reynolds*, 78 Ill. 11; *Coleman v. Billings*, 89 Ill. 183; *Coughlin v. New York Cent. & H. R. R. Co.* 71 N. Y. 443; *Million v. Ohnsoorg*, 10 Mo. App. 432; *Atchison, T. & S. F. R. Co. v. Johnson*, 29 Kan. 218; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Wald's Pollock*, Cont. 295, and note.

In *Meeks v. Dewberry*, *supra*, it was held immaterial that the claim had been reduced to judgment, and that the champertous agreement was for the collection of the judgment.

The right of a court of equity is well established to cancel an illegal agreement at the suit of one of the parties before the unlawful purposes contemplated by the agreement have been carried out.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 847; *White v. Franklin Bank*, 23 Pick. 181; *Debenham v. Or.* 1 Ves. Sr. 276; *Reynell v. Sprye*, 1 DeG. M. & G. 660, 21 L. J. Ch. 633; *Teppenden v. Randall*, 2 Bos. & P. 467.

The following cases illustrate the principle in actions brought by or on behalf of corpora-

tions to undo *ultra vires* transactions, and to recover considerations paid thereunder:

Salomons v. Laing, 12 Beav. 877; *Bryson v. Wurwick & B. Canal Nav. Co.* 4 DeG. M. & G. 711; *Ernest v. Croyedill*, 2 DeG. F. & J. 175; *Russell v. Wakefield Water Works Co. L.* R. 20 Eq. 474; *Aitj-Gen. v. Daugars*, 88 Beav. 621; *Hardy v. Metropolitan L. & F. Co.* L. R. 7 Ch. 427; *Newcastle N. R. Co. v. Simpson*, 21 Fed. Rep. 588; *Knoxville v. Knoxville & O. R. Co.* 22 Fed. Rep. 758; *Auburn Academy v. Strong*, Hopk. Ch. 278, 3 L. ed. 421; *Mills v. Central R. Co.* 41 N. J. Eq. 1; *Chicago v. Cameron*, 9 West. Rep. 507, 120 Ill. 447; *Seirs v. Hotchkiss*, 25 Conn. 171, 65 Am. Dec. 557; *Northwestern U. Packet Co. v. Shaw*, 87 Wis. 660; *Ashton v. Dashaway Assn.* 7 L. R. A. 809, 84 Cal. 61; *Green's Brice, Ultra Vires*, 2d ed. 658.

Spear, Ch. J., delivered the opinion of the court:

The real question is, whether or not the contract, as explained by the other evidence, is without consideration, illegal and void.

As a first step at the trial plaintiff sought to contradict and vary the terms of the written instrument by parol evidence, and for this purpose called McMillan, the assignor. The witness testified that he received no consideration whatever for the assignment of the judgment. In the light of his further testimony, it is fair to assume that he meant by this only that he received no money consideration, and that nothing was actually paid to him, for he proceeded then to state that the valuable services rendered and to be rendered, referred to in the agreement, formed no part of the consideration for the assignment. This statement, taken in connection with the whole testimony of the witness, is, after all, but an opinion—the stating of a conclusion of law. He stated further that the agreement was entered into on the afternoon of November 9, and that before noon of that day he had made a complete settlement with Reece, as the receipted bill would show. The bill referred to, which covers several pages, extends over four years of time, and contains a large number of items, is receipted thus: "Rec'd payment of all above accounts." This is a complete settlement of the items in the bill; it does not purport to be a settlement in full of all claims. Nor is it pretended that Reece had been paid his fees for obtaining the judgment save as appears by the bill. Among the items we find one of \$10 which is a specific charge for services in the suit against the West Hamilton Company. It is possible that another charge of like amount is intended for services in this case, but if so, the two together would be an exceedingly meager charge, and wholly out of proportion to the probable work, and the amount involved. By reason of some misunderstanding, as it appears, Reece was not present at the trial. This left the plaintiff opportunity to give uncontradicted proof, and make the best case possible. Had McMillan been possessed of facts which would impeach the writing, as to services past and to come, it is presumed he would have stated them; at least nothing prevented. No proof

was offered by defendant, and so we have a question upon the uncontradicted evidence of plaintiff. The proof actually made, we think, is not of that high character required to overcome the statements of the written agreement, signed by the parties, as to past and future services, and the presumption that, under all the circumstances as shown, there was, at the time, an understanding between them, that Reece still had an unsatisfied claim for services in procuring the judgment, and that he had such claim in fact.

This, then, was the situation. Reece had an unsatisfied claim for fees in obtaining a judgment for McMillan. His relation as attorney, as to that judgment, had not terminated. His claim gave him an equitable interest in the judgment, and a lien upon it. It was of uncertain value. McMillan was impecunious, and in fact, insolvent. He had not the means to then prosecute farther, and aside from that, was disinclined to do so because several stockholders of the Hydraulic Company were his relatives, and hence he wanted to dispose of the judgment. Reece was willing to take an assignment of it coupled with the obligation to proceed to enforce collection by action against the stockholders, within his discretion, at his own expense in the first instance, but if not made by the anticipated proceeding, then one half the expense to be repaid by McMillan, and the net proceeds, if successful, to be equally divided. The effect of the assignment, if legal, was to make them joint owners of the judgment, the legal title being in Reece. If the parties could not legally enter into such a contract, then the judgment of the circuit court is right; if they could, it should be reversed. There is no question of fraud as between debtor and creditor, nor of undue advantage, or bad faith between attorney and client, in the case; nor can we assume, considering the doubt as to the collectibility of the judgment, and the character of the proceeding which it would be necessary to prosecute and maintain in order to enforce it, that the contract was unreasonable.

The contract is assailed as being without consideration and champertous. If the agreement was illegal, because champertous, then there was no consideration, and the contract was void. So, there is at last but one question, and that is: "Will a promise by an attorney to render legal services in an effort to collect a judgment, for obtaining which the attorney has not been fully paid, and to advance costs and expenses in the first instance, one half to be repaid by the client in case of failure, form, as between attorney and client, a valid consideration to support an assignment of a judgment, the net proceeds of which are to be equally divided in case of success?"

Maintenance is defined to be an officious intermeddling in a suit that no way belongs to one, by assisting either party, to the disturbing of the community by stirring up suits; champerty, a species of maintenance, being a bargain with a party to divide the land or other matter sued for between them, if they prevail in the suit which the champertor undertakes to carry at his own ex-

pense; though if a man have any interest, however slight, in the subject of the matter about which the suit is to be brought, or is depending, the aid given has been held not to be maintenance. Statutes in relation to maintenance and champerty were first enacted in England at an early day. Additional legislation was found necessary during the reign of Henry VIII. It was common then for nobles and other powerful men to take transfers of pretended rights in action, especially of lands, from persons not in possession, and prosecute them, to the great oppression of the weak. Juries were made up in large part of the dependents of such men, and the processes of law were thus converted into engines of oppression. The Statute of 32 Henry VIII., chap. 9, recites that "the King our sovereign lord, calling to his most blessed remembrance, that there is nothing within this realm that conserveth his loving subjects in more quietness, rest, peace, and good concord, than the due and just ministration of his laws, and the true and indifferent trials and issues, as been to be tried according to the laws of his realm, which his most royal Majesty perceiveth to be greatly hindered and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretended rights of persons not in possession, whereupon great perjury hath ensued, and much iniquity, oppression, vexation, troubles, wrongs and disinheritation hath followed among his most loving subjects, to the great displeasure of Almighty God, the discontentation of his Majesty, and to the great hindrance and let of justice within this his realm." The buying of pretended titles by those not in possession, and acts of champerty and embracery, were, by this statute, forbidden under penalty of sweeping forfeitures of lands, the one half to go to "the King, our sovereign lord," to relieve, it may be respectfully presumed, the "discontentation" referred to.

That there was necessity for such statutes, the history of that time, as gathered from Hume and other historical writers, as well as from law-writers, sufficiently shows. Hume says: "Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law-suits, and it was found necessary to check this iniquity by Act of parliament." And, speaking of the subject, Coke says: "Nothing in action, entry or re-entry, can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." Rights in action were forbidden to be transferred "lest justice should fail and oppression result." But, as methods of judicial procedure improved, and a firmer and purer administration of justice was attained, and popular rights received wider recognition, the mischiefs complained of became less apparent, and the enforcement of such statutes became of less and less importance. Then followed judicial modifications and exception to the sweeping inhibition of the statutes. Exception was made where the person maintaining and the suitor stood in

some social relation, as that of relatives by consanguinity or affinity, master and servant, or landlord and tenant. Other exceptions are adverted by *Mr. Justice Buller*, in *Master v. Miller*, 4 T. R. 840, 841 (1791), as follows: "It is laid down in our old books that for avoiding maintenance a *chose in action* cannot be assigned, or granted over, to another. The good sense of that rule seems to me to be very questionable; and in early as well as modern times, it has been so explained away, that it remains at most only an objection to the form of the action in any case. . . . It is curious and not altogether useless to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would not otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have a subpoena, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly a variety of exceptions were soon made; and amongst others it was held that if a person has any interest in the thing in dispute, though on contingency only, he may maintain an action on it. 2 Rolle, Abr. 115. . . . So an assignment of a *chose in action* has been held a good consideration for a promise, 1 Rolle, Abr. 29; [*Loder v. Chesleyn*], Sid. 212, and [*Lewis v. Wallis*], T. Jones, 222; and lastly, by all the judges of England, in *Mouldsdele v. Birchall*, 2 Wm. Bl. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails."

Among the reforms in England may be mentioned the enactment of Statutes for the Limitation of Actions, the Statute of Frauds, the extension of the action for malicious prosecution, and that for awarding costs against unsuccessful parties, all which have been passed since the Acts relating to maintenance. These changes have contributed materially to the discouragement of groundless and vexatious litigation, and it has resulted that the law of maintenance, as originally understood and enforced in England, has been essentially modified, and is said by Story (Contracts, § 711,) "to be now confined to cases where a stranger, having no interest in the suit, improperly, for the purpose of stirring up litigation and strife, encourages others to bring actions, or make defenses which they have no right to make,"—citing *Lord Abinger*, in *Findon v. Parker*, 11 Mees. & W. 675.

In several of the states of the Union statutes have been passed making maintenance in varying forms unlawful, while in other of the states the doctrine is scarcely recognized even by the courts. No statute similar to the English statutes has ever been enacted in Ohio. Champerty has, however, been the subject of judicial inquiry, and has been held to avoid contracts in which it was

present. In *Key v. Vattier*, 1 Ohio, 132, the vice of the contract was that the attorneys were to save and keep the client harmless from all costs and charges, and no compromise was to be made except the attorneys join in it. In *Weakly v. Hall*, 13 Ohio, 187, the debt was released by the creditor to the debtor, after assignment by him under an agreement by which the assignee, not a lawyer, engaged to collect the claim in the assignor's name, to employ counsel, advance all money, procure bail, etc., reimburse himself for his allowances from the proceeds when collected, and receive a portion of the avails for his compensation, and the court held the release effectual, although suit had been commenced and money expended, in accordance with the contract. In *Stewart v. Welch*, 41 Ohio St. 483, by a divided court, it was held that a contract whereby the claim was assigned to Welch, who brought suit in his own name, could not be enforced, it appearing that the contract was made for the purpose of carrying on litigation without expense to and free from control of the assignor, who was to receive nothing except a share of the recovery.

It will be noted that there are important distinctions between these cases and the case at bar. In each case the suit was to be prosecuted wholly without cost or expense to the original owner of the claim, and it does not appear that the party maintaining the contract had any interest in or claim upon the cause of action other than that given by the assignment. So that, for the purpose of nullifying the contract between McMillan and Reece, we are asked to take a step in advance of previous decisions. Ought this to be done?

It is difficult, at best, to reconcile the strict law of maintenance and champerty with our ideas of the rights of property, and the right of the citizen to contract. Among the fundamental rights is the right to acquire, possess and dispose of property. The right of disposition necessarily inheres in the right of ownership. We are taught that a chose in action is as much property as a thing in possession, and that in this day the right to dispose of such property is as high and free from doubt as is the right to sell the horse or farm of which the seller has manual possession. And if one may lawfully dispose of such property why may he not dispose of it upon such terms as to him may seem advantageous?

That the consideration received by McMillan is a promise by Reece cannot be fatal to its legality. It would be conceded that McMillan might have assigned his judgment upon Reece's written agreement to dig a ditch, or plow a field, or build a house. So, too, Reece might have agreed to sell his legal services for a promise by McMillan for some labor or service on his part. And yet, while either can purchase of the other, there appears, under the early decisions, an insuperable objection to the valuable thing which each has, being the subject of barter between them. Upon reason, the objection would seem to lack substance. It has been based upon grounds of public policy.

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Of course, if a proposed contract is clearly against public policy the courts will say it cannot be entered into. But why, applying this test, should we limit the subject of contracts for compensation otherwise than by discriminating against transactions which are prohibited by statute, or are immoral, or hurtful, in their nature, in the sense of contravening some established interest of society? That contracts similar to the one at bar were regarded dangerous three or four hundred years ago is not a powerful reason for so regarding them now, when we consider that social conditions, and the law in other important respects, have undergone radical changes. Fortunately the condition of society to day is on a higher plane than in the chaotic times of Henry VIII., our judicial methods are more enlightened, and the day of combinations among the powerful to oppress the weak in the courts has gone by.

It will be borne in mind that great scrutiny was given in England to the acts of counselors and attorneys, because of the peculiar relation which the law placed those officers in with regard to their clients. The former were incapacitated to make any contract for compensation with the client, though he might accept a gratuity, while the latter might make such contract only as the law had made for him in fixing for every service a corresponding fee. A contract, therefore, between a counsellor or attorney, and his client, for a share of the thing in suit, would have been invalid on this ground, as well as others. No such strictness ever obtained here. Our laws have always recognized the right of either to compensation for his legal services, in a reasonable amount, either on a *quantum meruit*, or upon special contract. Beyond this, the propriety of accepting compensation by way of a fee contingent upon the event of the suit, and payable out of the thing recovered, has been recognized. Also the advancing by the attorney, for the benefit of the client, of funds in payment of costs and necessary incidental expenses. Indeed, such advances by the attorney in the progress of litigation, is so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession. *Wylie v. Core*, 56 U. S. 15 How. 415, 14 L. ed. 753; *Stan-ton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Allard v. Lamirande*, 29 Wis. 502; *Neukirk v. Cone*, 18 Ill. 449; *McDonald v. Chicago & N. W. R. Co.* 29 Iowa, 171; *Quint v. Ophir S. Min. Co.* 4 Nev. 805. This upon the idea of duty on the part of the profession to investigate the claims, and give professional aid in redressing the wrongs of the indigent who have been injured, for in this way many poor people are enabled to obtain justice, where, without such aid they would be remediless. And it has been considered that there is no practical distinction between such an arrangement and one where counsel undertake, for an agreed fee, to be paid in the future, the prosecution of a case for a client so poor that unless the cause be gained the attorney could not possibly realize any compensation whatever. That a contract of the

latter kind is legal was held in *Moore v. Campbell Academy Trustees*, 9 Yerg. 119.

As before stated, we have never had in Ohio, any legislation upon that phase of maintenance known as champerty. But the evil of stirring up suits and controversies whereby persons should be defrauded or injured was early the subject of legislation. By the Act of February 10, 1824, the encouraging, exciting, and stirring up of any suit, quarrel or controversy, between two or more persons, by certain named officers, including attorneys and counselors-at-law, with intent to injure such persons, was made an offense punishable by fine of not more than \$500, and liability to the party injured in treble damages, which, as to the penal sanction, is the law to-day. It would seem that the terrors of this Act would be sufficient to protect the people from any vestige of the evil tendency to combinations by the strong to injure the weak by oppressive litigation.

The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part is essential to the security of community, and the due administration of justice. Any infraction of the letter of this statute would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict letter or not. So, too, the courts have been, and continue to be, careful not to sanction contracts which appear to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward. And anything like sharp practice, or the taking of undue advantage by the attorney of the confidence or necessities of the client, would meet with no favor nor mercy at the hands of the courts. At the same time it would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts. Nor would it be judicious to extend arbitrarily those rules which say that a given contract is against public policy, for men of full age and competent understanding ought to have the utmost liberty of contracting. Their contracts when entered into fully and voluntarily, should be held sacred and should be enforced by the courts, for it is a paramount public policy

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that courts should not lightly interfere with the freedom of contract. Sir G. Jessel, in *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 463. It is much more easy to denounce, in general and sweeping terms, contracts said to involve champerty as "odious," and "worthy only of the severest condemnation," than it is to point out wherein it is wrong to make an effort, under the circumstances disclosed in the case at bar, to enforce a claim solemnly adjudicated by a court to be just and legal, by one who has an interest in the judgment because of services rendered in obtaining it. It is difficult, also, to perceive how such a proceeding would contravene any established interest of society, or tend to corrupt the fountains of justice, or bring the legal profession into disrepute.

Decisions by courts of other states have been cited. We have examined them. Many are based upon statutes, and have but little bearing in this state. Others are in conflict, and cannot be reconciled.

The holding in the recent case of *Pennsylvania Co. v. Lombardo* (Ohio) 14 L. R. A. 785, recognizes the doctrine that a champertous agreement is against public policy, and void. As it is not stated what will constitute champerty in an agreement, it is to be inferred that the doctrine is governed by previous holdings; and the point determined is, that, whether the contract between Lombardo and his attorney was shown to be champertous or not, his claim against the railroad company was not affected by it. It is not necessary, in order to dispose of the present case, to unsettle the *Lombardo Case*, nor any of the previous decisions of this court, and there is no purpose to do so. Nor is it necessary to formulate any new rule on the subject. Each case as it presents itself may be safely left for disposition on its own peculiar facts. We are not, however, disposed to go farther in enforcing the ancient rules, than the decisions by this court have heretofore gone. In the present case, if the contract rests upon a consideration which the law will sanction—and, for reasons heretofore stated, we think it does—there would seem to be an end of the inquiry. The promise to advance costs in the first instance is neither illegal nor improper, and the agreement to pay one half the costs by Reece was no more than, being owner of one half the judgment, he was in fairness and equity, bound to do. We conclude that the contract has not been shown to be wanting in consideration, or otherwise invalid.

Other questions were raised by plaintiff in error, but we do not regard them of sufficient importance to warrant discussion.

It follows that the judgment of the circuit court should be reversed, and the petition dismissed.

ALABAMA SUPREME COURT.

William E. BOYD, *Appt.*,

v.

City of SELMA *et al.*

(... ..Ala.)

1. Negotiable promissory notes for money loaned are "personal property," within the meaning of a charter authorizing taxation of such property.
2. The domicile of the creditor is the situs for the purpose of taxation of negotiable promissory notes given for money loaned.
3. A full, complete, and adequate remedy at law for illegality of a tax furnished by notice and opportunity to defend in the tax proceeding will prevent an injunction against collection of the tax.

(June 22, 1892.)

APPPEAL by complainant from a decree of the Chancery Court for Dallas County sustaining a demurrer to the bill in a suit instituted to restrain the collection of a tax. *Affirmed.*

The facts are stated in the opinion.

Messrs. Satterfield & Young for appellant.

Mr. J. W. Mabry for appellees.

NORM.—Situs for purpose of taxation of debts evidenced by notes and mortgages.

In general.

In *Worthington v. Sebastian*, 23 Ohio St. 10, it is said: "Intangible property has no actual situs. If, for purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter, is to tax the debtor and not the creditor, to tax poverty instead of wealth." This was a case of bonds of a foreign corporation owned in Ohio where they were held taxable.

In *Cleveland, P. & A. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 300, 21 L. ed. 179, Field, J., in discussing railroad bonds, says: "Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms."

Debts and other incorporeal rights, when treated as property for the purpose of taxation, should be assessed at the domicile or place of residence of the creditor, without regard to the domicile of the debtor. *Barber Asphalt Pav. Co. v. New Orleans*, 41 La. Ann. 1015; *Com. v. Hays*, 8 B. Mon. 1; *Babcock v. Cass Twp. Board of Equalization*, 65 Iowa, 110; *Hayne v. Delesseine*, 3 McCord, L. 374.

In *Foreman v. Byrns*, 68 Ind. 247, the following propositions are laid down as "fully supported both by reason and authority:"

"1. That all debts of every kind and nature, due to persons having a domicile in the state of Indiana, are taxable to the creditor where such creditor has his domicile.

"2. That all debts of every kind and nature, due 16 L. R. A.

Thorington, J., delivered the opinion of the court:

Appellant filed his bill of complaint in the chancery court of Dallas county, averring the following state of facts: Appellee Selma is a municipality incorporated under the laws of this state by that name, and among other powers conferred on it by its charter is the following: "That the mayor and councilmen of said Selma shall have the power to levy taxes on real and personal property, capital employed in any business carried on in said city," etc. Since 1884 the said city has had an ordinance in operation and effect authorizing and providing for the taxation of "all moneys loaned, and their value, after deducting the indebtedness of the taxpayer." On the 1st day of May, 1890, which was the beginning of the city tax year for 1890-91, appellant, who resides in said city, duly returned his list of property taxable by said city to the city assessor, showing real property to the amount of \$3,000 in value, and personal property to the value of \$583, of which personal property \$200 was exempt by law from taxation, and which exemption was so claimed on said list. After said list was so returned the assessor, without appellant's knowledge, added thereto, under the head of "all moneys loaned and solvent credits, or credits of value, and their value after deducting the indebtedness of the tax-

from persons having a domicile in the state of Indiana to persons not having a domicile in the state of Indiana, on the day named in the statute, unless in the hands of an agent doing business in the state of Indiana, from which such debts have sprung, have no situs in the state of Indiana, but have a situs where the creditor has his domicile and are not taxable in the state of Indiana. *Culbertson v. Floyd County Comrs.*, 52 Ind. 361; *Herron v. Keeran*, 50 Ind. 472, 26 Am. Rep. 87; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 300, 21 L. ed. 179."

In *People v. New York Tax Comrs.*, 53 N. Y. 242, it was held that money advanced by a resident of New York for the building of certain ships in Delaware secured by a contract for a lien on and ownership in the vessels as the building thereof progressed was taxable in New York. The court held the arrangement to give no absolute ownership in the vessels and said: "Only in the case of absolute ownership would there be such a conversion of taxable money into steamships having a situs in Delaware as not to make them taxable in New York."

It is held in *Thomas v. Mason County Ct.*, 4 Bush, 135, that the debt due a person in Kentucky for money loaned to one in a foreign state is taxable against the creditor in Kentucky notwithstanding the fund is taxed as the property of the borrower in the other state.

Capital of a bank invested in foreign countries will be presumed to be in the usual form of investments by banks and is subject to the tax imposed on the capital of state banks by § 3403, U. S. Rev. Stat. *Nevada Bank of San Francisco v. Sedgwick*, 104 U. S. 111, 26 L. ed. 703.

In the absence of constitutional restriction it is competent for a state to subject to taxation loans made by its citizens to persons residing out of the state. *Kirtland v. Hotchkiss*, 42 Conn. 423, 19 Am. Rep. 546; *Boyer v. Jones*, 14 Ind. 354.

payer," an item of \$25,262, which is stated by the assessor in writing on said list to have been "added from information from county assessor's book," which item had been assessed to appellant for state taxation in Dallas county for the pending year. Said sum represented negotiable promissory notes for so much money loaned by appellant, payable to him or his order in Birmingham, Ala., and are secured by mortgages on real property in said last named city. The makers of said notes all reside in Birmingham, and the notes themselves, since March, 1890, have been and now are in said city, in the hands of appellant's agent there, for collection of interest and the reinvestment thereof, with the exception of one note for \$100, which is in appellant's possession in Selma. Appellant, before his bill was filed, applied to the mayor and councilmen of Selma to cancel the said item of \$25,262, so added to his tax list by the assessor, but, after hearing on his petition, they refused so to do. It is also alleged that no appeal is provided by law from their decision in the matter, and that the remedy by certiorari would not afford relief, for the reason that the facts outside the record could not be shown in that proceeding, and that appellant is therefore without remedy, except in a court of equity; that said mayor and councilmen levied a tax of 1½ per centum on the property assessed to appellant, making the aggregate amount of the tax claimed by said city of Selma from appellant \$428.93. The bill shows a proper tender of the amount legally due according to appellant's theory of the case, including the \$100 note in Selma,

and contains an offer to do equity and abide the decree of the court. The charter of Selma gives to tax assessments made by the mayor and councilmen the force and effect of a judgment at law against the taxpayer, and makes the same a preferred lien from its date over all other incumbrances on all his property, real and personal, within the city, or that may be brought to the city. Appellant is seized and possessed of real property in said city to the value of \$3,000, and appellee, Goodwin, as tax collector for said city, is about to proceed to sell appellant's said real property for the payment of said municipal tax, including that assessed on said item of \$25,262. It is averred that said levy and assessment cast a cloud on the title of appellant to said real property, and that the collector is about to cast a further cloud thereon by proceeding to sell as aforesaid, and that relief should also be granted to avoid a multiplicity of suits. The bill prays for an injunction to restrain the collection of the alleged illegal portion of the tax, and that the assessment made by the assessor on said solvent credits may be canceled as a cloud on appellant's title. To this bill appellee demurred; the demurrer was sustained by the chancery court, and, appellant failing to amend his bill, it was dismissed. We have been particular in thus setting out the facts averred by the bill for the reason that the case involves, among others, an important principle of municipal as well as general taxation.

The two controlling questions are whether the bill makes out a case coming within some ground of equitable jurisdiction connected

Mortgages.

Money at interest secured by mortgage is a chose in action whose *situs* for the purpose of taxation is the domicile of its owner. *State v. Earl*, 1 Nev. 304; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

Under a statute authorizing a tax on all property within the state, mortgages held by nonresidents on land in the state are not taxable. *Davenport v. Mississippi* & M. R. Co. 12 Iowa, 539; *Arapahoe County Comra. v. Cutter*, 3 Colo. 349; *Territory v. Delinquent Tax List (Ariz.)*, April 18, 1890; *Grant v. Jones*, 39 Ohio St. 536.

Where the statutes provide for taxation of property in the district in which the owner resides and for the taxation of certain property of nonresidents, in which money loaned on mortgages is not embraced, the latter is not taxable, if belonging to a nonresident of the state. *St. Paul v. Merritt*, 7 Minn. 258.

Under a statute requiring "credits" to be listed for taxation by the owner, if a resident of the state, or by his agent controlling them, mortgages on land in the state held by a nonresident and not controlled by a resident agent are not taxable. *Goldgart v. People*, 106 Ill. 25.

Where the statute requires property to be taxed in the county "where the same may be found" a mortgage is not taxable in the county where it is recorded unless the mortgage itself be found therein. *Gallatin County v. Beattie*, 3 Mont. 173.

In *People v. Eastman*, 25 Cal. 601, it is said of money loaned on mortgage: "The property to be assessed in such cases is money at interest or debt. The money at interest, debt, or obligation is the principal thing, and the mortgage is only security—a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it, a payment of the debt discharges the mortgage. The thing secured is in- 16 L. R. A.

tangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person." And it was held to make no difference that the mortgage had been foreclosed and the lien carried into a judgment, and that it was taxable in the county of the creditor's residence and not of the location of the land mortgaged. Last point also held in *People v. Whartenby*, 38 Cal. 461.

A judgment and decree of foreclosure is taxable in the county of the residence of the owner thereof not in the county where it is docketed. *Barber v. Farr*, 54 Iowa, 57.

A debt, though evidenced by a judgment at the domicile of the debtor, is not assessable or taxable elsewhere than at the domicile of the creditor. *Meyer v. Pleasant*, 41 La. Ann. 645.

Notes.

Notes taken in payment for an iron-ore furnace and its equipment are not taxable in the town where the furnace is located and where the notes are kept but at the residence of the owner of the notes. *Lanesborough v. Berkshire County Comra.* 131 Mass. 424.

The *situs* of notes belonging to an intestate for purposes of taxation is at the place of his domicile when alive, not at the domicile of his personal representative living in the same state. *Stephens v. Booneville*, 34 Mo. 323.

But if bonds held by the decedent in another state come into the hands of an administrator in Missouri they are taxable in the latter state. They are on the same footing as other personal property. *State v. St. Louis County Ct.* 47 Mo. 504.

The *situs* of the credits of a decedent's estate within the state for the purposes of taxation is at the domicile of the administrator although the evi-

with the alleged illegality of the tax, and whether solvent credits or negotiable promissory notes are taxable at the domicile of the owner, or whether the *situs* of such property, and not the domicile of the owner, determines the liability to taxation; and these questions we will consider in the inverse order to that in which they are above stated. Preliminary to these two questions, however, we will notice the proposition argued by appellant's counsel, that negotiable promissory notes are not embraced in the term "personal property," found in section 27 of the charter of Selma, above quoted. Acts 1882-83, p. 414, § 27: "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred." Dill. Mun. Corp. 4th ed. § 768. Or, as sometimes more tersely stated, "municipal corporations have no implied powers of taxation; they have only such as are granted." It is also a clearly settled proposition that, in the absence of constitutional restraint, "the General Assembly may delegate to municipal corporations the power of taxation of persons or property in such manner and to such extent as it may deem expedient, but it cannot confer power which it does not itself possess." *Ex parte City Council of Montgomery*, 64 Ala. 463. The state has power to tax, and does tax, solvent credits, including negotiable promissory notes. It appears from an inspection of the charter of Selma (Acts 1882-83, p. 396, that the power is not conferred on said city to tax such property

eo nomine, but the power is given in express terms to tax real and personal property; and, if the term "personal property" can be said to embrace choses in action, then it is undeniable that the charter confers upon the city express power to tax that species of property. This is as truly axiomatic as that the whole includes all its parts. In its general or ordinary significance, the term "personal property" embraces all objects and rights which are capable of ownership except freehold estates in land, and incorporeal hereditaments issuing thereout, or exercisable within the same. 18 Am. & Eng. Encyclop. Law, p. 408. And, when used in statutes authorizing the imposition of taxes, the word "property," without the qualifying term "personal," will be held without further signification to include solvent credits. 1 Desty, Taxn. pp. 818, 819; Cooley, Taxn. p. 372; *Savings & Loan Soc. v. Austin*, 46 Cal. 415; *People v. Park*, 28 Cal. 133; *Louisville v. Henning*, 1 Bush, 381; *Catlin v. Hull*, 21 Vt. 152. So in this state the words "personal property," employed in exemption statutes, have been construed to include money, choses in action, and even a claim for damages resulting from negligence. *Borden v. Bradshaw*, 68 Ala. 363; *Darden v. Reese*, 62 Ala. 311; *Williamson v. Harris*, 57 Ala. 40.

In the definition of terms given in the Code, § 2, subd. 3, the words "personal property" include "money, goods, chattels, things in action, and evidences of debt," etc.; but that definition only applies to the words "personal property," as used in the Code, and is not a general, authoritative definition, attaching to

dences thereof may be in a different county. *Sommers v. Boyd*, 48 Ohio St. 648.

Under a statute authorizing a city to tax all personal property "in the city" promissory notes deposited in the city by one living without the city limits are not taxable. *Ferris v. Kimble*, 75 Tex. 476; *Connor v. Waxahachie* (Tex.) Dec. 9, 1890.

Under a statute authorizing a tax on "money, property, or labor due from solvent debtors on contract," debts evidenced by notes belonging to a citizen which are deposited for safe keeping without the state and never have been within it, are subject to taxation. *Hunter v. Board of Supra*, 33 Iowa, 376.

Under a statute taxing personal property "actually within" the limits of a city, loans made by a resident therein on notes and mortgages are taxable, notwithstanding the notes and mortgages are deposited without the city limits. *Johnson v. Oregon City*, 2 Or. 327, affirming 3 Or. 13. To the same effect is *Poppleton v. Yamhill County*, 7 L. R. A. 449, 18 Or. 377.

If bonds are sent out of the state, except for the purpose of evading taxation, they are not taxable in the state. *State v. Howard County Ct.* 60 Mo. 464.

A city empowered to tax property "within the limits of the city" cannot tax notes held by a resident against parties residing without the city. *Bridges v. Griffin*, 33 Ga. 118.

The court said: "Unless the persons who owe the debts reside in Griffin, they are not property within the city. The fact that the owner of these debts resides in the city, and has the notes there, does not alter the fact. The notes are but the evidences of the debt, while the debt itself is out of the city, as a man's title deeds or bill of sale are the evidence of the owner's right of property in his land and negroes, and it would never be thought the land

and negroes out of the city would be liable to the city taxes because the owner resided in the city and kept his title deeds there."

A directly opposite view seems to be taken in *Collins v. Miller*, 48 Ga. 336, where it was held that a debt evidenced by a note made by a resident of Georgia and held by a nonresident was not situated in the state for the purpose of taxation.

This change of view as to the location of choses in action is accounted for in *Augusta v. Dunbar*, 50 Ga. 387, by the act taxing bonds, notes, etc., due from persons in other states, from which it is inferred that it was intended to declare that the *situs* of such choses in action is with their owner.

In *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107, premising that it was not the intention of the laws of Kansas to tax property not within the jurisdiction of the state, it was held that notes given in pursuance of a contract for the sale of land in Illinois, and left there for payment, are not taxable in Kansas because of the owner's domicile there. To the same effect is *Fisher v. Rush County Comrs.* 19 Kan. 414.

An *obiter* remark in *Blain v. Irby*, 25 Kan. 501, is to the effect that promissory notes, unlike other choses in action, have a personal and independent *situs* of their own and may be taxed where they are situated.

When held by agent residing in different state from principal.

Where the investment of funds of a nonresident is controlled by his agent and loaned and reloaned to citizens of a state, the notes and securities taken and held in the possession and under the control of the agent have a *situs* within the state that makes it competent for the state to subject them to taxation. *Catlin v. Hull*, 21 Vt. 152.

This is called a "business *situs*" and is an excep-

said terms, as found in all legislative enactments of this state, general and special. Whatever effect this section may have upon general enactments since the Code in which these words occur, when found in special statutes enacted either before or since the Code, they have the usual and ordinary meaning attaching thereto, unless otherwise limited or qualified by the context. In the section of the charter of Selma herein quoted we do not find in the context any associated words which give to the term "personal property" a narrower or different meaning from that found in the authorities we have cited above. True, some of the items of personal property specifically mentioned in the section would, according to the general definition given in the citations, fall within the generic term, and some would not; but the former appear to have been particularized *ex industria*, or by way of precaution, and not with the in-

tent to limit the preceding general words. We think it clear that the term "personal property," as used in section 27 of the charter of said city, includes solvent credits and choses in action, and consequently that such property is liable to taxation by said city in the manner and to the extent provided by its charter. Practically the same question was settled by this court in the case of *St. John v. Mobile*, 21 Ala. 224, where it was held that the charter of that city, which authorized it to tax "real and personal estate within the city," included the power to tax bills of exchange, notes, etc. To the same effect is the case of *Paris v. Farmers' Bank of Missouri*, 80 Mo. 575.

Passing to the question whether negotiable promissory notes are taxable at the domicile of the owner, or whether the *situs* of such property, and not the domicile of the owner, determines the liability to taxation, we find ir-

tion to the rule that the *situs* of credits is at the domicile of the owner. *Re Jefferson*, 35 Minn. 215.

Before a nonresident can be taxed for credits it must be shown that they are actually at the place where they are assessed under the actual control of his agent, and it is not enough to show that an indebtedness to him, evidenced by a promissory note, was negotiated through an agent at the place. *People v. Davis*, 112 Ill. 272.

Securities taken by a nonresident agent for loans made by him in foreign states and held by such agent, are not taxable in the state of the owner's domicile. *People v. Gardner*, 51 Barb. 363; *People v. Smith*, 88 N. Y. 573. This rule is changed by statute in New York.

Under the statute it is held that securities in the actual possession and control of a nonresident trustee, the beneficiaries also being nonresidents, are not "due or owing to persons residing within the state," so as to be subject to taxation within the state, although two of the three trustees are residents thereof. *People v. Coleman*, 7 L. R. A. 407, 119 N. Y. 137, reversing 58 Hun, 482.

Notes secured by mortgages on land in a foreign state in the hands of an agent there to be collected and reloaned are property of the owner within the state of his residence for the purpose of taxation under a statute subjecting "all debts due from solvent debtors," unless such notes are expressly exempted. *State v. Gaylord*, 73 Wis. 316.

The court said: "When, as here, there is an absence of any statute prescribing a different rule, and an absence of any evidence of injustice by reason of double taxation, we must hold, under our statutes cited, that for the purposes of taxation, a debt has its *situs* at the residence of the creditor and may be taxed there."

Under Vt. Rev. Laws, § 270, exempting personal property situated in another state, a debt evidenced by a promissory note owned by an inhabitant of Vermont is taxable there, although secured by a mortgage on lands in another state, and the note and mortgage are in an agent's possession, living where the land is situated. *Bullock v. Guilford*, 4 New Eng. Rep. 352, 59 Vt. 516.

Debts due for money sent out of the state and loaned by nonresident agents on notes and mortgages retained by them and which had never been in the state, are not subject to taxation, under Hill's (Or.) Ann. Code, § 2731, providing that personal property shall include money, notes, or mortgages, "either within or without this state; . . . all debts due or to become due from solvent debtors." The "debts" mentioned include only domestic debts, since the latter clause does not contain any words similar to those of the previous clause re-

lating to property or interests out of the state. *Poppleton v. Yamhill County*, 7 L. R. A. 449, 18 Or. 377.

Contracts for the sale of land which are in the possession of the agent of a nonresident vendor are taxable at the agent's domicile. *People v. Trustees of Ogdensburgh*, 48 N. Y. 350.

Contracts for the sale of land which are in the possession of an agent are not taxable at the agent's residence where his principal has a residence within the same state. *Lord v. Arnold*, 18 Barb. 104.

While no stress is laid in this case on the fact that the principal resided within the same state, and in fact the language used indicates that the same rule would apply were he a nonresident, it is only with this limitation that the decision harmonizes with the others of New York state.

Under a statute taxing credits and investments within the state, in the possession or under the control of an agent of the owner, notes for the purchase price of land secured by the land, which are actually within the state, are taxable there though the owner be a nonresident. *Redmond v. Rutherford Comrs.* 87 N. C. 122.

In this case it is said: "The theory of taxation is that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The debts due to the plaintiff upon their land contracts are personal estate, the same as if they were due upon notes or bonds; and so far as they have any substantial existence they are in this state, and not elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiff's domicile. It is but just, therefore, that they should contribute toward the support of the only government which affords them protection, and help to defray the expenses incurred in so doing."

Notes and accounts in the hands of attorneys for collection, and bonds deposited for safe keeping, belonging to a nonresident, are not "within the state" as contemplated by the tax laws. *Herron v. Keeran*, 69 Ind. 472, 28 Am. Rep. 87.

A statute requiring every person to list for taxation "all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person," does not warrant taxing mortgages of a nonresident held by a resident agent for the purpose of collection and transmission to his principal. *Myers v. Seaberger*, 10 West. Rep. 474, 45 Ohio St. 223; *Williams v. Wayne County* Supra. 73 N. Y. 551.

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reconcilable confusion in the adjudicated cases, as well as differences in the statement of the doctrine in the text-books. Much of this confusion results from a failure to observe the varying phraseology of the different statutes giving rise to the decisions, but in some instances the authorities differ in the statement of the general principle involved. In 1 *Desty on Taxation*, p. 323, § 67, the general rule is stated thus:

"The *situs* of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner: the only exception being where the property is employed in business or is in the hands of an agent of the owner having an actual *situs* different from the domicile of the owner. It is not necessary, therefore, that the owner should reside within the state, to render his personal property situated within the state liable to taxation." In *Cooley on Taxation*, p. 371, it is said: "Where one is taxed for his personality at the place of domicile, it is in general immaterial that some, or even the whole, of it is at the time out of the state." Mr. Burroughs, in his work on *Taxation*, after an elaborate review of the conflicting authorities, states his own conclusions as follows in section 50, at page 59: "We conclude that the *situs* of personal property for the purposes of taxation depends in a great measure upon the nature of the property: (a) If it be chattels, which have a tangible existence, they are taxed in the locality in which they are situated. (b) Evidences of debt, such as state stocks and bonds of municipal corporations, transferable by delivery, and indeed all negotiable instruments which are of a chattel nature, are taxable where the evidence of the debt is actually situated. . . . (d) Debts not negotiable are taxable where the owner resides; they follow his person. . . . (f) Stocks of corporations follow the person of the owner, and are taxed at the place of his residence."

(h) The rule as to debts not negotiable being taxed at the residence of the owner is modified to the extent that where a person residing in one state has an agent in another, who loans or invests money for him, holds the evidences of debts, and so invests the proceeds of the loans when collected in the same state, it is held then to be taxable at the residence of the agent." The omitted paragraphs indicated above by the stars have no bearing upon the question as to the place of taxation of choses in action or evidences of debt, and it therefore appears that Mr. Burroughs either includes negotiable promissory notes in the words "all negotiable instruments of a chattel nature," as used in paragraph b, and makes them taxable where they are "actually situated," or he has failed to provide in the rules he has so carefully laid down for that class of negotiable notes which do not pass by delivery, but require an indorsement to pass the title thereto.

Applying the maxim *locus sit ubi res sit* and giving the words "of a chattel nature" their usual and ordinary meaning, it would seem that the negotiable instruments to which he refers are such as are sold in the market like municipal bonds, and pass by delivery; and that this is his meaning finds support in what he says in section 45 of the same work viz.:

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"The state bonds, and bonds of municipal bodies, and circulating notes of banks, which are treated as property where they are, and pass by delivery, are the subjects of taxation wherever they are found, in the same manner as chattels." And further in the same section he says: "The idea upon which the decisions are based is that, when the evidence of the debt is such that it passes by delivery, then the *situs* of the evidence of the debt is the *situs* of the debt, and it is taxable there. But, where it is necessary that the evidence of the debt should be in the state of the debtor in order to transfer the title to it, it is taxable in the state of the debtor." But, while the notes on which this case is based are negotiable promissory notes, we prefer to rest our decision on other principles and authorities, whose clearness and soundness we do not think can be questioned.

Referring again to the assessment made by the city tax collector, it is to be observed that it is for "all moneys loaned, and solvent credits, or credits of value, and their value after deducting the indebtedness of the taxpayer." The thing taxed is the debt, a species of intangible property incapable of an actual *situs* independent of the owner. The notes and mortgages representing the debts due to appellant may render the value of the debts more definite and stable, but they do not constitute the debts themselves, but are the mere evidence of such debts. They might be lost, stolen, or destroyed, but the debts, the credits, would remain. In the case of *Kirland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, it is said in the opinion of the court: "The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands, constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to contribute for the support of the government whose protection he enjoys. That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and, if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign Held Bonds*, 83 U. S. 15 Wall. 800, 21 L. ed. 179, the right of the creditor to proceed against the property mortgaged, upon a given contingency to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state." In the case of *Hunter v. Board of Supra*, 88 Iowa, 376, Judge Miller, in a case where a resident of Iowa deposited for safe keeping in Illinois promissory notes for \$7,000, that were never brought into

Iowa, says: "It is not the notes, as such, that are taxed; it is the debt. Notes are mere evidences of the debt. The right to money due being in the resident in Iowa, the property must of necessity be at the place where he resides, irrespective of the *situs* of the evidence." In California the statute required all property to be taxed in the county where it is situated. A., residing in San Francisco, held a mortgage on property in Mariposa county. It was recorded and foreclosed in that county. It was held by the supreme court of that state not liable to taxation in the latter county, the court saying: "The mortgage has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the "residence of the holder. It pertains to and follows the person." See also *People v. Park*, 23 Cal. 188. In *State v. Earl*, 1 Nev. 394, it is said: "A tax on money at interest, secured by mortgage on land, is a tax neither on the coin, the land on which the security is taken, nor upon the paper on which the promise to pay is written, but on the choses in action or right to collect the debt." In an elaborate *note* to the case of *New Albany v. Meekin*, 56 Am. Dec. 523, many authorities, Federal and state, are cited in support of the doctrine that debts, negotiable instruments, and choses in action follow the domicile of the owner or creditor and are taxable there. And among other propositions set forth in the note is the following: "Mortgages and mortgage debts are, according to the overwhelming weight of authority, taxable at the mortgagee's domicile. Like any other debt, they have no other *situs*, and the fact that the debt is secured upon land does not affect this principle." The authorities collated in support of the proposition are numerous, and many of them entitled to the greatest weight. See also 1 *Desty, Taxn.* p. 380.

We forbear a review of the decisions of the state courts which assert a contrary doctrine to that laid down in the foregoing authorities, but must notice some of the decisions cited by appellant's counsel, and the decisions of this court which touch upon this subject, and one of the latter of which is apparently somewhat opposed to the view we have adopted. Not, however, in its enunciation of the principle applicable to the facts of that particular case, but in the generality of its statement of the law. The first decision of this court, so far as we have been able to discover, which bears upon the question is the case of *St. John v. Mobile*, 21 Ala. 224, where the question for decision was whether the capital of a commercial firm in the city of Mobile, employed by them at that place in purchasing cotton upon commission, and in buying and selling bills of exchange, comes under the description of "personal estate in the city of Mobile," liable to taxation for city purposes, under the charter of 1844. The court held that the cash and securities employed by the appellant firm were personal estate, within the meaning of the statute; and although part of such securities, consisting of bills of exchange and promissory notes, were, at distant points, New York or Liverpool, for instance, running to maturity or payable there, by the regular course of the firm's

business, they were, nevertheless, personal estate of the firm in the city of Mobile, within the meaning of the charter, and properly taxable there as personal property. The other two cases to which we will refer did not involve the question of taxing solvent credits or choses in action, but of visible, tangible personal property, capable of having an actual *situs* separate and distinct from the domicile of the owner. In the case of *Mobile v. Baldwin*, 57 Ala. 61, the question was whether a steamer was liable to taxation in Mobile. It was owned by one Baldwin, who was not a citizen of that city, and was employed as a ferryboat, crossing from the eastern shore of the bay in Baldwin county to Mobile, leaving Baldwin county in the morning, and returning from Mobile in the evening. The boat was not kept or used in the city except to visit it in the daytime on its regular trips, returning at night to Baldwin county. The boat was licensed and enrolled under the laws of the United States at the port of Mobile, and was run on tide water only, in such ferryage business, and the owner paid taxes thereon in Baldwin county. The court held that the *situs* of the property, for taxation, was in Baldwin county, the domicile of the owner, and that its transient presence at Mobile on its daily trips did not separate its *situs* from the domicile of the owner. We quote from the opinion as follows: "The *situs* of the property, not the domicile or residence of the owner, is the test to which the liability to taxation must be submitted. . . . If it be visible, tangible property, or if it be property not having a visible, tangible existence, yet a legal existence, capable of an actual *situs*, it is the actual *situs*, not the domicile of the owner, most material to be considered. . . . If the owner of personal property separate it from his domicile,—commits it to another jurisdiction, so that it is not distinguishable from other property of a like kind within that jurisdiction or from similar property casually, in the usual course of its use and enjoyment, coming within that jurisdiction,—he takes it away from the jurisdiction of his domicile, and commits it, not to the county, but to the power of the place to which he transfers it." There can be no doubt of the correctness of the decision above quoted from, so far as the result reached is concerned. But so much of the opinion as declares that "the *situs* of the property, not the domicile or residence of the owner, is the test to which the liability to taxation must be submitted," can only be applied, so far as concerns personal property, to visible, tangible property, which has been separated by the owner from his domicile, by applying it to use or employment elsewhere, or by placing it elsewhere under circumstances indicating permanency of location in the sense specified in *Trammell v. Connor*, hereinafter cited. And so much of the opinion as applies the principle on which the case rests to property "not having a visible, tangible existence, yet a legal existence, capable of an actual *situs*," may be regarded as *dictum*. It would seem that this description could only embrace property that is purely *jus incorporate*, and, aside from the difficulty in conceiving of property which is neither visible nor tangible having an actual *situs* separate from that of the domicile of the

owner, we prefer to observe the general rules, and exceptions thereto, laid down by the text-writers and recognized in the authorities, both in respect of visible, tangible property, and such as is not visible or tangible. The latest decision of this court on that question clearly recognizes one of such exceptions, and is in harmony with the general rule sustained by the weight of authority. The decision referred to is *Trammell v. Connor*, 91 Ala. 398, where it is said: "As regards the place at which tangible personal property is assessable for taxes, the courts have generally discarded the legal fiction that such property follows the domicile of the owner, and hold that it may have an actual *situs* independent of the owner's residence, constituting the condition which subjects it to taxation. . . . In order, however, to render the property liable to taxation, its *situs* must be permanent in its nature, though not so permanent as real estate; it must have no actual location elsewhere. Property *in transitu*, or temporarily in the county, is not subject to assessment merely because it happened to be in the county on the day the assessment commences."

Mr. Desty, in his work on Taxation, (vol. 1, p. 326), states the general rule to be that the domicile of the owner is the place where, by a legal fiction, his personal property is regarded as having its *situs*, and where it is to be taxed, and then declares the rule as to intangible property as follows: "The *situs* of invisible and intangible property, not growing out of real estate, is with the owner. . . . Intangible property has no *situs*. If, for purposes of taxation, it be assigned a *situs*, it should be the place where it is owned, not the place where it is owed. . . . The debt, then, having its *situs* at the creditor's domicile, both he and it are, for the purposes of taxation, within the jurisdiction of the taxing power." He recognizes, however, exceptions both as to visible, tangible property, and as to invisible, intangible property; the exceptions as to the former being such as in the case of *Trammell v. Connor*, *supra*, and the exception to both the former and the latter being the case of property debts and credits belonging to a nonresident, but held by his agent in the state where they are assessed; but, he adds, "if in the hands of an agent living in another county, and subject to the order and control of the owner, it is taxable to him at his residence, and not to the agent." Desty, Taxn. p. 323. And this last proposition is fully sustained by the case of *Boardman v. Tompkins County Supra.*, 85 N. Y. 359, which is as follows: "Appellant had, as agent for his sisters, bonds and mortgages belonging to them, which he procured as an investment with their money, and at their request. He held them subject to their order and control. He resided in Ithaca, Tompkins county; they, in Rochester, Monroe county. The assessor for Ithaca assessed the property on information, against the agent's protest. The court of appeals held the assessment erroneous, and that the property was taxable in Monroe county, where the owners resided. The court, among other things, said: "Any other construction would defeat this object. A person living in a city where taxation was onerous would escape the burden by

placing his personal assets in the hands of an agent in an outlying town, while the countryman, whose property might at the time of the assessment be in the hands of his factor, broker, or commission agent for sale or investment, would find it enlarged by city valuations, only to be diminished by taxes from which he would derive no benefit. Produce, money, and securities, for purposes of sale, investment, or collection, are constantly moved from the owner to his factor, broker, or attorney. At all times he can be easily reached at his residence; but, if taxation is to depend upon locality, the rate will be uncertain, and the work of discovery attended with increased difficulty. Such a result is not called for by the terms of the statute, nor can it be justified on principle." So far as we have been able to discover, the only exception to the rule that, for the purposes of taxation, the *situs* of visible, tangible personal property is the domicile of the owner, is where such property has been separated from his domicile by the owner, and placed elsewhere, under circumstances indicating permanency of location, as in *Trammell v. Connor*; and the only exception as to invisible, intangible property seems to be where nonresidents have committed such property, or evidence thereof, to their agents living in the state where its liability to taxation is claimed.

We have examined the authorities cited by appellant to the effect that the words "personal property" do not include solvent credits or choses in action, and also that the power given to a municipal corporation to tax property within the city applies only to visible, tangible property within the corporate limits; but they are either predicated on statutes, the particular phraseology of which is materially variant from the charter of Selma, or they are in conflict with the weight of authority. For instance, in the case of *Pullen v. Raleigh Board of Comrs.*, 68 N. C. 451, the court held that the city of Raleigh had no power to tax debts and securities. But it was so held on the ground that the charter enumerates, *nominatim*, each subject of taxation, and that no one subject so specified, "by the utmost stretch of construction, can be made to embrace debts and securities for money." Also that the words "real and personal property" are used in the state Constitution in a sense to exclude "credits and investments." And in the case of *Bank of United States v. Huth*, 4 B. Mon. 423, no question of taxation was involved. It was simply a question whether the words "real or personal estate," as employed in a statute requiring mortgages to be recorded, embraced choses in action or claims for debts; and it was held they did not, because the statute designated the place for recording as the county "in which the estate or greater part thereof lies," that only such property was embraced in the words "personal estate," or was capable of having an actual *situs*, and therefore "may be or lie in a certain place or county;" and that choses in action were not capable of a *situs* or local position. In the case of *Johnson v. Lexington*, 14 B. Mon. 648, it was held that the terms "personal property" and "personal estate," as used in the Lexington city charter, do not embrace debts and other choses in action, but embrace only visible property, and that the city had no

power to tax personal property without the city, but that such power is confined to property within the city. But the decision was put on the ground that the language of the charter "renders it reasonably certain that the power conferred was only intended to embrace such personal estate as is within the city," and it was held that the words "personal property" and "personal estate" did not include debts and other choses in action, because at that time the state "had not adopted the principle of taxation by which the money and choses in action of the citizen are not made liable to taxation;" and that it could not, therefore, be presumed that the state then intended to confer on the city authorities a power of taxation which it did not itself exercise. The case of *Gallatin County v. Beattie*, 8 Mont. 173, decides that a mortgage can only be taxed in the county where it is found, but the statute the court was considering in terms required all property to be assessed in the county "where the same may be found." In the opinion of the court it is said: "Taking this section in connection with section fourteen of the same Act, and, I may add, the whole scope of the statute upon revenue, where it relates to assessment of property, and it is evident that it was not intended to give the assessor of any county power to assess property not in his county." And in the case of *Bridges v. Griffin*, 38 Ga. 118, while the court holds that the words "personal property" in the tax law embraced solvent notes and other choses in action, they were not taxable in the city of Griffin, because the persons owing the debts did not reside in Griffin, and therefore the notes were not property within the city. This is directly opposed to the principle laid down in the text-books, and is in conflict with the cases of *Kirtland v. Hotchkiss* and *Hunter v. Board of Supra*, here in cited, as well as the almost uniform current of authorities. Mr. Cooley, in his work on Taxation, 2d ed. p. 23, in speaking of debts, says: "They are not the property of the debtors, in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, but to call them property in the hands of debtors is a misuse of terms." The conclusion we reach from the principles herein discussed and the authorities cited is that the money loaned, or solvent credits, or choses in action, referred to in the bill of complaint, are properly taxable in and by the city of Selma, where appellant resides. The city charter authorizes the assessor to assess property for escaped taxes, on information, and no

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question is raised by appellant as to the regularity of the assessment.

What has been said renders it unnecessary to consider at length the question relating to the jurisdiction of the chancery court to enjoin the collection of a municipal tax on the ground of its illegality, but, in order that we may not be understood as sanctioning that remedy in this case, we notice it briefly. The rule on that subject, as declared in this state, is that, "in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors of excess in valuation, or hardships, or injustice of the law, or any grievance which can be redressed by a suit at law, either before or after payment of the taxes, will not justify a court of equity to interfere by injunction to stay collection of the tax." Here the right is claimed on the ground that the assessment, by the terms of the statute, has the force and effect of a judgment at law on all of appellant's property in said city, including his real estate, which judgment is made a preferred lien, and that it therefore creates a cloud on his title, which he has the right to come into equity to remove. Whether this statement of the bill would bring the case within the rule as above declared, it is unnecessary now to decide, for the reason that it is clear the charter itself provides a complete and adequate remedy at law. Section 83 of the charter requires the collector, before selling real estate for city taxes, to file a list of the delinquent taxes in the office of the judge of probate of Dallas county, and a decree of sale can only be rendered by the probate court after notice to the taxpayer, and a hearing, if he chooses to defend; and the defense is expressly authorized to be made that the property is not liable for the taxes, and that the taxes are not authorized by law. An appeal is provided from the decree of the probate court to the circuit court of said county, or the city court of Selma, where the trial is *de novo*; and from any judgment that might there be rendered, an appeal would lie to this court, under the general statutes providing for appeals from the judgments of courts of law in this state. From this it is plain that appellant had a full, complete, and adequate remedy at law, and that the tax, if illegal, could not have been properly enjoined in this suit.

There was no error in the decree of the chancery court sustaining appellees' demurrer, and dismissing the bill. Its decree is accordingly affirmed.

OREGON SUPREME COURT.

STATE of Oregon, *ex rel.* D. F. SHERMAN,
Appt.,
v.

M. O. GEORGE *et al.*, *Respds.*

(.....Or.....)

1. A statute providing for the appointment by the judges of a court of the members of a bridge committee to have charge of the city's bridges does not violate a constitutional provision that persons charged with official duties under one of the three departments of government shall not exercise powers confided to either of the other departments on the ground that the appointment belongs to the executive department even if this were true as to the appointment of officers generally since such committeemen are mere agents of the city and not officers within the meaning of the Constitution.
2. The rule of law against delegation of power by the Legislature refers to the law-making power and does not prohibit the Legislature from delegating the selection of mere municipal agents.
3. The position of bridge committeeman is not an office within the meaning of a constitutional provision that no senator or representative shall during the time for which he may have been elected be eligible to an office, the election to which is vested in the legislative assembly.

(March 22, 1892.)

A PPEAL by relator from a judgment of the Circuit Court for Multnomah County in favor of defendants in a suit brought to test

the rights of defendants to hold the positions of bridge committeemen of the city of Portland and to prevent them from issuing bonds for expenses connected with such bridges.
Affirmed.

Statement by Lord, J.:

This was a proceeding in the nature of a quo warranto, brought by the state upon the relation of D. F. Sherman, a citizen and taxpayer, to try the title of the respondents to hold the office of bridge committeemen under the Act of the legislative assembly commonly known as the "Meusdorffer Act." By section 2 of said Act it is provided that "the power and authority given to the cities named in section 1 hereof, since consolidated as the city of Portland, to construct, purchase, and hire and keep up and maintain bridges across the Willamette river, and to issue and dispose of bonds therefor, shall be exercised, as hereinafter provided, by eight tax-payers of Multnomah county, to be appointed by the two judges of the circuit court for said county, who shall be styled the 'Bridge Committee.'" The Act then directs that within thirty days after the time it takes effect it shall be the duty of said judges to appoint the committee referred to in section 2, and to cause notice of such appointment to be served on each person appointed. Within twenty days after notice of their appointment the members of the committee are directed to meet, and organize by the election of a presiding officer from their number, who shall be styled the "Chairman of the Committee;" by the selection of a clerk, who shall be styled the "Clerk of the Committee;" and the

NOTE.—Constitutional power of courts or judges to appoint officers.

The general proposition has been sometimes made by the courts that appointments to office are intrinsically executive acts. *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Taylor v. Com.* 3 J. J. Marsh. 401; *Evansville v. State*, 4 L. R. A. 93, 118 Ind. 426.

But these cases do not actually decide that all appointments to office must be made by the executive department.

The proposition is modified in other cases to the effect that, while appointments are essentially executive acts, the power may be exercised by the Legislature or the courts as an incident to a principal power, that is where it is necessary to the exercise of legislative or judicial power. *State v. Noble*, 4 L. R. A. 101, 118 Ind. 530; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 333; *Hovey v. State*, 119 Ind. 305; *State v. Hyde*, 121 Ind. 20.

Other cases say that appointments are not necessarily executive acts unless made so by the organic law or legislative enactment. *People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 3 West. Rep. 522, 118 Ill. 587.

The proposition that the act is executive is denied in a Maryland case, which holds that appointments may be made by the Legislature. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572. The question as to legislative appointments, however, is not to be treated in this note.

In *Taylor v. Com.*, 3 J. J. Marsh. 401, the constitutional power of a court to make an appointment

was not involved as the Constitution itself gave the power; but the declaration that an appointment was intrinsically an executive act was made as the ground of dismissing a writ of error to review the action of a court in removing its clerk and appointing another.

So in *Re Stebold*, 100 U. S. 371, 25 L. ed. 717, the power of a circuit court to appoint supervisors of election under an Act of Congress was upheld by virtue of the constitutional provision that "Congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments."

In *Heinlen v. Sullivan*, 64 Cal. 376, it was merely decided that the power to appoint police commissioners, vested in the judges of certain courts, was not a judicial power and therefore by the new Constitution was not devolved upon the judges of the superior court of San Francisco.

In *People v. Rumsey*, 64 Ill. 44, an Act for the appointment by the judges of Cook county of an official stenographer was held to be abrogated on the ground that it was special legislation, but no question was raised as to the nature of the power.

So in *People v. Williams*, 51 Ill. 63, no such question was raised although the power of the judge of a circuit court to appoint assessors in proceedings to condemn land for a park was upheld.

Numerous cases in the same state have upheld the appointment of drainage commissioners by the courts without any attack on this ground. *Moore v. People*, 108 Ill. 376; *Blake v. People*, 109 Ill. 604

appointment of a treasurer. The committee thus constituted is authorized to fill any vacancy that may occur in that body by death, resignation, removal from the city of which he is a resident, or otherwise, by appointment of a person to be a member thereof who is a bona fide resident of the city in which resided the member he is appointed to succeed. Whenever, and, in the judgment of the committee, as soon as the several bridges are procured as contemplated, or the limit of the sum of money authorized to be expended has been reached, the Act commands the selection of four persons, whose duty it shall be to maintain, manage, and keep the bridges in repair. These shall be styled individually "Bridge Commissioners," and collectively the "Bridge Commission;" and thereafter the power conferred upon the city by the enactment named shall be exercised by said commission in the manner explicitly provided. These commissioners are to be selected in the first instance by the committee from their own number, one each from the members who reside, respectively, in the cities of East Portland and Albina, and two from members who reside in the city of Portland, for the several terms of two, four, six, and eight years. In case a sufficient number do not consent to serve as such commissioners, the remainder may be selected from the resident tax-payers of the respective cities, and thereafter the commissioners shall be appointed by the said judges from such tax-payers in the following manner: If a vacancy arises otherwise than by the expiration of a term, for the remainder of the term; and in case of the expiration of a term, for the full term of eight years thereafter. The commission is required to meet at a time and place to be appointed by the committee, and organized by the election of a chairman,

treasurer, and clerk, as provided in the case of the committee. When the commission is elected and organized in accordance with the intention of the law, the committee is directed to turn over to it the bridges and all property pertaining thereto and remaining under the control of the committee. It is then made the duty of the commission to take entire possession and charge of all the property and affairs of the committee, and thenceforward manage and conduct the same. The two judges of the circuit court of the state of Oregon for Multnomah county, acting in pursuance of the authority conferred by the terms of said Act, and within the time therein limited, duly appointed the respondents to the position of bridge committeemen, making the selection of the different individuals with reference to their places of residence and other qualifications prescribed. The committeemen met within the proper time, qualified, and organized in all respects in conformity with the law. On the 18th day of November, 1891, John M. Pittinger resigned. The remaining seven members of the committee, at a meeting duly called, appointed T. W. Pittinger, who possessed the requisite qualifications, as his successor. After reciting these and other facts, the petition then alleges "that the defendants to this action, and all and each of them, ever since their said appointment as aforesaid, and under said appointment, have acted as and claimed to be, and are now acting as and claiming to be, the bridge committee of said three cities," etc., "as the same existed prior to said consolidation, and as the same now exists, and has existed since said consolidation; and that said defendants, claiming to be said bridge committee, are about to issue, sell, and dispose of a large amount of the negotiable bonds," etc., "as provided for in said free

Kilgour v. Drainage Comrs. 111 Ill. 342; *Huston v. Clark*, 113 Ill. 344; *Owners of Lands v. People*, 113 Ill. 296.

So in New York the appointment by judges of commissioners in proceedings to open streets is held to be judicial. *Re Canal & W. Streets*, 12 N. Y. 406; *Striker v. Kelly*, 2 Denio, 323; *Re Canal Street*, 11 Wend. 154, overruling *Re Beekman St.* 20 Johns. 269.

And an Act for the appointment by a judge of a circuit court of commissioners to construct a court-house was upheld in Kentucky without any question as to the power of appointment, but it was held that they were agents for the districts and not officers. *McArthur v. Nelson*, 51 Ky. 67.

In *State v. Manlove*, 33 Tex. 798, the *pro tem.* appointment of a district attorney by a district judge under authority of a statute was upheld without any question as to the constitutional power.

In *Re Janitor of Supreme Ct.* 35 Wis. 410, it was directly decided that there was power inherent in a court of record, especially one of last resort, to appoint its necessary assistants, such as janitors.

But in *State v. Smith*, 32 Mo. 51, reversing 15 Mo. App. 412, it was decided that this power did not exist in a criminal court where an ordinance provided for the appointment of its janitor by a commissioner of public buildings, even if he appointed a person whom the court did not approve.

In *State v.oble*, 4 L. R. A. 101, 118 Ind. 360, a statute providing for the appointment by the Legislature of supreme court commissioners to aid the 16 L. R. A.

court in its duties was held unconstitutional on the ground that the power to choose its assistants resides in the court.

In *People v. Morgan*, 90 Ill. 553, it was decided in an elaborate opinion that the provision of the Illinois Constitution that the governor by and with the consent of the Senate shall appoint all officers, whose appointment or election is not otherwise provided for, does not apply to municipal officers.

This case reviews the practice of the court in many cases to officers such as clerks, or state's attorneys to fill vacancies, as well as to appoint masters in chancery, reporters, supreme court librarians, janitors, etc.

This is followed in *People v. Hoffman*, 3 West. Rep. 522, 116 Ill. 587, upholding the power of county courts to appoint election commissioners.

In *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, it is decided that the Legislature may provide for the appointment by a court of the trustees of a contemplated railroad, because they are not public officers.

In *Re Cooper*, 23 N. Y. 67, the admission of an attorney by a court is held to be a judicial act and therefore subject to appeal.

It will be seen that the exact limit of the power of courts as to appointments is not entirely settled, but that a long continued and rarely challenged practice has in fact confided to courts the appointment of many officers of inferior grades especially those who are more or less under the control of the court making the appointment. B. A. R.

bridge Act, which said bonds will be a burden upon the property of the above-named relator, and the other citizens and tax-payers of the present city of Portland, and subject them to expensive litigation, in order to prevent the assessment and collection of taxes upon their property for the payment of the principal and interest of such bonds," etc.; concluding with a prayer for a judgment of ouster. The defendants demurred to the petition upon the ground of the insufficiency of the facts to constitute a cause of action. The demurrer was sustained by the court below, and judgment rendered dismissing the action, from which judgment this appeal is taken.

Messrs. Thomas A. Stephens, Dist. Atty., and Paxton & Paddock, for appellant:

Commissioners appointed by Act of the Legislature to lay out and build a road for the use of the public are public officers. An office is a public charge or employment, and every office is considered public, the duties of which concern the public.

People v. Hayes, 7 How. Pr. 248; *United States v. Hartwell*, 73 U. S. 6 Wall. 385, 18 L. ed. 890; *State v. Kennon*, 7 Ohio St. 547; *State v. Vail*, 41 Mo. 29.

The judges of the circuit court, no matter whether they are referred to as individuals or as judicial officers, are "persons charged with official duties under" the judicial department of the government, and by the terms of the Constitution are prohibited from exercising any of the functions of either of the other departments.

State v. Denny, 4 L. R. A. 65, 118 Ind. 449; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 382; *State v. Simons*, 32 Minn. 540; *Houston, T. & B. R. Co. v. Randolph*, 24 Tex. 817; *People v. Albertson*, 55 N. Y. 55.

The act of appointing to office is not a judicial duty, nor is it a function pertaining to the judicial department of the government.

Mechem, Pub. Off. §§ 104-108; *Heinen v. Sullivan*, 64 Cal. 378; *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Taylor v. Com.* 3 J. J. Marsh. 401; *State v. Kennon*, *supra*; *People v. McKee*, 68 N. C. 429; *State v. Tate*, Id. 548; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Smith v. Strother*, 68 Cal. 194.

This court in *Biggs v. McBride*, 17 Or. 640, decided that the Legislature in appointing railroad commissioners had not encroached upon the executive department or attempted to exercise powers belonging to the governor.

The railroad commissioners, however, are state officers of general authority throughout the state, charged with official duties to be exercised for the benefit of the state at large, and appointed for a fixed and limited term.

Even though the Legislature may exercise the power of appointment of such state officers of general authority, it has not power to make permanent appointments to fill purely local municipal offices, nor to invest such appointees with authority to tax or impose indebtedness upon the district for which they are appointed.

State v. Denny, 4 L. R. A. 65, 118 Ind. 449; *Evansville v. State*, 4 L. R. A. 93, 118 Ind. 16 L. R. A.

426; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Chicago*, 51 Ill. 17, 3 Am. Rep. 278; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People v. Albertson*, 55 N. Y. 55; *People v. Porter*, 90 N. Y. 68; Mechem, Pub. Off. § 106.

The Legislature cannot delegate the powers conferred upon it.

Cooley, Const. Lim. 6th ed. 187; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, Id. 122; *Barto v. Himrod*, 8 N. Y. 488, 59 Am. Dec. 506; *Willis v. Owen*, 43 Tex. 41; *Brewer Brick Co. v. Brewer*, 62 Me. 62; *State v. Hudson County Ass. Comrs.* 37 N. J. L. 12; *Auditor v. Holland*, 14 Bush, 147; *State v. Simons*, 32 Minn. 540; *Oakland v. Carpentier*, 13 Cal. 540; *State v. Paterson*, 84 N. J. L. 163; *Ruggles v. Collier*, 43 Mo. 383; *St. Louis v. Clemens*, 43 Mo. 395; *Thomson v. Boonville*, 61 Mo. 282; *Whyte v. Nashville*, 2 Swan, 864; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453.

The respondent, C. H. Meusdorffer, was a member of the Legislature which passed the Meusdorffer Act, being a representative from Multnomah County. He was not eligible to be appointed a member of the bridge committee.

State v. Boyd, 21 Wis. 210; *State v. Vail*, 41 Mo. 29.

Mr. William T. Muir, City Atty., for respondents:

The entire law-making power of this state is committed to the Legislature, except so far as it is expressly or by necessary implication limited by the Constitution.

Cooley, Const. Lim. 5th ed. 106, 107; *David v. Portland Water Com.* 14 Or. 98.

The Constitution broadly separates the powers of government into three branches. It does not undertake to declare what shall be considered a legislative, executive, or judicial Act. The authority to appoint municipal and other officers is not given to either department. In the absence of any express declaration to the contrary the power is merely ministerial and the Legislature may confer it in particular instances upon persons holding judicial office.

Or. Const. art. 3; 1 Hill's Code, § 86; *People v. Morgan*, 90 Ill. 558; Ill. Const. art. 3; *Starr & C. Stat.* 109; *McArthur v. Nelson*, 81 Ky. 67; Ky. Const. art. 1, § 1, 2; Gen. Stat. 91; *People v. Salomon*, 51 Ill. 89; *Baltimore v. State*, 15 Md. 376; *Police Comrs. v. Louisville*, 3 Bush, 597; *People v. Pinckney*, 32 N. Y. 377; *People v. Bachelor*, 22 N. Y. 129; *People v. Woodbury*, 14 Cal. 43; Cal. Const. art. 3; 1 Deering, Stat. bottom p. 96; *David v. Portland Water Committee*, 14 Or. 98.

The Legislature of the state has repeatedly exercised the appointing power in a manner similar to the method adopted in this case.

Laws Sp. Sess. 1885, p. 97; Sess. Laws 1887, p. 80; Sess. Laws 1891, p. 791.

Great weight should be given to contemporaneous construction.

Cooley, Const. Lim. 5th ed. 81, 82; *Baltimore v. State*, 15 Md. 376; *Biggs v. McBride*, 5 L. R. A. 115, 17 Or. 640.

This interpretation of the Constitution by the Legislature has been upheld by this court. *David v. Portland Water Committee*, and

Biggs v. McBride, supra; Cook v. Port of Portland, 20 Or. 580.

The correct interpretation of article 8 of the Constitution of this state is that no person employed in one department of the government shall at the same time be employed in either of the other two.

People v. Provinces, 84 Cal. 520.

The position of bridge committeeman is not an "office" within the meaning of the Constitution. He is a mere agent of the city.

David v. Portland Water Committee, supra; Barton v. Kallach, 56 Cal. 95.

The phrase "elected or appointed" does not refer to municipal officers.

Barton v. Kallach and People v. Provinces, supra; People v. Henry, 62 Cal. 557.

Lord, J., delivered the opinion of the court:

The question presented for our determination arises upon the sufficiency of the facts to show the defendants are entitled to hold the office of bridge committee, and to exercise the functions thereof. The aim of the proceeding is to test the constitutionality of the method provided by the Act (Sess. Laws 1891, p. 638) commonly known as the "Meusdorffer Act," for the appointment of the bridge committee. It is insisted that the facts alleged show that the defendants are holding the offices of bridge committee, and exercising the functions thereof, without title or legal right, because the two judges of the circuit court for Multnomah county, referred to in the Act, are prohibited by article 8 of the Constitution from exercising the appointing power, or any function other than judicial. This proceeds upon the assumption that the act of the two judges of the circuit court in appointing the bridge committee was not a judicial duty, nor a function pertaining to the judicial department of the government. By article 8 of the Constitution the powers of the government are divided into three separate departments,—the legislative; the executive, including the administrative; and the judicial,—and any person charged with official duties under one of these departments is prohibited from exercising the functions or powers confided to either of the other departments, except as in the Constitution expressly provided. It is claimed that the two judges of the circuit court, no matter whether they are referred to in the Meusdorffer Act as individuals or judicial officers, are persons charged with official duties under the judicial department of the government, as the members of the Legislature are under the legislative department; and that by force of this constitutional provision the Legislature is prohibited from conferring upon such judges, and such judges from exercising, the power of appointment conferred by the Act; and hence such Act and all the appointments under it are void. There can be no doubt that there are authorities to the effect that the exercise of the power of appointment to office is an executive Act, and that, being such, the power cannot be exercised by the Legislature or judiciary under a constitutional provision distributing the powers of government into three separate departments, 16 L. R. A.

like our own. But this question, although not directly passed upon by the court in *Biggs v. McBride*, 17 Or. 640, 5 L. R. A. 115, nevertheless received a good deal of its attention. The point was there made that so much of the Act creating the offices of railroad commissioners as permitted them to be filled in joint convention of both Houses of the Legislature was in conflict with the Constitution, and void. After referring to article 8 and section 1, art. 5, of the Constitution, Strahan, J., said: "Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of the chief executive power of the state, the appellant's contention would be sustained. But no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the Constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogatives in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or, in some cases, of changing the method of filling an existing office." After proceeding to enunciate several instances in which the power had been exercised by the Legislature in making these appointments to office, which were in no way connected with the discharge of legislative duties, he concluded his opinion upon this point by saying: "The power exercised by the Legislature in the appointment of some of these officers is almost coeval with the Constitution. The power thus exercised has never been called in question, but has ever been acquiesced in by every department of the government, and is in itself a contemporaneous construction of the Constitution, which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such construction is entitled to great weight, and could not be lightly regarded."

Except as limited by constitutional restrictions, it is agreed that the Legislature may exercise all governmental powers. It is the law-making power of the state. "Plenary power in the Legislature," said Denio, *Ch. J.*, "for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception." *People v. Draper*, 15 N. Y. 548. While our Constitution separates the powers of government into three distinct departments, and prohibits any of them from exercising any powers confided to the other, it does not undertake to declare what shall be considered legislative, executive, or judicial acts. As Walker, J., said: "That provision declares, only in general terms, that each department of government shall be confined to the exercise of the functions of its own department. It does not undertake to define in any specific manner

what are legislative, executive, or judicial powers or acts. Like most other provisions of that instrument, the terms employed are of the most general and comprehensive character. We find no provision that declares that the appointment of a municipal officer, however extensive his powers, is the exercise of a legislative or executive power." *People v. Morgan*, 90 Ill. 562.

But it is argued that, if it be conceded that *Biggs v. McBride*, *supra*, established the principle that the Legislature, in the appointment of the railroad commissioners, had not encroached upon the executive department of the government, they were state officers, charged with official duties to be exercised for the benefit of the state at large, and appointed for a fixed term, while the members of the bridge committee, provided for by the Meusdorffer Act, are municipal officers, or a municipal board of local authority, in which the state generally has no interest, and appointed for an indefinite term. Hence it is claimed, even though the Legislature may exercise the power to appoint such state officers of general authority, that it has not the power to make appointments to fill municipal officers for an indefinite term. But it seems to us the force of this contention is broken by the case of *David v. Portland Water Committee*, 14 Or. 98. The duties of that board or committee, in principle, were like the duties of the defendant bridge committee. If the members of the water committee were not officers in the sense of the Constitution, but "no more than agents of the city," as held in that case, the members of the bridge committee must likewise be agents for the city, and not officers within the meaning of the Constitution. It would be difficult to show upon principle by a comparison of the acts wherein they differ so as to make the members of the water committee agents, and the members of the bridge committee officers. That the persons named by the Act as the bridge committee were, as Thayer, J., said of the individuals designated as the water committee, "officers, in the broad sense of that term, there can be no question; but whether they were such officers as were intended by said section 3, art. 15, of the Constitution, is very doubtful. In order to be such officers, they must have been elected or appointed to an office under the Constitution, which I understand to be an office provided for by that instrument." The same would be true of the bridge committee, so far as this section of the Constitution applies. But the court, in *David v. Portland Water Committee*, *supra*, based its decision upon the principle decided in *McArthur v. Nelson*, 81 Ky. 67. In that case the Act authorized the judge of the circuit court to appoint three commissioners of the district, who should hold their office at the will and pleasure of the judge. It was made the duty of the commissioners to have constructed a court-house at a cost not to exceed a sum specified, and to enable them to raise the money they were authorized to issue bonds, to redeem them, and to levy an annual tax upon the real and personal property of the district. In determining the

question as to whether such commissioners were officers or not, under the Constitution, Pryor, J., said: "Nor do we think it was necessary for the Legislature to prescribe the term of office for the commissioners, although they are made a body corporate and politic, with power to sue and be sued, contract and be contracted with, under the style of 'Commissioners of the Court-House District.' They are not district officers, within the meaning of section 10 of article 6 of the Constitution, but are mere agents of the district, required by the Act to discharge certain duties with reference to the building of a court-house; and when those duties end their employment terminates."

To hold that such commissioners are to be selected, and, when selected, to be removed as officers within the meaning of the Constitution, would be determining by judicial precedent every one charged with the execution of a ministerial duty under legislative sanction an officer, whose term must be designated, or the appointment will be held invalid." In commenting upon that case, Thayer, J., said: "The question involved in that case is very similar to the one here, and the language of the court expresses the view we entertain regarding it,—that the members of the water committee are no more than agents of the city, required by the act to carry out its provisions, as was said in that case regarding the commissioners to build the court-house."

Within the principle here decided, the vice of the argument for appellant lies in assuming that the members of the bridge committee are officers. Counsel proceed upon this hypothesis, but contend that, being municipal officers of local or limited authority, their appointment by the Legislature cannot be sustained, for their duties are not such as to affect the state at large, and cannot, therefore, be upheld, as in the case of the appointment of state officers to discharge duties in which the general public are interested. But if the members of the bridge committee are not officers, but agents, appointed to carry out the provisions of the Act, the argument can have no application. In the absence of constitutional restrictions, the power of the Legislature over municipal corporations is unlimited, except so far as they are endowed with rights incident to a private corporation. Dill. Mun. Corp. 3d ed. § 66. But counsel for appellant, recognizing the effect of these decisions upon the pending question, and the practice of our Legislature, coeval with the formation of the state government to create and fill a certain class of offices, further argue that, if it be admitted that the Legislature had power, under these decisions,—*Biggs v. McBride*, *supra*, and *David v. Portland Water Committee*,—not only to create the bridge committee, but to appoint the persons constituting the same, this power cannot be delegated by the Legislature to the judges of the circuit court to be exercised by them in the appointment of the members of the committee. It is no doubt true that the Legislature cannot delegate the powers conferred upon it. The general rule of law to this effect is unques-

tioned. But this refers to the delegation of the law-making power. It prohibits the delegation of authority to legislate, or to devolve upon others duties which must be performed by it as a legislative body. Every law must be executed, if at all, by some one charged with that particular duty. Laws special in their nature, and of the kind in question, and as in *David v. Portland Water Committee, supra*, may be carried into effect by agents appointed for that purpose. Within that decision, nothing more nor less has been done in this case. The Legislature exercised its function in enacting the law and directing the manner of its execution. Nor is the authority given by the Act to the two judges of the circuit court to appoint the members of the bridge committee, even considered as officers, without judicial precedent to sustain it, as not in conflict with section 1 of article 3 of our Constitution. In Illinois there is a like provision substantially. Ill. Const. art. 3 (Starr & C. Stat. 109.) In *People v. Morgan*, 90 Ill. 558, the power of the judiciary to appoint certain officials, whose duties are not strictly judicial, or even connected with the business of the courts, was fully recognized and sustained. A statute of that state, which authorized the judge of the circuit court of Cook county to appoint assessors and commissioners for the South park, located in that county, was held to be constitutional. The point was expressly made that the circuit judge could not appoint a park commissioner, on the ground that he was thereby exercising an executive or political function, forbidden by the clause of the Constitution referred to. The point was, however, overruled, and the power of the judge or judges to make the appointment was sustained. After giving numerous examples of official appointments made by the judges or courts, Walker, J., said: "The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers, elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function, unless made so by the organic law or legislative enactment. And in this case it is not so unless the power is thus conferred. If it were conceded that these appointments were the exercise of political power, would it necessarily be violative of any provision of the Constitution? The division and allotment of powers are not into political, executive, and judicial, but into legislative, executive, and judicial. It was no doubt the exercise of political power, as that embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other. Political power is the policy of government or its administration, and may be exercised either in the formation or administration of government, or both. Hence it follows that, if it be a political power, that, of itself, in no wise militates against its exercise by a person belonging to the judicial department of the government. All three departments

aid in the administration of government, but perform different functions. The elector who votes for an officer or measure exercises political power, yet no one would claim that, because a judge was a person belonging to the judicial department, he was prohibited from thus voting. We therefore conclude that, if the power to appoint to office is a political function, this article of the Constitution does not prohibit its exercise because the power is political; and, if prohibited, it must be for some other reason, or by some other provision, which, in terms or by necessary implication, prohibits such an exercise of the appointing power." And again he says: "But this is not a question as to what department these officers belong to or the functions they perform, but the question is, What department, in the absence of an election, can constitutionally confer the power on them to perform public duties? It is not whether the General Assembly, the executive, or the judiciary are the best qualified to select or appoint such officers, but Where is the power to do so lodged? The original power to fill all offices rests with the people, but our Constitution has vested the power in the governor to fill all constitutional offices not provided for by election or otherwise." In *People v. Hoffman*, 116 Ill. 589, 8 West. Rep. 522, it was held that section 1, article 2, of the Election Law of 1885, for cities, etc., which provides for the creation of a board of election commissioners consisting of three members, and directs that they be appointed by the county court, is not violative of that provision of the Constitution dividing the powers of government into three departments, and prohibiting any one of such departments from exercising powers properly belonging to either of the others. It was there urged that the appointment of the commissioners could not be conferred upon the county court, because such appointment involves an exercise of political power, while the functions of the county court are exclusively judicial. But Magruder, J., said: "The reasoning in *People v. Morgan* shows that it was never intended to vest in the governor the selection of such local and municipal officers as these commissioners. The power to appoint officers of this class is not specifically designated in the Constitution as either a legislative, judicial, or executive power. It is not therein specifically conferred on either department. Nor is there anything therein expressed which, either directly or impliedly, prohibits the Legislature from authorizing the county court to appoint the commissioners. Therefore the authority conferred on that court to do so does not make the Act invalid. The law-making powers of the states can do any legislative Acts not prohibited by the state Constitutions."

A statute of the United States authorizes the circuit courts of the United States to appoint supervisors of election in certain cases and under certain conditions therein specified. In *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, the point was made that the United States circuit courts had not the power to appoint supervisors of election, on the

ground that the duties of such courts were judicial, while the supervisors of election were officers whose duties were executive in their character. But the court held otherwise, *Mr. Justice Bradley* saying: "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department, to which the duties of such office appertain. But there is no absolute requirement to this effect in the Constitution, and, if there were it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment is, in ordinary cases, left to the president and the Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it would be in the president alone, in the department of justice, or in the courts. The marshal is pre-eminently the officer of the courts; and in case of a vacancy Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated." But, independent of these considerations, the power to appoint the bridge committee may be upheld on the ground that the two judges of the circuit court for Multnomah county in performing this duty act as individuals, and not as judges. This conclusion the court thought in *People v. Morgan, supra*, might be drawn from the Act authorizing the circuit judges of Cook county to appoint park commissioners; Walker, J., in speaking for the court, saying: "The power might, no doubt, be sustained on the ground that its exercise is the act of the individual, and not the performance of an official function; that the act referring to the judge was only intended to apply to the person who filled the office at the time when the appointment was required to be made, whether it should be the same or a different person; thus being the individual act of the incumbent. . . . So that,

whether the appointment of these park commissioners be the exercise of a judicial, ministerial, or other function, whether it be the act of the officer as such or as an individual, we are of the opinion that the power was well conferred, and might be properly exercised by the circuit judge."

In view of these considerations, our decisions, and those of other courts, and the power exercised by the Legislature in making a certain class of appointments, almost coeval with the Constitution, it is immaterial whether the appointment by the judges of the members of the bridge committee be considered the exercise of a judicial, ministerial, or other function, or it be the act of the judges as such or as individuals, or whether the members of the committee be considered as agents of the city, and not officers; the result is the same, and affirms the validity of the Act granting the power.

The second question presented for our determination is whether the appointment of the defendant C. H. Meusdorffer as a member of the bridge committee is valid, he being a member of the Legislature which passed the Act. The contention of the appellant is that he was not eligible to be appointed a member of the bridge committee, because such appointment is in conflict with section 30 of article 4 of the Constitution. That provision is as follows: "No senator or representative shall, during the time for which he may have been elected, be eligible to an office, the election to which is vested in the legislative assembly," etc. Within the meaning of the Constitution, as held in *David v. Portland Water Committee*, under a statute of similar import, the position of bridge committeeman is not an office. He is a mere agent of the city. So that, turn over this case as we may, keeping in view the well-recognized rule that doubt must be solved in favor of the validity of the law, and that a law, to be invalid, must clearly conflict with the Constitution, *we must affirm the judgment.*

SOUTH CAROLINA SUPREME COURT.

Martha J. WOODARD, Admx., etc., of Addison S. Woodard, Deceased, *Resp't.*,
v.

J. Frierson WOODARD in His Own Right and as Admr., etc., of Stephen D. Woodard, Deceased, Impleaded, etc., *App't.*

(.....S. C.....)

The vindication of the honor of his intestate is not a purpose for which an ad-

ministrator can use funds of the estate by employing counsel to aid in prosecuting for murder one who killed the intestate and attacks his honor by matters which he alleges in justification of the crime.

(April 19, 1892.)

A PPEAL by defendant J. Frierson Woodard from a judgment of the Common Pleas Circuit Court for Sumter County in favor of plaintiff in a proceeding instituted to set aside

NOTE.—*Expenditure of administrator for the protection of decedent's character.*

It was held in *Luak v. Anderson*, 1 Met. (Ky.) 426, that an administrator cannot bind the estate for the fee of counsel employed by him to prosecute the supposed murderer of his decedent.

An executor is not entitled to credit in his general account for a payment made to save a legatee 16 L. R. A.

from disgrace and to preserve the elevated standing and character of the family of his testator. *Jones v. Ward*, 10 Yerg. 180.

We have been unable to find any other adjudications upon the propriety of charges against an estate, incurred for services, or prompted by motives, similar to those involved in the principal case.
J. G. G.

appellant's discharge as administrator of Stephen D. Woodard, deceased, and to require him to account for assets which came into his hands as such administrator and remained unaccounted for. *Affirmed.*

The facts are stated in the opinion.

Messrs. Haynsworth & Cooper, for appellant:

The law recognizes a right to vindicate the dead in its punishment for libel, where, although the person libeled be dead at the time of the publication of the libel, yet it is punishable if its tendency is to stir up others of the same family or society to break the peace in vindication of the memory of the deceased.

2 Addison, Torts, § 1171.

The administrator is to be guided in his expenditures by the directions of the statute. But our own courts have always treated those directions as flexible and expansive.

Gurritt v. Garrett, 2 Strobb. Eq. 272; *Van Emon v. Tulare County Super.*, Ct. 76 Cal. 589; *Sullivan v. Horner*, 41 N. J. Eq. 299.

Messrs. Earle & Purdy for respondent.

McGowan, J., delivered the opinion of the court:

The complaint alleges that Stephen B. Woodard, late of the county of Sumter, departed this life intestate, seised and possessed of a considerable estate, leaving as his heirs-at-law the plaintiff, his brother, and the defendants, Nancy Woodard, his mother, Henry Woodard and J. Frierson Woodard, his brothers, and Winnie S. Stuckey and Mary E. Stuckey, his sisters; that J. Frierson Woodard was appointed administrator of the estate. And plaintiff is informed and believes that said administrator has not accounted for certain specified personal property belonging to the estate, and had paid out without warrant or authority of law various sums of money, amounting in the aggregate to \$1,250, for some services rendered by certain gentlemen of the bar for and in behalf of the said J. Frierson Woodard in his own right, and not for the benefit of the said estate, and that upon an *ex parte* application, of which the plaintiff had no notice, the said J. Frierson Woodard was improperly and illegally discharged as administrator as aforesaid by the probate court for said county; that Nancy Woodard, Henry Woodard, Winnie S. Stuckey, and Mary E. Stuckey were made defendants because they refused to join as plaintiffs in the action. Wherefore the plaintiff prayed that the pretended discharge of the said J. Frierson Woodard as administrator should be set aside, and the said administrator aforesaid be required to account for his actings and doings, etc. J. F. Woodard answered, denying that he was illegally discharged as administrator, or that he had failed to account for any property of the estate in his hands to be administered. He admitted, however, that as administrator he paid out the sums of money referred to in the complaint, aggregating \$1,250, as stated, but denied that he paid such sums without warrant or authority of law, or in his own behalf; and he denied that said payments were not for the benefit of the estate. "He alleges that the intestate, the brother of the plaintiff as well as of this defendant, was intentionally shot down and killed suddenly, in the main street of the town of

Bishopville, being engaged in no conflict, or even altercation, with his slayer; that it was alleged on the part of the slayer and by his friends that he was justified in so slaughtering the deceased, who, it was alleged, had been guilty of such ungentlemanly and insulting and dishonoring conduct towards, and remarks to or about, an unmarried daughter of the slayer that he (the deceased) deserved to be shot down as he had been, and merited the ignominious death which befell him; that rumor was busy in besmirching the fair reputation of the deceased, who had occupied a respectable station in society, had demeaned himself as a high-toned and honorable gentleman, and had meritoriously achieved for himself a good name and reputation; that it was known that the slayer, in his approaching trial for the said homicide, would seek an opportunity to justify himself, or diminish the criminality of his act, by endeavoring to establish the truth of the allegations above referred to, of ungentlemanly and insulting and dishonoring conduct and remarks of the deceased towards and of or about the said young lady; and the nearest relatives and heirs of the deceased (except, perhaps, the plaintiff) felt that it was due to the memory of the deceased, and that it was an obligation of the highest nature upon them, that at least a portion of deceased's estate should be used in the vindication of his name and character from charges which menaced his name and character with obloquy; that for such vindication it was necessary to employ counsel to assist the state's attorney in the preparation for and the conduct of the said trial, and that the lawyers' fees, the payment of which is objected to in the complaint, were paid to the attorneys for their services in the preparation for and conduct of said trial; that the deceased left an estate of the value of more than \$10,000 over and above all his indebtedness; that the payment of said fees by the legal representative of the deceased out of his estate was a proper expenditure, and for the benefit of the estate," etc. The plaintiff died pending the suit, and *Judge Witherspoon*, on October 26, 1889, passed an order by which the action was continued in the name of Martha J. Woodard, his administratrix. The cause came on for trial before *Judge Fraser*, who, stating that for the purposes of the hearing, and for this purpose only, the allegations in the complaint and answer were admitted to be true, with the additional fact that upon the trial of the case therein referred to William A. James was acquitted by the jury, held that he was not able to find any authority which would justify him in holding that the administrator of Stephen D. Woodard had a right to use a portion of his estate to pay fees to counsel employed by him to assist the solicitor in prosecuting the case against William A. James, charged with the murder of the deceased; and he therefore decreed that Martha J. Woodard, as administratrix of Addison S. Woodard, do recover against J. Frierson Woodard, administrator of Stephen D. Woodard, one sixth of \$1,250 of the estate of the intestate so improperly paid out, with proper interest thereon, and referred it to the master to inquire and report what amount of principal and interest was due, etc. From this decree the defendant appeals to this court

upon several grounds. Inasmuch, however, as we think the real and only question in the case now is whether the administrator of the estate of the intestate, Stephen D. Woodard, was authorized by law to make the expenditure of \$1,250 for the professional services referred to, we need not set out in detail the grounds of appeal, which are all in the brief.

There can be no question as to the great importance of moral obligations, but the court has no power to enforce them as such. They lie beyond the scope of human tribunals for the administration of justice. As we understand it, our duty is simply to administer the law of the land as we conceive it, and we think it would be not only a grave but futile and dangerous error to attempt to reach beyond that. The universal law of civilized nations makes it the first duty of his legal representative to bury the body of the deceased in a decent manner, suitable to the estate he has left behind him. When that is done the law declares that his assets, after proper allowances for the expenses of administration, shall be applied to the payment of his debts in a particular order: (1) Funeral and other expenses of the last sickness; (2) debts due to the public, etc. It is true that in the case of *Perical v. DeVoy*, Dudley, L. 339, the majority of the court held that the aforesaid Act, in reference to "funeral and other expenses of the last sickness," should be construed liberally, as it was in accordance with the principles of Christian civilization to let it inure to its proper end,—the full relief of the sick and infirm. But the expenses here in question were never debts of the intestate. They were incurred after his death, and we can find no authority for placing them in the

class, either of funeral and other "expenses of the last sickness," or of the "expenses of administration." While we may well understand and appreciate the natural feeling which induced the expenditures, we cannot say that they were for the benefit of the estate, in the sense of the act, or allowed by law. We think there is nothing substantial in the circumstance that Judge Fraser put at the head of his decree the title of the case as it was originally instituted, and as the defendants' attorneys did in their printed argument for this court; but the decree recites the fact that "Addison S. Woodard had died since the commencement of the action, and the case had been continued in the name of his representative, Martha J. Woodard, administratrix," and the judgment was "that Martha J. Woodard, as administratrix of Addison S. Woodard, do recover against J. Frierson Woodard, administrator of Stephen D. Woodard, one sixth," etc. It was a mere clerical mistake, and a very natural one, and did not involve any substantial right. See *Henlein v. Graham*, 32 S. C. 807. We do not think this is an ordinary accounting by the administrator for a portion of the estate of his intestate unaccounted for, in which he would certainly be entitled to commissions; but we suppose the administrator received his commissions for paying out the fund when the settlement of the estate took place in the probate office. We are constrained to concur with the circuit judge.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIver, Ch. J., and Pope, J., concur.

CALIFORNIA SUPREME COURT.

Frank E. BATES, *Appt.*,

v.

E. S. BABCOCK, Jr., *et al.*, *Respts.*

(.....Cal.....)

1. Only the entire absence of a material fact in a complaint will make it insuffi-

cient on appeal to sustain a judgment on the merits.

2. An oral agreement of partnership in the profits of buying and selling real property is not within the Statute of Frauds.

(*Beatty, Ch. J., dissent.*)

(August 4, 1892.)

NOTE.—Validity of parol partnership for dealing in lands.

There is very little real conflict in the decisions upon this question. There are two lines of authorities each fairly consistent with itself and radically opposed to the other, which fact is caused, not by any conflict in principle, but by the different ends sought by the litigants. As a rule parol contracts for such partnerships are held valid and all suits recognizing the existence of the partnership and seeking relief which may be legitimately sought by a partner are upheld, while on the other hand parol contracts for an interest in land are ignored and suits brought to enforce them dismissed, although they may constitute a part of a partnership agreement.

Parol agreement to procure land on joint account.

A contract by one to buy lands on joint account of himself and another is within the statute. *Parsons v. Phelan*, 134 Mass. 109; *Bailey v. Hemenway*, 16 L. R. A.

6 New Eng. Rep. 613, 147 Mass. 326; *Brosnan v. McKee*, 6 West. Rep. 163, 63 Mich. 454; *Hollida v. Shoop*, 4 Md. 455, 59 Am. Dec. 38; *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14; *Wallace v. Stevens*, 64 Me. 225.

So an agreement to purchase land and transfer a portion to another is within the statute. *Harrison v. Bailey*, 14 S. C. 234; *Erben v. Lorillard*, 19 N. Y. 299; *Levy v. Brush*, 45 N. Y. 599; *Lamas v. Bayly*, 2 Vern. 627.

So an agreement by one to acquire title to land and then to convey a share thereof to another, upon the latter's paying his proportionate share of the purchase money, is within the statute. *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703.

Under an agreement that land shall be purchased for the joint benefit of two, if one procures the title to be transferred to himself the other cannot compel a division of the land. *Robbins v. Kimball*, 55 Ark. 416.

No action will lie to recover a portion of the

APPEAL by plaintiff from a judgment of the Superior Court for San Diego County in favor of defendants, and from an order denying a motion for new trial, in an action brought to obtain a settlement of certain alleged partnership transactions which had taken place between the parties. *Reversed.*

The facts are stated in the opinion.

Messrs. Sprigg & Barber, for appellant:

The contract was not obnoxious to the Statute of Frauds, for it was not an "agreement for the sale of real property, or of an interest therein."

Cal. Civ. Code, § 1741.

It was formerly held in Massachusetts, and imitated in California, that a copartnership agreement to deal in lands must be in writing.

1 Devlin, Deeds, § 80; *Gray v. Palmer*, 9 Cal. 639.

This rule, however, "is not in accord with the modern decisions."

1 Devlin, Deeds, §§ 80, 50, 51; *Coward v. Clanton*, 79 Cal. 23.

An oral agreement by which one is to negotiate the purchase of lands, and the other is to pay the price and take title, and when the latter shall sell the profits shall be divided between them, is not within the Statute of Frauds.

Snyder v. Wolford, 88 Minn. 175, 53 Am. Rep. 22.

The subject-matter of the contract was the profits to be realized from sales made, and the controversy here is as to such profits, and the adjustment of accounts as between the partners. This is a matter over which a court of

equity has complete jurisdiction, and the defendant cannot, after the contract has been executed, and the profits have gone into his hands, be heard to say that the contract under which the profits were realized was void under the Statute of Frauds.

Coward v. Clanton, *supra*.

The contract does not differ from those partnerships formed for the purpose of buying and selling real estate. Bates held the naked legal title in trust for the Millers, who had paid the consideration to the Beach Company, his grantors, and had made the improvements.

Cal. Civ. Code, § 853; *Hidden v. Jordan*, 21 Cal. 93.

The trust fastened not to the person of the trustee, but to the property.

2 Pom. Eq. §§ 298, 299.

The Statute of Frauds has no application to an executed agreement.

Remington v. Palmer, 62 N. Y. 84; *Green v. Wells*, 2 Cal. 586; *Beach v. Covillard*, 4 Cal. 817; *Whiting v. Healep*, 4 Cal. 830; *McDonald v. Mountain Lake Water Co.* 4 Cal. 836.

If the defendants intended to perform, their intentions should be enforced, for otherwise plaintiff will greatly suffer on account of his full or part performance.

Arguello v. Edinger, 10 Cal. 159; 3 Pom. Eq. Jur. § 1293; 2 Pom. Eq. Jur. §§ 858, 873, 874, 921; *Owen v. Frink*, 24 Cal. 176; *Willink v. Vandecree*, 1 Barb. 607; 1 Pom. Eq. Jur. §§ 103, 368; *Swain v. Burnette*, 89 Cal. 569; *Caldwell v. Carrington*, 84 U. S. 9 Pet. 86, 9 L. ed. 60; *Hidden v. Jordan*, 21 Cal. 101; *Grant v. Burr*, 54 Cal. 800.

lands bought under an agreement for a joint purchase. *Henderson v. Hudson*, 1 Munf. 510.

And in such case if one party refuses to pay his share of the purchase money and the advance payment is forfeited no action will lie against him to recover his share of the loss sustained. *Walker v. Herring*, 21 Gratt. 680, 8 Am. Rep. 616.

On the other side, under the Texas statute, which merely requires contracts for the "sale of lands" to be in writing, an agreement to bid off property at a sheriff's sale on joint account is not within the statute. *James v. Fulcoord*, 5 Tex. 518, 55 Am. Dec. 743.

So an agreement to locate land certificates and procure patents in consideration of part of the lands is not within the statute. *Watkins v. Gilkerson*, 10 Tex. 340; *Evans v. Hardeman*, 15 Tex. 480; *Smock v. Tandy*, 28 Tex. 120; *Gibbons v. Bell*, 45 Tex. 417.

So a contract that if A will move B to a certain place B will give A a portion of all the lands he acquires by reason of his location in such place, is not within the statute. *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 688.

So in Mississippi a contract to procure a conveyance of land and convey a portion to another upon payment of a share of the purchase money is not within the statute. *Evans v. Green*, 23 Miss. 295.

Incorporation of such contract in partnership agreement.

Where a law firm agreed to purchase real estate the title to be taken by one for the benefit of both, and he, after acquiring title, repudiated the agreement, the contract was held not to be enforceable. *Clarke v. McAuliffe* (Wis.) Jan. 12, 1892.

An agreement to form a partnership for the purchase of lands containing timber, by the terms of which one party is to negotiate the purchase, 16 L. R. A.

take the title in his own name, and pay the purchase money, and the other party is to render services in manufacturing the timber into lumber, in consideration of which he is to receive a portion of the land, which is to be conveyed to him, and an interest in the profits made,—is a contract which must be in writing. *Raub v. Smith*, 61 Mich. 543.

The fact that such contract is part of a partnership agreement is immaterial so far as recovering a portion of the land is concerned.

A bill to compel conveyance of a share of the property cannot be maintained. *Parker v. Bodley*, 4 Ky. 102; *Cowell v. Watts*, 3 Hall & T. 224; *Young v. Wheeler*, 34 Fed. Rep. 98.

Validity of parol partnership generally.

There seems to be no claim that a partnership agreement cannot in general be formed by parol. When the concern is once established it seems that it may purchase lands although it exists only in parol. And it is immaterial that the title is in one of the partners. *Allison v. Perry*, 130 Ill. 9, affirming 28 Ill. App. 400.

And it seems that real estate owned by it will have all the characteristics of other partnership real estate. *Bopp v. Fox*, 63 Ill. 540.

A parol partnership is valid and real estate held by it for partnership purposes will constitute partnership property and be subject to the same disposition as other partnership property. *Knott v. Knott*, 6 Or. 143.

The partnership is not invalid because one of its objects is to purchase real estate for use by the firm. *Smith v. Tarlton*, 3 Barb. Ch. 333, 5 L. ed. 665.

It is immaterial that the purchase of specific lands is contemplated. *Pennybacker v. Leary*, 65 Iowa, 222.

That lands are partnership property may be

Messrs. Works & Works, for respondents:

The basis upon which the appellant proposed to compel an accounting was shown by his demand made upon the defendants before bringing this suit, in which he says: "I hereby offer to transfer to you said property and its proceeds and to fully account with you." It shows also that the title to the property was then in the appellant.

There can be no kind of question that this was a contract for the purchase of an interest in real estate. If so it is directly within the letter, as well as the spirit, of our statute.

Chester v. Dickerson, 54 N. Y. 1.

A contract for any interest in lands, legal or equitable, no matter how small, is within the statute.

1 Warvelle, Vend. & P. 172; *Fuller v. Reed*, 38 Cal. 99; *Whiting v. Butler*, 29 Mich. 121; *Grover v. Buck*, 34 Mich. 519; *Daniels v. Bailey*, 43 Wis. 566; 8 Am. & Eng. Encyclop. Law, 694 *et seq.*

The attempt is to show an express trust in Hubbell, for the benefit of the parties to this action, which must itself have been expressed in the deed to have been valid.

Civ. Code, § 852; *Re Hinckley*, 58 Cal. 483.

There is nothing whatever in the deed which shows what the terms of the contract, alleged in the complaint, were. It would still have to be established wholly by parol testimony, which is the very thing the statute is intended to guard against.

Swain v. Burnette, 89 Cal. 564.

Harrison, J., delivered the opinion of the court:

The plaintiff brought this action against the defendants for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate in San Diego. At the trial of the action the plaintiff offered himself as a witness, and, under the objection of the defendants that it was incompetent and immaterial, gave testimony tending to show that an oral agreement had been made between himself and the defendant Babcock, acting on behalf of the defendant the Coronado Beach Company, of which he was president, by which they were to pay off the incumbrances upon certain real estate, sell and dispose of the same, and share the profits and loss in dealing therein; that for that purpose he gave to the defendants \$15,000 with which to pay certain claims and incumbrances thereon, and that the same was so applied; and that at the request of the defendant Babcock a conveyance of the property was executed to one Hubbell, who was the secretary of the defendant corporation. After this testimony had been given the defendants moved to strike out all portions thereof "relating to an agreement for an alleged partnership between the plaintiff and the defendants, or either of them, in the land described in the complaint, or any partnership between the parties, upon the ground that the same is incompetent and immaterial; that a partnership of the character alleged in the complaint must be proved by an instrument in writing, signed

proved by parol. *Fairchild v. Fairchild*, 64 N. Y. 471.

Although the title is in one of the members. *York v. Clemens*, 41 Iowa, 95.

In Pennsylvania it was originally held that real estate cannot be shown to be partnership property by parol. *Hale v. Henrie*, 2 Watts, 143, 27 Am. Dec. 239; *Ridgway's App.* 15 Pa. 177, 53 Am. Dec. 536.

Under that rule a parol agreement made before a partnership exists to put land into the firm or to consider it as firm property passed no title either in law or equity. *McCormick's App.* 57 Pa. 54, 95 Am. Dec. 191.

But if the land is bought with partnership funds for partnership purposes, and title is taken in the name of one of the partners, it may be shown to be partnership property. *Erwin's App.* 39 Pa. 536, 80 Am. Dec. 542.

And as between the partners themselves it will be firm property although conveyed to them as tenants in common. *Abbott's App.* 50 Pa. 234.

So that the present rule seems to be that as between the partners themselves parol evidence is admissible to show that real estate is firm property, but as to third persons, an agreement of parties to make real estate part of the common stock must be in writing. *Le Fevre's App.* 69 Pa. 122; *Ebbert's App.* 70 Pa. 79; *Harding v. Devitt*, 10 Phila. 95.

In Louisiana, on the other hand, a partnership, which has for its object the acquisition of real estate must be in writing. *Pecot v. Armelian*, 21 La. Ann. 667.

Or where any of the partnership stock is to consist of real estate the agreement must be in writing. *Dunbar v. Bullard*, 2 La. Ann. 510; *Benton v. Roberts*, 4 La. Ann. 216.

Parol partnership for dealing in lands.

If an ordinary partnership may be formed by parol, and if it may purchase and hold real estate 16 L. R. A.

as partnership property which will be regarded in all respects as other partnership property, as indicated by the above decisions, is there any reason why a parol partnership formed for the express purpose of dealing in lands should be invalid?

In *Smith v. Burnham*, 3 Sumn. 485, in which such a partnership had been formed, the bill prayed for an account and that if any lands remained unsold defendant might be decreed to convey to plaintiff his just and equitable share. The question was very fully considered by *Mr. Justice Story*. Although he reached the conclusion that there was no sufficient evidence of a partnership as alleged in the bill, he proceeded to decide that a parol agreement for dealing in lands is within the statute. The judge said it was a case of the declaration or creation of a trust or confidence in lands not arising or resulting by implication or operation of law. He repudiated the argument that the several interests attached only to the proceeds by saying that the agreement, if good at all, attached also to the lands at time of the purchase and it is then an agreement for an interest by way of trust in land, and it is in virtue of this trust estate, and this only, that a right can attach to a moiety of the proceeds. The conclusion was that the whole title of plaintiff "resolves itself into a parol trust created by an express agreement of the parties in the purchase and sale of the lands on joint account which is within the Statute of Frauds."

The principle of that decision was followed in *Rowland v. Booser*, 10 Ala. 685, and *Gray v. Palmer*, 9 Cal. 639, which latter case was practically overruled by *Coward v. Clanton*, 79 Cal. 27. Such agreement must also be in writing in Louisiana. *Pecot v. Armelian*, 21 La. Ann. 667.

It was subsequently held that the rule of *Smith v. Burnham*, *supra*, does not apply in favor of third persons. As to them a partnership may be proved by parol. *Re Warren*, 2 Ware, 320.

by them, or one of them." The court granted the motion, saying that "the contract, as alleged in the complaint and supported by the evidence, is one clearly for an interest in lands, and as such is void under the Statute of Frauds." Upon the submission of the cause the court in its decision found that there had been no agreement for a partnership in the land, and rendered judgment in favor of the defendants. From this judgment, and an order denying his motion for a new trial, the plaintiff has appealed.

We cannot upon this appeal consider the objections to the complaint that were made by the demurrer thereto, except the one specifying that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled for "want of presentation," and the defendants, having gone to trial upon their answer, obtained a judgment in their favor upon the merits. Upon an appeal by the plaintiff from that judgment we can consider only such errors of the court as are shown to have contributed to its rendition, and not such as might have defeated a contrary judgment. If a judgment in favor of the defendant is the result of errors in excluding evidence that should have been received, he, as respondent upon an appeal, cannot for the purpose of sustaining that judgment have a consideration of errors against him which were entirely disconnected with the trial, or the judgment rendered. Objections to a complaint which should be pointed out by special demurrer, such as uncertainty or ambiguity, are insufficient, unless so specified, to defeat a verdict

against the defendant, nor can they, if overruled after having been so specified, be considered for the purpose of sustaining a judgment in his favor that was erroneously rendered after a trial upon the merits. It is only when there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof, and, if sufficient to sustain the averments, to render a judgment as asked by the plaintiff.

The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. The averment that the defendants agreed with the plaintiff that if he would pay certain claims against the property "they would become equal partners with him in the said property," does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with the averment immediately following, viz., "and would share equally with him, in the proportion of one

In *Bird v. Morrison*, 12 Wis. 183, in which the court says that an agreement of partnership for dealing in real estate is within the statute, the action was not to recover a share of the profits but a share of the land the title to which was held by one of the members.

In opposition to the above decisions is the entire weight of authority English and American. *Dale v. Hamilton*, 5 Hare, 383, in which the validity of the partnership was recognized, is usually regarded as the leading case in favor of the prevailing doctrine. In that case the distinction taken in argument and apparently acted upon by the court was this: If the allegation is of an agreement to transfer an interest in the land the statute applies; if the allegation is that the land is to be improved and resold at the joint risk for profit or loss, the statute does not apply.

A verbal agreement to share any profits arising from the purchase and sale of real estate may be made independent of any contract for an interest in the land itself. Such agreement may become the foundation for a money judgment, but not for a decree affecting the title. *VonTrotha v. Samburger*, 15 Colo. 1.

An interest in lands cannot be established by parol, but that rule does not apply to an agreement for division of profits. *Everhart's App.* 106 Pa. 349.

In *Chester v. Diokerson*, 54 N. Y. 9, 13 Am. Rep. 550, in which the question was as to the liability of the members of the alleged firm for the fraud of one of the members, the court ruled that the fact that the partnership was by parol and the business was dealing in lands presented no obstacle to holding the members to partnership liability while they pretended to be acting as such.

In *Williams v. Gillies*, 75 N. Y. 197, the validity of the contract was assumed for the purpose of 16 L. R. A.

considering the liability of one partner upon a bond for purchase money signed by the other.

A parol agreement of partnership for dealing in lands is not within the Statute of Frauds. *Holmes v. McCray*, 61 Ind. 353, 19 Am. Rep. 735; *Richards v. Grinnell*, 63 Iowa 44, 50 Am. Rep. 727; *Kilbourn v. Latta*, 5 Cent. Rep. 425, 5 Mackey, 304, 60 Am. Rep. 373.

An agreement to divide the profits resulting from the purchase and sale of a farm is not within the Statute of Frauds. *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592.

A partnership for dealing in options in coal lands is not within the statute so as to prevent the recovery by one party from the other of his share of the profits. *Howell v. Kelly* (Pa.) May 23, 1892.

It is immaterial that the title to the land was taken in the name of one of the parties. *Newell v. Coobran*, 41 Minn. 374.

In application of the above doctrines it is held that the statute has no application where the action is for a division of the profits. *Bunnell v. Taintor*, 4 Conn. 372.

Therefore an action will lie to recover profits. *Davis v. Gerber*, 13 West. Rep. 394, 69 Mich. 246; *Snyder v. Wolford*, 33 Minn. 175, 53 Am. Rep. 22.

An accounting of profits may be enforced. *Petrie v. Torrent*, 38 Mich. 43; *Benjamin v. Zell*, 100 Pa. 33.

So a suit for accounting and division of profits is sustainable. *McElroy v. Swope*, 47 Fed. Rep. 390.

The fact that different rules are required for transferring lands than personalty can make no difference in the result as to profit and loss. *Dudley v. Littlefield*, 21 Me. 423.

After the fulfillment of the contract it is too late to deny its execution or complain of the manner in which it was entered into. *Hunter v. Whitehead*, 42 Mo. 524.

half to plaintiff and one half to defendants, all sums received for said property, and all profits and losses accruing on account thereof," which is evidently inserted by way of explanation, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land. It appears from the complaint that at the time of this agreement the property in question was owned by one Miller and his wife, and that the defendant corporation held certain mortgages thereon, which were subordinate to certain other liens, and that the title to the property stood in the name of the plaintiff, and was held by him "as trustee for the benefit of said Miller and wife." It does not appear that the plaintiff had any beneficiary interest in the land, and the averment that \$5,000 of the money advanced by him under the agreement was paid to the Millers, "for a release from the said trust in their favor," confirms the inference that it was merely a dry, naked trust. The subsequent averment that, "in pursuance of said agreement" then made, the plaintiff paid to the defendants \$15,000 with which to remove certain charges and incumbrances, and that "all of said property was duly transferred by plaintiff to O. S. Hubbell, Esq., secretary of said Coronado Beach Company, as trustee for the parties hereto, to facilitate a sale," and that with the concurrence of the defendants the plaintiff paid liens and debts on account of said property amounting to \$42,000, removes all possibility of construction that the agreement was for a sale of the

property to the defendants, or for the creation of an interest or estate therein, and shows that the parties dealt with the property as assets of their said partnership.

A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional or commercial or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture. *Dudley v. Littlefield*, 21 Me. 422; *Oester v. Dickerson*, 54 N. Y. 1; *Williams v. Gillies*, 75 N. Y. 201.

Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a dictum in *Gray v. Palmer*, 2 Cal. 689, to the effect that it must be in writing, for which *Story*, Partn. § 88, is cited as authority; and in *Smith v. Burnham*, 3 Sumn. 458, it was so held by that distinguished jurist. The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence. It was so stated in *Coward v. Clanton*, 79 Cal. 23, where it was held that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of

Where the contract is to purchase and sell lands and share the profits, one who has taken the title, made the sale, and realized a profit, cannot set up the Statute of Frauds to avoid accounting. *Coward v. Clanton*, 79 Cal. 27.

He is estopped from claiming that the agreement is void under the Statute of Frauds. *Flower v. Barnekoff*, 11 L. R. A. 149, 20 Or. 132.

Conversely the statute is no defense to a suit to compel contribution toward a loss. *Babcock v. Read*, 99 N. Y. 609; *Wormser v. Meyer*, 54 How. Pr. 189.

Where the contract has been executed and the suit is brought to compel one of the parties to contribute towards advances and share liabilities, the statute does not apply. *King v. Barnes*, 12 Cent. Rep. 204, 109 N. Y. 286.

The promise of one partner to reimburse the other for money advanced by him in the common undertaking is not within the statute. *Wetherbee v. Potter*, 99 Mass. 364.

A parol agreement to purchase lands and share the profits is so far valid as to support an action against one of the parties to compel him to contribute his share of the purchase money. *Meason v. Kaine*, 63 Pa. 339.

Methods of enforcing rights.

In *Morrill v. Colehour*, 63 Ill. 618, the court said, had the one who took the title failed to make the sales as contemplated by the parties he could, no doubt, have been compelled to do so or another would have been appointed for the purpose by the court.

Where real estate is held for the purpose of a partnership, there is a trust by operation of law for the partners as tenants in common though it has not been declared in writing. *Hanff v. Howard*, 56 N. C. 410.

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Upon the dissolution of the partnership and a full payment of the partnership debts the partners become tenants in common with regard to any and all real estate still belonging to the partnership, and the court will decree a division. *Tenney v. Simpson*, 37 Kan. 363.

If the one taking the title disposes of the lands at a profit a resulting trust will arise in favor of the other. *Wallace v. Carpenter*, 85 Ill. 590.

The rights of one member may be made effectual to him by decreeing the execution and delivery to him of a conveyance of his undivided share or by directing a sale of the property and a division of the proceeds. *Bissell v. Harrington*, 18 Hun, 56.

But a trust in land cannot be predicated upon proof of an agreement to create a partnership for the purpose of purchasing and handling or improving the same, the partnership relation not having existed prior to acquisition of title and no partnership funds having been invested in the property. *Kayser v. Maughan*, 8 Colo. 232.

Where an agreement had been made for purchasing and selling farms under which two farms had been purchased jointly, and then one of the members took the title to a third in his own name, and it was always treated as firm property, the court held there were elements of fraud in the case which would cause equity to compel a conveyance of plaintiff's share of the property. *Traphagen v. Burt*, 67 N. Y. 30.

In *Larkins v. Rhodes*, 5 Port. (Ala.) 196, in which the bill alleged a copartnership for entering public lands and dividing the profits and prayed a division of the lands which had been purchased, the court refused to consider the question of partnership on the ground that it was within the Statute of Frauds, but considered the case as one of resulting trust.

the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing. More than a hundred years ago it was held by Lord Thurlow in *Elliot v. Brown*, reported in 3 Swanst. 489, *Jeffereys v. Small*, 1 Vern. 217, that the right of survivorship in a joint demise of a farm was destroyed by reason of the tenants having farmed the land upon joint account, and thus by their acts made it partnership assets. The question was very fully considered by *Vice Chancellor Wigram* in *Dale v. Hamilton*, 5 Hare, 369, wherein previous decisions involving similar principles were reviewed, and it was held that under the principles of those decisions the existence of such a partnership could be shown by general evidence, without the necessity of a written agreement. In that case a parol agreement had been entered into under which a tract of land was to be purchased in the name of one McAdam, and laid out in lots and resold, he furnishing the capital, and the plaintiff the skill and labor, necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdam, but the defendants, who had succeeded to McAdam, with notice of the agreement, afterwards refused to carry it

out. Thereupon the plaintiff filed his bill for an accounting and a sale of the land under the direction of the court, with a division of the proceeds, in accordance with the terms of the agreement. The defendants resisted the suit upon the ground that the agreement was within the Statute of Frauds, and could be established only by an instrument in writing, but the vice-chancellor overruled their objections and upheld the bill. In his opinion (page 883) he uses the following illustration in support of his conclusion, which is peculiarly appropriate to the present case: "In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value; that a loss had been sustained, and that Hamilton and McAdam were the plaintiffs, seeking to compel Dale to contribute his proportion of the loss. If in this case the authorities would have enabled Hamilton and McAdam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will upon like proof support the present suit upon the principle—that of mutuality in remedies—which enables a vendor to recover the purchase money in this court though the remedy at law may be equally adequate, and more

Partnership in securing products from land.

A parol agreement of partnership for working lands is not within the statute. *Personette v. Pryme*, 84 N. J. Eq. 23.

An agreement that one shall procure the transfer of land to another who shall pay for it and that both shall open and work a quarry thereon and share the profits, is not within the Statute of Frauds. *Treat v. Hiles*, 68 Wis. 344, 60 Am. Rep. 858.

An agreement to form a partnership for the purpose of acquiring a lease in a certain mining property and extracting the ores therefrom is not within the Statute of Frauds, but it may be proved by parol in a suit between the partners for a settlement of the partnership affairs. *Reed v. Meagher*, 9 L. R. A. 455, 14 Colo. 335.

A partnership in carrying on a colliery is not within the statute, and an interest in the lease will pass by operation of law as incident to the trade. *Forster v. Hale*, 5 Ves. Jr. 306.

In *Godfrey v. White*, 43 Mich. 171, an agreement to procure lands and work gypsum mines on them, which was executed by the procurement of the lands and having a portion of the title conveyed to each of the parties and the lands worked for some time, was treated as a partnership venture and settled as such.

But the line of distinction is strongly brought out by a decision that an agreement between a lessee of a mine and another person to become partners in the lease, pay the rent, and collect royalties, is within the statute. *Caddick v. Skidmore*, 2 DeG. & J. 52.

Under the Louisiana rule as indicated above a partnership in crops cannot be proved by parol. *Gantt v. Gantt*, 6 La. Ann. 677.

Other contracts relating to lands.

A contract by the owners of land to give another a certain portion of the proceeds for selling it, is not within the statute. *Heyn v. Phillips*, 37 Cal. 531; *Carr v. Leavitt*, 54 Mich. 540.

A parol contract that one shall buy lands for another, who shall sell them and pay the former a

portion of the proceeds, is not within the statute. *Harben v. Congdon*, 1 Coldw. 221.

A parol promise to pay another a portion of the profits made by the promisor, in the purchase and sale of real estate, is not within the Statute of Frauds. *Trowbridge v. Wetherbee*, 11 Allen, 361.

When the land has been sold an action will lie to recover the promised share. *Ibid.*

An agreement by which one was to look up and locate lands, and another was to pay for and take title to them, and then sell them and pay the former a portion of the proceeds, is not within the statute. *Watters v. McGuigan*, 72 Wis. 155.

An agreement whereby one person is to improve and sell lands of another and after paying an agreed sum to the owner of the lands to share in the proceeds of the sale, is not a contract for the sale of land within the Statute of Frauds. *Lesley v. Rosson*, 39 Miss. 368, 77 Am. Dec. 679.

An agreement to jointly locate, develop, and mine quartz lodes is not within the statute. *Hirbour v. Reeding*, 8 Mont. 15.

An agreement to explore the public domain and discover and locate lodes for the joint benefit of the contractors is not within the Statute of Frauds. *Murley v. Emla*, 2 Colo. 300.

Transfer of partnership interest.

An interest in an agreement to share profits of dealings in lands may be released by parol. *Morrill v. Colehour*, 82 Ill. 618.

A member may be admitted by parol into a firm owning real estate. *Marsh v. Davis*, 33 Kan. 323.

But where one member of a partnership dealing in lands sold a part of his share to a third person it is held to be within the Statute of Frauds. *Black v. Black*, 15 Ga. 450.

Availability of statute as a defense.

The statute must be pleaded as a defense to the accounting in order to be available. *Patterson v. Ware*, 10 Ala. 447.

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appropriate," and cites several authorities to the effect that in such a case the defendant would have been liable for contribution. The rule laid down in *Dale v. Hamilton* has since been generally followed, and, although there are some decisions to the contrary, may now be said to be the prevailing rule upon that subject. Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the Statute of Frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement, —that sense in which the beneficiary under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land, but it is only a pecuniary interest resulting from the sale, and a right to have the land sold, rather than an interest in the land itself. The Statute of Frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the Statute of Frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but, by reason of the acts of the parties thereunder, an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity. It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personally, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships.

The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. The question has frequently arisen in actions for the division of the proceeds after a sale under such an agreement, and it has been invariably held that the Statute of Frauds is no defense thereto. *Bruce v. Hastings*, 41 Vt. 380, 93 Am. Dec. 592; *Benjamin v. Zell*, 100 Pa. 39; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Babcock v. Read*, 90 N. Y. 609; 16 L. R. A.

Coward v. Clanton, 70 Cal. 23; *Reed*, Stat. Fr. § 727. See also *Hyers v. Locke*, 98 Cal. 493. Under such an agreement it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement was invalid at the outset, it could not form the basis of such an action. If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and, although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose, the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners. This was the case presented and maintained in *Dale v. Hamilton*. The same procedure was upheld in *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727; *Bunuel v. Taintor*, 4 Conn. 568; *Hunter v. Whitehead*, 42 Mo. 524; *Bissell v. Harrington*, 18 Hun, 81; *Holmes v. McOray*, 51 Ind. 353, 19 Am. Rep. 735; *Coward v. Clanton*, 70 Cal. 23. After the agreement for the purchase and sale has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the Statute of Frauds. *Pico v. Cuyas*, 47 Cal. 174. The Statute of Frauds has no application to an executed agreement.

That the agreement between the parties which is averred in the complaint, and the evidence given in support thereof, did not contemplate any transfer of the land or of any interest therein to the defendants, or either of them, but had for its object only a division of the profits and loss that would remain after its sale, is shown by a consideration of the averments of the complaint hereinbefore presented, and also by the direction of Babcock to the plaintiff, while negotiating the agreement, to "sell it off as soon as you can, pay up the debts, and divide the profits." It was not necessary for the plaintiff, in support of these averments, to produce written evidence of the agreement, but the agreement could have been established by his oral testimony; and the court erred in striking out the testimony that he gave in support of the agreement. The first question to be determined by the court was whether there was a partnership, and that fact could be shown by general evidence. In *Forster v. Hale*, 5 Ves. Jr. 309, where the right to an interest in the leasehold of a colliery, claimed by virtue of a partnership with one of the leasees, was involved, and it was objected that, by permitting parol evidence to establish such interest, an interest in real estate or a declaration of trust would be gained without any writing, in violation of the Statute of Frauds, Lord Loughborough said: "That is not the question; it is whether there was a partnership. The subject being an agreement for land, the question is whether there was a resulting trust for that partnership by operation of law. The question of partnership must

be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership."

Under the same principles, if in the present case the court should find upon sufficient evidence that a partnership existed between the parties, the fact that they would have an interest in the land which forms a portion of the assets of the partnership would result by operation of law as an incident to such partnership,

but this result would not constitute a reason for excluding parol testimony to establish the existence of the partnership.

For the error of the court in striking out the evidence of the plaintiff, *the order and judgment are reversed*, and the court is directed to grant a new trial.

We concur: **Paterson, J.; Sharpstein, J.; De Haven, J.; Garoutte, J.; McFarland, J.**

Beatty, Ch. J.:

I dissent. The complaint, in my opinion, shows no cause of action, and the evidence offered and stricken out by the court was of a parol contract, invalid under the Statute of Frauds.

MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN, *ex rel.* Henry C. KUNZE *et al.*, *Appts.*,

v.

FT. WAYNE & ELMWOOD R. CO.

(.....Mich.....)

1. A street railway in a street does not create an additional servitude.
2. The grant of the right to lay a street railway in a street where the driveway is so narrow that but 8 feet 7½ inches will be left on each side of a street-car for the passage of teams is not beyond the power of a city council.
3. Quo warranto will not lie to exclude a street railway company from the right of laying its tracks in a city street, which has been granted to it by the municipality acting within the scope of its authority.

(*Moree, Ch. J., and McGrath, J., dissent.*)

(July 28, 1892.)

APPEAL by relator from a decree of the Circuit Court for Wayne County in favor of defendant in a proceeding in the nature of quo warranto instituted to exclude defendant from exercising the right of laying tracks upon a public street in the city of Detroit. *Affirmed.*

The facts sufficiently appear in the opinions. *Messrs. Henry M. Cheever and Jasper C. Gates*, with *Messrs. A. A. Ellis, Atty-Gen.*, and *Samuel W. Burroughs*, for appellants.

Messrs. Edwin F. Conely and Orla B. Taylor, for defendant.

The clear and well-defined policy of this state, in the matter of roads, streets, and the like, has been to confide jurisdiction of all subjects falling under that head to the management and supervision of local authorities.

NOTE.—For a collection of authorities upon the question how far a street railway is regarded as an additional burden on the rights of the abutting owner, see *note* to *Iron Mountain R. Co. v. Bingham* (Tenn.) 4 L. R. A. 624.

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Mich. Const. art. 4, § 23; art. 10, §§ 9, 11; art. 14, § 9; art. 18, § 4.

In furtherance of this policy the various charters of the city of Detroit have conferred upon that municipality full control over its streets, avenues, squares, and other public places.

Detroit Charter, ed. 1886, pp. 69–71, §§ 131, 132.

If the local authorities are satisfied in any of these matters, it is of little or no concern to the state whether represented by the attorney-general or the prosecuting attorney.

The state is not concerned in every municipal irregularity, and it would be a very curious condition of affairs if, upon every divergence from the strict letter of the law not amounting to usurpation or abuse, the solemn intervention of the state can be demanded or invoked.

Atty-Gen. v. Detroit, 26 Mich. 263; *Atty-Gen. v. Moliter*, 26 Mich. 444; *Atty-Gen. v. Kwart Boom. Co.* 34 Mich. 462; *Atty-Gen. v. Detroit*, 55 Mich. 181; *Grand Rapids v. Grand Rapids Hydraulic Co.* 10 West. Rep. 631, 66 Mich. 606.

The exercise of the power of using streets for street railway purposes is rather an easement than a franchise.

Maybury v. Mutual Gas Light Co. of Detroit, 38 Mich. 154.

Montgomery, J., delivered the opinion of the court:

This is an action in the nature of a quo warranto filed to exclude the defendant corporation from laying its tracks upon and occupying for the purposes of a street railway Champplain street, in the city of Detroit, from Randolph street to Elmwood avenue. It is claimed that the defendant has no right to the franchise or privilege in question, because (1) the street is too narrow to admit of defendant's cars and other vehicles at the same time, and that the contemplated use by the defendant will interfere with the right of the general public in the street; (2) that the amended ordinances of the city of Detroit under which the defendant claims are invalid, for the reason

that the original ordinance was not re-enacted and published, but it was attempted to amend it by reference to its title merely; and for the further reason that the council by this ordinance attempts to grant to the defendant the exclusive use of the street for street railway purposes.

1. The case shows that the width of Champlain street is 50 feet, and the paved portion 25 feet. The ordinance gives the defendant the right to construct a single track railway in the middle of the street. The gauge of the track is 4 feet 8½ inches, and the width of a close car 7 feet and 9 inches, leaving a space of nearly 9 feet for the passage of vehicles. This is sufficient width to admit of the passage of ordinary vehicles, and the ordinance is not, in my opinion, so unreasonable as to require the interference of the court, if it be held that an ordinary street railway is not in and of itself an additional servitude. I think such a use of the street does not create an additional servitude. Opinion of *Justice Grant*, *Detroit City R. Co. v. Mills*, 85 Mich. 643, and cases cited; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Grand Rapids St. R. Co. v. West Side St. R. Co.* 43 Mich. 433.

2. The right being such a one as the common council had a right to grant, and the common council having assumed to grant the right, the case presented is not such a one as calls for the exercise of the jurisdiction of this court in a public proceeding instituted by quo warranto. The question presented is similar to that involved in *Maybury v. Mutual Gas-Light Co.* 38 Mich. 154. In that case it was sought by quo warranto to deprive the respondent of its franchises, on the ground that the company had violated the terms of the agreement upon which the assent of the city to the use of its privileges was granted. *Chief Justice Campbell*, in delivering the opinion of the court, said: "In the present case the state has shown by the incorporating Act that public policy is not opposed to and is in favor of allowing gas companies to exist, as they only can exist by having power to lay their pipes. The consent of the municipal corporation is required because the terms on which streets may be safely allowed to be occupied for the purposes of laying gas pipes can best be determined by leaving the regulation to be harmonized with all other exigencies by the authorities controlling their use. . . . The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise. . . . It is a matter peculiarly local in its character, and which should always be to a reasonable extent under municipal supervision to prevent clashing among the many convenient uses to which ways must necessarily be subjected, for water, drainage, and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a state franchise, but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license, and in nothing else. A violation of the contract, or an unauthorized intrusion, must be redressed, as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the state whether the power

is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. . . . This court has heretofore refused to recognize the encroachment of a corporation on a highway as subject to be reached by quo warranto, and we discover no better reason for interfering in the present case." Relator's counsel rely upon *People v. Plymouth Plank Road Co.* 81 Mich. 178, and *Detroit v. Park Comrs.* 44 Mich. 803. The case of *People v. Plymouth Plank Road Co.* was a case involving a forfeiture of a franchise, and not a case for private redress. *Detroit v. Park Comrs.* was a proceeding against public officers to inquire into the exercise of a franchise in the matter of controlling and supervising a public park, and is not analogous. What was said upon this subject in *Detroit City R. Co. v. Mills*, 85 Mich. 647, 648, was unnecessary to the determination of the case, and should be limited at least in its application to a case where the right attempted to be exercised is one which the local authorities have not power to confer, which is not the case here.

3. It is unnecessary to determine whether there was any irregularity in the enactment of the ordinance conferring the right to use Champlain street. If so, it was an irregularity, and is a matter in which the state is in no way concerned.

4. It is unnecessary to determine whether the council has the power to grant an exclusive use of the street for street railway purposes to one corporation. It does not appear that any attempt has been made by others to acquire a similar privilege. Certainly the grant is good to the extent of the power which the council has under the statute, and, if it has exceeded its power in this regard, the question can properly be raised when other interests require it.

Long and Grant, JJ., concurred with **Montgomery, J.**

McGrath, J., dissenting:

I think that this case comes clearly within the exceptions mentioned in *Detroit City R. Co. v. Mills*, 85 Mich. 643. *Justice Grant* in that case discussed the questions involved upon the expressed "assumption that sufficient room was left to permit the free passage of teams and vehicles when the cars were upon the track." There the street had recently been brought within the city limits, it had not been graded or paved, and the width of the roadbed had not been established, and it is said that "the distance from the rail to the pole is about nineteen feet. This space is ample for the passage of teams and vehicles, if the street were properly graded." It was held that a street railway could not be lawfully constructed and operated in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor so as to interfere with the rights of the general public in the street, nor in a street, though of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the use of the street.—citing *Grand Rapids St. R. Case*, 43 Mich. 433.

Champlain street is a residence street, and has been graded and paved. It is 50 feet wide,

with a roadbed 25 feet wide, leaving a space of 12½ feet each side of the roadbed for sidewalks and shade trees. A car upon the track leaves a space of 8 feet 7½ inches between the car and the curb. A lumber wagon is 5 feet 9 inches wide, a heavy truck is 7 feet 8 inches, and the space within which an ordinary load of hay can pass is 10 feet 7 inches. Shade trees line each side of the roadway in the spaces between the curbs and the sidewalks. Under such circumstances, a physician's buggy, a milk wagon, a grocer's cart, or a family carriage standing at the curb is an obstruction to the street. Imagine a fire engine, a street-car, and a family carriage, or a funeral procession, upon that street at the same time. Champlain street leads to Elmwood and Mount Elliott cemeteries, to the Boulevard and to Belle Isle park. Upon certain portions of it a double track is authorized to be laid by the ordinance in question. Who, with any experience in such matters, will attempt to say that the general driving public will not be practically excluded from that street? In such case, under the rule laid down in the *Mills Case*, the proposed use of the street is one of which the general public has the right to complain. In the *Grand Rapids Street Railway Case*, Justice Campbell says: "That body [the council] certainly cannot properly so multiply tracks as to interfere with the rights of the general

public in the street." The number of tracks is not the test of the council's power; it is the fact of exclusion. Nor is the exercise of the discretion given to the council final or conclusive, for, if so, it is equally conclusive when exercised respecting a multiplicity of tracks. The common council cannot create a nuisance, nor can a use of a street which practically excludes others from it, and injuriously affects the rights of the public, be regarded as authorized by law. The grant of the privileges or consent to such use must be treated as an abuse of discretion, and is no defense. *Maybury v. Mutual Gas-Light Co.* 38 Mich. 154, has no application. The complaint there was that the company had violated the terms of an agreement with the city,—one of the conditions upon which the city had granted certain privileges. The court held that public policy was in favor of allowing gas companies to exist, and was not concerned in the enforcement of a purely local condition. This is, however, a proceeding not to punish but to enjoin a use of a highway which will exclude the public, and the state is concerned in the preservation and integrity of its public highways. It follows that the exercise of the privilege attempted to be granted should be enjoined.

Morse, Ch. J., concurred with *McGrath, J.*

MISSOURI SUPREME COURT (In Banc.)

Joseph A. BOWERS, *Appt.*,

Ellis R. SMITH, *Resp.*;

(.....Mo.....)

*1. The "Australian Ballot" Laws of England, Missouri, and other states compared and discussed.

*Head notes by BARCLAY, J.

NOTE.—*Constitutionality of "Australian Ballot" statutes.*

That question discussed and such laws held constitutional. *State v. McMillan* (Mo.) Oct. Term, 1891; *State v. Black* (N. J.) 46 Alb. L. J. 129; *De Walt v. Bartley*, 16 L. R. A. 771, 146 Pa. 529.

Defects in nomination papers.

A candidate whose full name was "Robert Vickers Mather" appeared on the roll of burgesses as "Robert V. Mather," and signed his nomination-paper in the latter style. It was held that such paper did not comply with the law requiring a statement of "the surname and other names of the person nominated." *Mather v. Brown* (1876) L. R. 1 C. P. Div. 506.

A similar ruling was made where the nomination bore the signature of "Charles Arthur Burman," but his name appeared as "Charles Burman" on the voters' roll. *Moorhouse v. Linney* (1885) L. R. 15 Q. B. Div. 273.

But some of the same judges have also held that "Wm." was a sufficient equivalent for "William," on such papers. *Henry v. Armitage* (1888) L. R. 12 Q. B. Div. 237.

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*2. Under the Missouri Ballot Act of 1889, (Rev. Stat. 1889, §§4755-4764), an error of the county clerk, in printing names of additional candidates on the official ballots, will not nullify the election at which those ballots are used, where no objection to them is made (as provided by that Act) before the election.

*3. Where the votes in a certain election district were received at two polling places instead of at one, that irregularity will not vitiate the returns, where no prejudice or disadvantage to the defeated candidate resulted.

And in New South Wales it has been ruled, from an early day, that such a paper is not invalidated by reason of the use of ordinary abbreviations in the signatures of voters thereon. *Ex parte Fallick* (1889) 10 N. S. Wales, L. R. 60, citing several earlier decisions.

Irregularities in taking the ballot.

The general rule in England is thus stated by Coleridge, Ch. J.: "The nonobservance of the rules or forms which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or, in other words, the result of the election." *Woodward v. Sarsons* (1875) L. R. 10 C. P. 751.

Failure of the election officer to place his initials on the back of the ballots, as required by the law, does not invalidate such votes. *Jenkins v. Brecken* (1883) 7 S. C. Cand. (Duvall) 247.

Even where the law declared that "the ballot paper shall be marked on both sides with an official mark," ballots not so marked on one side were

4. **Mandatory and directory provisions** of election laws discussed.
5. **Where the Legislature declares a certain irregularity in election procedure as fatal** to the validity of the returns, the courts will effectuate that command; otherwise they will ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a fair expression of the voters' will.
6. **An allegation in a statutory election contest that a list of names of party candidates was "illegally certified,"** without alleging how it was certified, or in what respect it was defective, is merely the statement of a legal conclusion, and not of a fact.
7. **Such a construction of an election law as would permit the disfranchisement of large bodies of voters** because of an error of a single official should not be adopted where the language in question is fairly susceptible of any other.
8. **Where a statute is adopted from another state** its construction there is not likewise adopted, if inconsistent with the Constitution of the state in which it is transplanted.
9. **Under the Missouri Ballot Law of 1889, electors may vote** for candidates whose names do not appear upon the official printed ballots, by adding their names upon the ballots in the proper places.

10. **It is proper to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent.**

(June 20, 1892.)

A PPEAL by contestant from a judgment of the Circuit Court for Pettis County in favor of contestee in a proceeding instituted to determine the validity of contestee's alleged election to the office of sheriff of the county. *Affirmed.*

Statement by *Barclay, J.:*

The official ballot mentioned in the opinion (omitting immaterial parts) is as follows, viz.:

STATE, COUNTY AND TOWNSHIP
TICKET, PETTIS COUNTY, MISSOURI.

DEMOCRATIC. REPUBLICAN. UNION LABOR.

* * *	* * *	* * *
* * *	* * *	* * *
* * *	* * *	* * *

<i>For Sheriff,</i>	<i>For Sheriff,</i>	<i>For Sheriff,</i>
J. A. BOWERS.	ELLIS R. SMITH.	G. D. SAPPINGTON.
* * *	* * *	* * *
* * *	* * *	* * *
* * *	* * *	* * *

counted, after elaborate consideration. *Ackers v. Howard* (1896) L. R. 16 Q. B. Div. 739.

Where the receiving officers placed their initials in the lower right-hand corner of the ballots instead of the lower left-hand corner, as the Indiana ballot law prescribed, the irregularity was considered harmless. *Parvin v. Wimberg*, Ind. Sup. 1892.

An election was held at two polling places in a township, one of which was not lawfully established, and the court (per Brewer, J.) sustained the result, saying: "It was the apparent creation of a voting precinct; and having been accepted by the people, the only ones interested in the matter, and acted upon by them as though it were in all respects legal and binding, the defects in the order cannot now be made the means of disfranchising a body of legal voters, innocent of wrong, seeking to exercise their rights of franchise and only misled by the officers of the law." *Wildman v. Anderson* (1876) 17 Kan. 847.

But closing the poll a quarter of an hour before the time fixed by law was held in New South Wales to vitiate the return. *Ex parte Russell* (1881) 2 N. S. Wales, L. R. 82.

What distinguishing marks or devices upon ballots will vitiate them. is discussed in *Rutledge v. Crawford*, 13 L. R. A. 761, 91 Cal. 526; *People v. Onondaga County Board of Canvassers*, 14 L. R. A. 624, 129 N. Y. 305, and the notes to those cases.

Harmless irregularities.

Where two voting places were appointed in a precinct entitled by law to but one, the irregularity was held immaterial. *Bell v. Faulkner* (Tex.) March 23, 1892.

Where the ballots were received, by the proper officers, at a poll, near the house appointed as the voting place but whose owner refused to permit its use, the election was upheld. *Preston v. Culbertson* (1881) 58 Cal. 193.

And so where some ballots were deposited by mistake in the wrong ballot-box, in use for another election conducted at the same time on the same premises. *People v. Bates* (1893) 11 Mich. 363, 88 Am. Dec. 745.

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Acquiescence in irregularities.

In *Reg. v. Bradburn* (1876) 6 Ont. Pr. Rep. 309, it was said by *Harrison, Ch. J.*, in an election contest, that, "even if the grounds alleged were sustained by the evidence, I should have some hesitation in setting the election aside at the instance of the relator who, instead of remonstrating against the supposed irregularities, took his chance of things as they were, and, having been himself defeated, is now endeavoring to defeat the choice of the electors."

Where the candidates and electors have fully participated in an election, the omission to properly proclaim the same, or to give complete notice thereof, has been held, in some circumstances, not to invalidate the result; as in *Nebraska*, where the governor failed to issue proclamation for the election of a district judge (*State v. Thayer* (1891) 31 Neb. 82); in *Rhode Island*, where less than the statutory notice for a city election was given (*State v. Carroll* (R. I.) July 23, 1892); in *California* where a clerk of the county board omitted to affix his official seal, required by law, to an election proclamation (*San Luis Obispo County v. White* (1891) 91 Cal. 432); and in *Michigan* (by a divided court), where the secretary of state and sheriff refused to issue statutory notices of an election for circuit judge. *Adsit v. Osmun* (1891) 11 L. R. A. 584, 84 Mich. 420.

In these recent cases a number of earlier ones are cited to the same effect.

In an election of a local board of health, the voting papers exhibited a blank in place of a statement required of the number of votes to which the voter was lawfully entitled as owner or ratepayer. A defeated candidate contested the election but had voted one of such papers, and the court held that by his acquiescence in the irregularity he was disqualified to complain. *Reg. v. Lofthouse* (1896) L. R. 1 Q. B. 438.

The same view of contestant's acquiescence, taken in the principal case, was adopted under a similar law, in *Allen v. Glynn* (Colo. 1892) 15 L. R. A. 743.

(The blanks in the ballot, indicated above by asterisks, were filled in the original with the names of the several party nominees for the various state, county and township offices.)

The other material facts appear in the opinion.

Messrs. Jackson & Montgomery and Charles E. Yeater, for appellant:

The violation of a statutory provision for the conduct of elections, which is mandatory in its nature, will avoid the election to the extent of the violation, without regard to the motive of the persons guilty of the violation, and without any inquiry into the effect or the result of the election.

6 Am. & Eng. Encyclop. Law, 825; *Gumm v. Hubbard*, 97 Mo. 811; *Keller v. Touline* (Miss.) May 26, 1890; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 58 Mo. 350; *State v. Cook*, 41 Mo. 598; *McCrary, Elections*, 8d ed. § 190.

Rev. Stat. 1889, § 4673, provides that only one polling-place shall be had and one set of judges and clerks appointed for each precinct, and the holding of two polling-places in a precinct with two sets of judges and clerks renders the vote of the precinct invalid and illegal.

McCrary, Elections, 2d ed. 108, 3d ed. § 249; *Sloan v. Hawley*, 48d Congress.

The judges and clerks of the two polling-places in the Sedalia city precinct were not *de facto* officers for the reason that a *de facto* officer necessarily presupposes the existence of a legal office which might be filled by a *de jure* officer, and creation of the two polling-places in violation of the mandatory provisions of Rev. Stat. 1889, § 4673, could not constitute legal officers for the maintenance of such illegal polling places.

Jester v. Spurgeon, 27 Mo. App. 477; *Ex parte Snyder*, 64 Mo. 58.

The ballots cast in the Sedalia city precinct did not conform to the provisions of Rev. Stat. 1889, art. 8, chap. 60, on elections, because they contained the names of the candidates of the alleged Union Labor party, which party had not cast 8 per cent of the vote at the last general election, nor had the nomination of the candidates of such party been certified to the county clerk in the manner prescribed by such article, and such ballots cannot be counted under the mandatory clause of section 4671 of such chapter, which recites that, "any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and the same shall not be counted."

Gumm v. Hubbard, 97 Mo. 811; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 58 Mo. 350; *Price v. Lush*, 10 Mont. 61; *Rug. v. Parkinson*, L. R. 8 Q. B. 11; *Mather v. Brown*, 1 C. P. Div. 596; *Hives v. Turner*, 1 C. P. Div. 670; *Monks v. Jackson*, 1 C. P. Div. 683; *Burgoyne v. Collins*, L. R. 8 Q. B. Div. 452; *Wigmore, Australian Ballot System*, 2d ed. 186, 187.

The certification of the nomination of the candidates of the alleged Union Labor party was in violation of Rev. Stat. 1889, art. 8, chap. 60, and such ballots cannot be counted under the mandatory clause of section 4773 of such article, which recites that, "every ballot printed under the provisions of this article shall contain the name of every candidate 16 L. R. A.

whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this article, and no other names."

Nor under section 4773 of such article, which recites that, "ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

Rev. Stat. 1889, art. 8, chap. 60, is not in conflict with those provisions of the Constitution which prescribe the qualifications of electors and declare that all elections shall be free and open, and that no power shall interfere to prevent the free exercise of the right of suffrage.

Blair v. Ridgely, 41 Mo. 167, 97 Am. Dec. 248; *Detroit v. Rush*, 10 L. R. A. 171, 82 Mich. 532.

Messrs. W. S. Shirk, Bothwell & Jaynes and Sangree & Lamm, for respondent Smith:

The provisions of a law may be most positive in their declarations as to the duties of officers charged with executing the law,—may command or prohibit in the plainest terms as to the conduct of certain officers, even making its violation by the officers a criminal offense,—and yet the same provisions of the law be construed to be only directory in so far as they affect the electors; and the disregard of the terms of such a statute by an officer will not render the election void, or justify the throwing out of the ballots, where it is not alleged that there was any fraud practiced, or that the result was affected or made doubtful by such official disregard of the law.

McCrary, Elections, 8d ed. §§ 190-198; 6 Am. & Eng. Encyclop. Law, *Elections*, pp. 325, 334.

While the violation of some mandatory provisions of the Constitution and statutes will be good reason for holding an election to be void, or for excluding certain ballots from the count, yet in the case of directory provisions, the election will not be set aside or the votes thrown out, unless it is alleged and proved that the disregard of the law has been such as to show fraud, or that the result has been changed or made doubtful thereby. The best authorities now do not hold these statutory provisions mandatory, unless they are plainly of such a character that their strict enforcement is necessary to a correct determination of the result of the election, or unless in the statute itself it is expressly declared that its violation will render the election void.

6 Am. & Eng. Encyclop. Law, *Elections*, "X," pp. 325, 334; *McCrary, Elections*, 3d ed. §§ 180, 137, 141, 137, 188, 190-193; *Cooley, Const. Lim.* 778-780, *618, 619, and authorities cited; *Davis v. State*, 75 Tex. 420; *Fowler v. State*, 68 Tex. 80; *Todd v. Stewart*, 14 Colo. 286; *Russell v. McDowell*, 83 Cal. 70; *Whinley v. McKune*, 12 Cal. 361; *DeBerry v. Nielson*, 102 N. C. 465, 11 Am. St. Rep. 767, and note; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, and note, 471, 472; *State v. Burbridge*, 24 Fla. 112; *Vurney v. Justice*, 86 Ky. 596; *Stemper v. Higgins*, 38 Minn. 222.

The laws as to the qualifications of the voters, and as to the time of holding the elections, are held to be mandatory.

McCrary, Elections, 8d ed. §§ 126, 198; 6 Am. & Eng. Encyclop. Law, *Elections*, "IX."

The statutory provisions as to the place of holding the elections are not so strictly construed, so long as no uncertainty existed and no injury resulted.

McCrary, Elections, 3d ed. §§ 123-125; 6 Am. & Eng. Encyclop. Law, *Elections*, "IX," pp. 323, 324, notes; *Dale v. Irwin*, 78 Ill. 170; *Davis v. State*, 75 Tex. 420; *Stemper v. Higgins*, 38 Minn. 222.

Nothing can be found in the statute which warrants the assertion that the election in the Sedalia city precinct was void, or that all the ballots must be thrown out, for the reason that two sets of election judges were appointed and served, to facilitate the receiving and counting of the ballots cast in the precinct. It would be improper to hold that provision of the statute to be mandatory, and the election void. Certainly some of the judges acted legally, and how can it be decided as to which lot of ballots shall be thrown out, and which body of electors shall be deprived of their constitutional rights.

McCrary, Elections, 3d ed. §§ 214, 216; 6 Am. & Eng. Encyclop. Law, *Elections*, "IX," "X," 323, 324, 327, and notes; Cooley, Const. Lim. 778-780, *618, 619, and authorities cited; *Stemper v. Higgins*, 38 Minn. 222; *Davis v. State*, 75 Tex. 420; *People v. Cook*, 8 N. Y. 87, 59 Am. Dec. 451, and note, 471, 472.

Under the Act of 1889 (Rev. Stat. 1889, art. 3, chap. 60) the clerk of the county court is given certain powers of a judicial nature, in connection with certain ministerial duties imposed on him. When he has acted and decided officially under the law, his actions and decisions can only be attacked by direct proceedings, in the nature of mandamus, injunction, or appeal under Rev. Stat. 1889, § 4778. Having made no timely complaints or efforts to correct the alleged mistakes of the clerk, it is now too late for a disappointed candidate to ask the courts to throw out the official ballots lawfully cast—depriving 3,160 electors of their constitutional right to vote for their sheriff, merely because a majority of those electors did not vote for the contestant.

McCrary, Elections, 8d ed. §§ 258, 259.

(a) As to judicial decisions:

Wellshear v. Kelley, 69 Mo. 343; *Yates v. Johnson*, 2 West. Rep. 132, 87 Mo. 218; *Yeoman v. Younger*, 83 Mo. 424.

(b) As to ministerial acts:

Evans v. Robberson, 10 West. Rep. 393, 92 Mo. 192; *Hallowell v. Page*, 24 Mo. 590; *Phillips v. Evans*, 64 Mo. 17.

It is not within the legislative power to deprive the elector of his franchise, or to enable any officer to do so, under pretext of regulating elections.

Mo. Const. art. 2, § 9, art. 8, art. 9, § 10; 6 Am. & Eng. Encyclop. Law, *Elections*, "II," "III," "IV," 287-289, and notes; McCrary, Elections, 8d ed. §§ 91, 98; Cooley, Const. Lim. 776, 778, *616-618, and authorities cited; note to *Blair v. Ridgely* (Mo.) 97 Am. Dec. 248, and cases cited.

If it were necessary to give to the Act of 1889 the construction contended for by appellant, it would be the duty of the courts to de-

clare that Act to be unconstitutional and void, as an invasion of the rights of the electors.

It is the duty of the courts to give to this statute a construction most favorable to its life and purpose, and not to give to it a forced construction which would render the statute unreasonable and unconstitutional.

Mo. Const. art. 2, § 9; McCrary, Elections, 8d ed. §§ 190-192; Cooley, Const. Lim. 778, *617, 618; Sutherland, Stat. Const. §§ 322, 323, 331, 332, 447, 452, 454.

Barclay, J., delivered the opinion of the court:

This appeal was first heard in division I, and a conclusion announced, November 9, 1891, as reported in 17 S. W. Rep. 761.

After a motion for rehearing was denied, plaintiff moved to transfer the cause to the court in banc. The motion was ultimately sustained, upon the entry of a dissent by one of the judges to the decision of the first division.

The case was then fully re-argued before the whole court.

It is a statutory contest to determine the respective rights of the parties to the office of sheriff of Pettis county.

The election in question took place November 4, 1890. Mr. Bowers is the contestant. For convenience, he will be called the plaintiff, and his opponent, Mr. Smith, who is the contestee, the defendant. Plaintiff's notice of contest assigned several distinct grounds, in as many paragraphs, in the nature of counts or causes of action. After it was served, defendant gave plaintiff a counter notice, which (besides denying the plaintiff's charges) alleged a number of objections to the original count of the ballots, and claimed that corrections, to defendant's advantage, should be made therein in a number of particulars.

The circuit court of Pettis county sustained motions to strike out some parts of plaintiff's notice. Exceptions were saved to that ruling.

The case then came to trial. As will appear, the real issues were finally resolved into questions of law, and upon them the trial court found for the defendant.

Plaintiff then appealed, after the usual motions.

After the formal contest began, plaintiff applied for, and obtained a recount, by the county clerk, of the original ballots cast at all the precincts in the county. The recount was conducted as provided by the statute on that subject (Rev. Stat. 1889, §§ 4721-4726). It resulted in an exhibit that defendant had a plurality over the plaintiff of 33 votes in the county, and that no less than 8,000 voters had cast their ballots in the city of Sedalia at that election.

Both parties rely on the recent statute concerning elections (§§ 4766-4794, Rev. Stat. 1889), commonly known as the "Australian Ballot" Law as first enacted in this state. It is thus conceded to apply to Sedalia as a city of over 5,000 population. The points of difference to be determined relate to features of the election in that city, held under that law.

We need not pause to state the particulars of the rulings in the trial court, raising the ma-

terial questions involved, but shall proceed at once to the merits of the dispute.

Plaintiff's contention is that the entire returns from Sedalia should be thrown out of the final count, for several reasons.

1. He claims that the official ballots, printed by the county clerk for use at the voting places in that city, contained (among others) the names of the nominees of the Union Labor party, and that that political party had not polled 3 per cent of the entire vote at the last previous general election, as required by section 4760, Rev. Stat. 1889.

Conceding (without investigating) the fact on which that claim rests, does it follow that the vote of the precinct should be discarded?

In interpreting the statute in question, it must be remembered that its adoption here brings it into subordination to the fundamental law of Missouri, and that prior decisions elsewhere, construing enactments on the same general topic, cannot properly be followed if inconsistent with that fundamental law.

By our Constitution general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.

The statute recognizes this right by requiring sufficient blank space for such writing, next to the printed names of candidates for each office. Rev. Stat. 1889, § 4773.

In this respect our law differs materially from the English Act of 1872, under which no actual poll of voters is held, unless more candidates are formally nominated than there are vacancies to be filled.

These observations seem necessary to guard against the supposed effect of adjudications in other states or countries, construing features of such laws differing from those in force in this state.

The living question which this case presents is, What construction shall be given to the Missouri statute on this subject, and to what extent the constitutional rights of voters depend upon the correctness of action of the county clerk in preparing and printing the official ballots?

The act of the clerk which is called in question consisted of admitting names to the ballot, not of excluding any.

There is a substantial difference, in principle and in effect, between admitting and excluding such names.

The practical consequence of erroneously adding a name to the ticket is merely to enlarge the voter's range of choice among candidates on the official list. In Missouri any voter may add such a name for himself in the blank provided on the ballot for that purpose.

How, then, are errors of this sort to be treated?

Plaintiff insists that they vitiate the whole return; that every such error of judgment is a sufficient ground to disfranchise the voters of the locality where such ballots are used.

The law in question presents a number of points at which errors may be expected of the most faithful and conscientious officers. It will often require nice judgment to determine (among other things) whether party candidates have been regularly nominated; how declinations should be treated; whether certificates of independent nominations have the necessary signatures; whether the signers are "resident electors"; whether nomination certificates are formally sufficient under the law; or whether acknowledgments thereof have been "executed with the formalities prescribed for the execution of an instrument affecting real estate." Rev. Stat. 1889, §§ 4756-4763.

It is declared to be the duty of the county clerk to provide the ballots, and that all others than those printed by him according to the provisions of this law "shall not be cast or counted in any election." The plain meaning and purpose of this expression can be seen from the context in the section in which it occurs and that which next follows (§§ 4772-73 of 1889). The design is to preclude the voter and his party friends from supplying his own ballot (as was the former practice), and to compel him to use only that furnished by the state through the county clerk. The latter is directed to print no other names on the voting papers than those of the candidates nominated according to the provisions of that law. The title of the original Act (Sess. Acts 1889, p. 105) and its opening lines plainly show that uniformity in the printing and appearance of the ballots is one of the main objects aimed at. The prohibitions above noted are inserted to further that object; but they give no countenance to the notion, advanced by the plaintiff, that their purpose or effect is to nullify the result of every election at which the county clerk may make some error in publishing or printing the names on the only ballots that can be used.

Legislative language should be clear and unequivocal to justify an inference that such consequences were intended to flow from it. Rutherford, Insts. 2d Am. ed. p. 418.

The printing of the ballots "according to the provisions of this" law, and the antecedent making up of a ticket to be printed (by acting on the nominations submitted) are two distinct official duties. The county clerk prints all the ballots. But he does not act originally on all the nomination papers.

Some of the latter are submitted to the secretary of state, and he certifies certain nominees to the county clerk. Rev. Stat. 1889, § 4767.

Errors in omitting or adding names to the list of candidates, by rulings on the nominating documents, are distinguished from errors made in the mere printing of ballots, by the terms of the law itself. Section 4778 provides a summary remedy to correct any "error or omission in the publication of the names or description of candidates nominated for office, or in the printing of the ballots." So that the language of section 4772, forbidding other ballots, than "those printed by the respective clerks of the county courts according

to the provisions of this article," to be cast or counted, obviously carries no such meaning as to nullify ballots, printed by county clerks as directed by the law, and cast by voters in conformity thereto, but incorrectly made up beforehand by the secretary of state or the county clerk by erroneously admitting some candidate's name to a place on the ballot.

The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other.

Wells v. Stanforth (1885), L. R. 16 Q. B. Div. 245.

Or, as a very able judge once tersely said: "All statutes tending to limit the citizen in his exercise of this right" (of suffrage) "should be liberally construed in his favor." *Owens v. State* (1885), 64 Tex. 509.

It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent. *State v. Hope* (1889), 100 Mo. 361, 8 L. R. A. 608. The consequences which would inevitably follow the acceptance of the reading proposed by the plaintiff are so far reaching and disastrous that they constitute a vigorous argument against adopting it.

More than that, section 4778 clearly discloses a legislative design to provide for the correction of just such errors as we are considering, at the instance of any elector (including every one interested), before the election. The process is so summary that the inference is irresistible that the errors it is designed to reach should be rectified by prompt action then, so as not to subject voters to the risk of losing their votes by reason of those errors.

"Sec. 4778. Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected."

In connection with this section it should be remembered that "at least seven days before an election," the county clerk is required to cause the list of nominations, "arranged in the order and form in which they will be printed upon the ballot," to be published in the newspapers, as provided in sections 4768-69. Thus every one in interest is apprised of the names of all candidates, as determined by the clerk, at least one week before election day, to the end that steps may be taken, if desired (as indicated by the language quoted), to supply any omissions or to correct other errors in that list as published. If full effect be given to that section, the injustice and unfairness which otherwise would result in the practical working of the statute will be avoided.

This "Ballot Reform Law" was intended to 16 L. R. A.

improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not destroy, the great objects in view in its passage. It resembles, and, in the main, follows statutes elsewhere on the same subject, but is not identical with its models at all points. A glance at these models, however, will show how foreign to the reason and spirit of such legislation is the idea that the unwary voter is to be subjected, in the name of "reform," to the risk of losing the right of suffrage every time an error in admitting a name to the official ballot is made by an officer passing upon the regularity of nominating papers, when no objection to his ruling is made before the election. Section 4778 was evidently framed with the view to avert such risk. It coincides with part of section 19 of the New York Law of 1890. It is not found in the English statute, but there we read that "the returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final; but if allowing the same, shall be subject to reversal on petition questioning the election or return" (85 & 86 Vict. (1872), p. 213, chap. 83, 1st sched. sec. 13). This provision applied at first to parliamentary elections only; but, after the decision in *Northcote v. Pulaford* (May 8, 1875), L. R. 10 C. P. 476, it was extended to municipal elections (the kind considered in that case) by the amendment of July 19, 1875 (88 & 89 Vict. chap. 40, § 1, p. 283).

So that, in England and New York to day, the erroneous addition of a name to the official list of nominees, though not corrected before the election, is harmless in its effect upon the voters' right to use the official ballot without fear of possible disfranchisement. This, we consider, is also the proper meaning to be placed upon the law of Missouri. Any other would metamorphose the supposed "reform" into a gigantic trap where the inoffensive citizen might readily be deprived of his most valuable right as a freeman by political manoeuvres in the form of "errors," the force of which he could not foresee until too late to avoid their consequences.

A single case appears to antagonize the conclusion we have reached on this point, namely, *Price v. Lusk* (1890), 10 Mont. 61. With all respect due to the court that decided it, we think it embodies a misapplication of the English precedents which it cites. It entirely omits to mention or consider the effect of section 19 of the Montana Statute (Gen. Laws Mont. 1889, p. 140, substantially the same as our section 4778), which should be given some significance to prevent such unjust consequences to voters as have been explained, and which are impossible under the English Ballot Act, which that case purports to follow and expound.

Some other decisions, however, are supposed to cast light on the present discussion, and will therefore be touched upon.

In *Talcott v. Philbrick* (1890), 59 Conn. 472, 10 L. R. A. 150, the Supreme Court of Connecticut had to deal with a statute so unlike the Missouri Law that it does not even provide for printing the list of candidates at public expense; but

it requires the secretary of state to furnish at cost (to all persons applying for them) blank slips of paper, of uniform size, color, etc., indorsed (in print) "official ballot;" and upon these papers the respective political parties may cause the names of their own nominees to be printed, under provisions declaring that, "in addition to the official indorsement, the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same" (Pub. Laws Conn. 1889, p. 155, § 1); and, further, that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted." (Id. § 12).

The case showed that some ballots, in a local election, had been issued by the Republican party but were headed "*Citizens*"; yet so loth was the court to disfranchise a few persons, who had voted for an alderman in Hartford, that the ruling, pronouncing the "*Citizens*" ballots illegal, was made by three judges only, the other two dissenting.

The exact value of such a decision in enlightening the case at bar we need not pause to measure. The reader can probably as well determine that for himself.

In *People v. Onondaga County Canvassers* (1891), 129 N. Y. 895, 14 L. R. A. 624, the statute required a certain uniform official indorsement on all ballots, cast at any one polling place, to preclude identification of any particular vote or class of votes, and declared that "no ballot that has not the printed official indorsement shall be counted." The facts were that certain ballots, having an indorsement different from others properly used at the precinct in question, were voted by 1,252 electors; and the court rejected the ballots mentioned, but only by the concurrence of four judges; three others dissenting.

We mention these cases neither to approve nor to disapprove them; but to indicate how inapplicable they are to the case in hand, and to show that, even with language as positive as that they construe, how reluctant are the courts to adopt an interpretation the effect of which is to deprive a large number of their fellow citizens of the electoral franchise.

Having regard to the spirit and purpose of the Missouri statute, and to the general principles governing the treatment of popular elections by the courts in this country, we think it should be held that, where a candidate for public office causes no timely objection to be made before the election (as permitted by section 4778), he should be regarded as having waived all objections that may exist to the presence on the official ballot of any names of nominees not properly entitled to be there. [Compare *Reg. v. Bradburn* (1876), 6 Ont. Pr. 808, and *Allen v. Glynn* (1892) (Colo.), 15 L. R. A. 743.]

2. It is next charged that the "Union Labor" list of names of candidates was not legally certified to the county clerk.

How it was certified is not stated. That it was not certified at all is not alleged. From what appears it is evident that the pleader is giving merely his views of the certificate, of which neither the language, substance nor legal import is mentioned, so that the court

cannot judge whether it was "legally certified" or not.

In addition, therefore, to the reasons already assigned for declining to review, in this proceeding, the alleged errors of the county clerk in preparing and printing the ballot, the application of a familiar rule of code pleading makes it unnecessary to discuss as a fact such a legal conclusion as alludes to the certification of the "Union Labor" ticket.

3. It is next asserted that the votes from Sedalia should be excluded because they were received at two polling places instead of at one.

It appears that the county court had designated Sedalia city as one election district, but had further provided two voting places therein for holding this election, with one set of judges at each, as hereafter more particularly described. This was done by orders to that effect before the election. Both of the voting precincts were at the court-house in that city.

At one, the voters whose surnames began with the letters "A" to "K" voted; at the other, those with the letters "L" to "Z." Each poll was reached by way of a window, and the two were only seventy-five feet apart. The windows fronted on one portico of the court building. Through them, pass-ways led to the polling booths in the rooms within, where the election judges were stationed and received the ballots.

Assuming that these arrangements involved the irregularity of receiving the vote at two places instead of at one, does it nullify the will of the people so expressed, the election having been regular in other respects?

Undoubtedly some irregularities are of so grave a nature as to invalidate the whole return of the precinct at which they occur; as, for example, the omission of registration. (*Zeiler v. Chapman* (1874), 54 Mo. 502). In determining which are of that kind, the courts aim merely to give effect to the intent of the law-makers in that regard, aided by established rules of interpretation.

If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. (*Ladbetter v. Hall* (1876), 62 Mo. 442). In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had, or had not, so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.

It has been sometimes said, in this connection, that certain provisions of election laws are mandatory, and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory, in the sense that they impose the duty of obedience on those who come within their purview. But it does not therefore follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish.

Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount

in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters' choice.

Thus, in *Davis v. State* (1889), 75 Tex. 420, the law required that each ward in a town should "constitute an election precinct," yet in San Marcos, a town incorporated with four wards, the county commissioners established two precincts only (without reference to ward lines), and each included parts of the adjacent country; but the court, after full discussion of the general subject, held that the election at those precincts was not avoided by the irregularity.

In *Stemper v. Higgins* (1888), 38 Minn. 222, a general election was conducted in the village of Madelia, by its officers, as though it constituted a district separate from the township in which it was situated, where also a precinct was open; whereas the law declared that "every organized township, and every ward of an incorporated city, is an election district;" yet the court held the returns from the village valid, despite the irregularity indicated.

These cases find support in others, illustrating the same principle: *Gass v. State* (1870), 84 Ind. 425; *Dale v. Irwin* (1875), 78 Ill. 180; *Wheelock's Case* (1876), 82 Pa. 297; *Preston v. Culbertson* (1881), 58 Cal. 209; *Farrington v. Turner* (1884), 53 Mich. 27, 51 Am. Rep. 88; and *Peard v. State* (Neb.) 51 N. W. Rep. 828, a case under a ballot reform statute.

Such rulings are not peculiar to election proceedings, but result, logically, from the application to them of a time-tested rule of interpretation which requires that the general design and object of a law be kept in view and effectuated, even if it be necessary, in so doing, to restrict somewhat the force of subsidiary provisions that otherwise would conflict with the paramount intent. *Cortis v. Kent Water-works Co.* (1827) 7 Barn. & C. 830.

Elections under the "Australian Ballot" statutes fall within reach of the principle above stated.

In the English Law of 1872 it is enacted that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." Ballot Act 1872, 35 & 36 Vict. chap. 38, § 13, p. 200.

(The rules and schedules prescribe the forms of nomination papers, and procedure for conducting the election.)

It has been judicially determined in that country that the language just quoted is merely declaratory of the common law of England. *Woodward v. Sarsons*, (1875), L. R. 10 C. P. 761.

It certainly goes no further, as a curative power, than the accepted general principles of the law of elections in this country, as ex-

pounded by the courts. We consider that they have a just and proper application to the facts now in judgment. It is not asserted, on this appeal, that the supposed irregularity, of having two voting booths instead of one, had any bearing upon the result of the election to the prejudice of plaintiff, and we are unable to conjecture how it could, in any wise, have redounded to his disadvantage. We believe it furnishes no sufficient reason for excluding the vote of the two precincts in the circumstances.

4 We conclude that a reasonable and natural construction of the law forbids us to repudiate, for any such reasons as have been presented, the 8,000 votes cast in Sedalia in 1890.

If for every error of a county clerk, or harmless irregularity in election procedure, citizens, having no control over either, are to lose their right of choosing public officers, the "Reform Ballot Act," instead of being found an improvement of the machinery of popular government, will justly be denounced as a "snare to entrap the unsuspecting voter." *Gumm v. Hubbard*, (1888), 97 Mo. 819. Such a result, however, was never contemplated in its enactment, and should not be brought about by a narrow and technical reading of it.

"Where any particular construction which is given to an Act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the Act." Peckham, J., in *People v. Onondaga County Canvassers* (1891), 120 N. Y. 895, 14 L. R. A. 624.

While it is well enough to insist on a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality where errors, such as are here charged, occur. The Legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction.

It seems to us, after full reconsideration of the case, that the decision of Judge Field on the circuit, in favor of defendant, was right, and should be affirmed.

Black, Brace and Macfarlane, JJ., concur. Sherwood, Ch. J., and Gantt, J., dissent; Thomas, J., will express his views in a separate opinion.

Gantt, J., dissenting:

Statement.

At the general election held on the first Tuesday in November, 1890, Ellis R. Smith was the Republican candidate for sheriff, and Josiah A. Bowers was the Democratic candidate. This is a proceeding under the statute by which the appellant is contesting the election of the respondent. The contestor gave notice of the contest as required by statute, as did also the contestee. After the contest was begun, under a provision of the statute, a recount was had, which gave the contestee, Smith, a majority, on the face of the county clerk's count, of 33.

The abstract showed the vote as follows for the whole county:

For Bowers	2,299
For Smith	2,222
For Sappington	65
For No vote	197
Total	6,873

The abstract of the vote of the city of Sedalia was as follows:

	Bowers.	Smith.	Sap'gton.	NoVote.
Sedalia City, A to K—618	862	19	98	
Sedalia City, L to Z—854	840	13	71	
Total	1,702	32	169	8,160

Various grounds were assigned in contestor's notice, but, after the recount, the parties virtually stipulated to withdraw all charges of lack of qualification of the various voters, and all charges relative to illegal voting.

The remaining objections are contained in the fifth and seventh grounds of notice, which are as follows: "(5) That said general election, on November 4, 1890, was illegally conducted in the city of Sedalia, in said Pettis county, in this: That notwithstanding the said city of Sedalia on said day constituted but a single voting precinct, with fixed boundaries, yet during the whole of said day, and during the whole time of election on said day, two separate and distinct polling places were maintained, by different sets of judges and clerks of election, within the limits of said voting precinct in said city, and votes were received during said day and said election at both of said polling places by the respective sets of judges in charge thereof; and the votes so received at both of said polling places were afterwards certified by the respective sets of judges and clerks of election of said two polling places to the county clerk of said Pettis county, and which votes so certified were afterwards included by said county clerk and the two justices of the peace, called in by said clerk, in the official count of the votes cast at said general election in said Pettis county,—all of which was and is contrary to the law of this state, and by reason whereof the said votes so certified from said city of Sedalia should have been and should be wholly excluded from the official count of the votes cast in said county at said general election." "(7) That in said city of Sedalia, in said Pettis county, the said general election was required to be conducted under the provisions of article 3, chap. 60, of the Revised Statutes of Missouri of 1889, and that on November 4, 1890, said general election was not conducted in the manner required, and as provided in said article of said chapter, in this: That the only tickets furnished to the voters and electors at said election in said city of Sedalia, and required to be used by them in voting at said election, were illegal, and did not conform to the provisions of said article of said chapter, but, on the contrary, were prepared, printed, and furnished in violation of said statute; and, among other reasons, said tickets were illegal because the said tickets so furnished and required to be used and voted at said election contained a list of candidates for various offices under the heading of 'Union Labor,' of and among which said list was the following: 'For sheriff, G. D. Sappington;' and which said list of candidates under the said heading was printed upon and made a part of

said tickets without any authority therefor, and contrary to the provisions of said statute, for the reasons: *First.* That there was not at the time of said election, nor on or within sixty days prior thereto any political party within said Pettis county having or being known by the name of 'Union Labor,' or any other similar name, or any name of similar import, which had, at the last general election in said county before said general election in 1890, polled as a party at least three per cent of the entire vote cast in said Pettis county at such prior election, and said list of names of candidates was not legally certified from any convention of a political party having the right in law to certify the nomination of candidates to be inserted in the tickets to be used and voted in said city of Sedalia at said general election in 1890. *Second.* That said list of candidates was not nominated as provided by law, and their alleged nomination was not certified by a certificate of nomination signed by electors resident within the said city of Sedalia, nor by electors resident within the said county of Pettis, to a number equal to one per cent of the entire vote cast at the last preceding general election in said Pettis county prior to said general election in November, 1890. *Third.* That the alleged nomination of said list of candidates, and one of each of them, so printed on said tickets under said heading of 'Union Labor,' was not made or certified to the clerk of the county court of said Pettis county, by filing a certificate of nomination executed with the formalities prescribed for the execution of an instrument affecting real estate; and no certificate of nomination of said candidates, or of any of them, executed with the formalities prescribed for the execution of an instrument affecting real estate, was filed with the clerk of the county court of Pettis county, Mo. For which reasons the votes cast in said precinct in and for the city of Sedalia were and are illegal, and should have been, and should be, wholly excluded from the official count of the votes cast at said general election, in November, 1890, in said Pettis county."

The contestee filed a motion to strike out of the contestor's notice the 4th, 6th, and 7th paragraphs, which alleged, respectively, that the ballots in the Sedalia precinct were counted contrary to law, and that two polling places were maintained in said precinct, and that the official ballot illegally contained the names of the candidates of the Union Labor party. This motion was sustained, to which action appellant duly excepted at the time. On the trial of the case the contestor offered in evidence one of the official ballots which were cast at the election in question, and also read in evidence the county clerk's abstract of the votes cast for the parties at such election as ascertained by the recount. The court refused, against the objections and exceptions of the contestor, to admit evidence showing that the city of Sedalia at the time was a city with over 5,000 inhabitants. The court then admitted evidence showing that the 164 votes in the Sedalia city precinct referred to in the county clerk's return of his official recount as "no votes" were so returned because the majority of said ballots were not counted for either of the three candidates for sheriff, by reason of the fact

that the name of only one of the same was crossed out, leaving the names of two candidates voted thereon for such office. The court next refused evidence offered by the contestor to show that two polling places were held in the Sedalia city precinct, with two sets of judges, clerks, poll books, and ballot boxes. And contestor offered evidence in connection therewith to show that in one of said polling places all voters the initial letter of whose last name fell between A to K, inclusive, were required to vote at one polling place, while in a like manner all between L to Z voted at the other polling place; but that the poll books showed about fifty exceptions to the rule, voters to that number having voted at the wrong place under such arrangement. That at each of said polling places there were six judges, two of whom had charge of the ballots, and issued them to the electors. At each place the judges numbered the ballots on the back to correspond with the number of the voter casting the same at the poll. That these polling places were 75 feet apart,—all of which evidence was, on motion of contestee, excluded by the court, to which appellant duly excepted. At the close of contestor's case the contestee offered in evidence his certificate of election, and his commission, and rested, and the court thereupon rendered judgment for the contestee. In due time, the contestor (Bowers) filed his motion for new trial, assigning as error the sustaining of contestee's (Smith's) motion to strike out parts of contestant's notice, and striking out said paragraphs, (4th, 5th, and 7th,) and excluding legal and competent evidence. This being overruled, the cause was appealed to this court.

Opinion.

The trial court excluded evidence tending to prove that the city of Sedalia was a city having over 5,000 inhabitants on the date of the general election in 1890. If the trial court refused to hear this evidence on the ground that it would take *ex officio* notice of the population of Sedalia, its ruling might be sustained; otherwise it was error to decline to hear it. Section 4794, art. 8, chap. 60, only applied to cities of 5,000 inhabitants. It was most material to know whether that article applied to the contest. It is, however, conceded by both sides here that said city has a population largely in excess of 5,000. Under these circumstances, article 8, chap. 60, Rev. Stat. 1889, was applicable to the method of holding and conducting said election in said city.

1. The contestor insists that the vote of the city of Sedalia should be rejected altogether, because the official ballot prepared by the county clerk, and used at that precinct, contained, in addition to the names of the Democratic and Republican nominees, duly certified to the county clerk, the names of certain parties as candidates of the Union Labor party,—among others, that of George D. Sappington, for sheriff,—when, in fact, no such party at the last previous general election had cast 3 per cent of all the votes of Pettis county, and no nominations of such a party had been certified to or filed with the county clerk, as required by said article 8, chap. 60. This, it will
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be readily seen, presents a question of great moment. The right of suffrage is justly esteemed the corner stone of our free institutions. Our election laws are framed with the special purpose of preserving this right, and of enabling every citizen, whatever his position in society, to express his choice, untrammelled and unintimidated. It is earnestly contended by counsel that, if the statute is to be construed so that ballots cannot be counted which contain names of candidates prohibited by the statutes, then it is unconstitutional. The argument of counsel for contestes is based upon the wrong that would be done the voter to deprive him of his franchise on account of the illegal act of a public officer, and that the statute is merely directory, and not mandatory. The right to make laws to preserve the purity of elections is expressly conferred on the Legislature in some of the states by their constitutions, but in Missouri the power to regulate elections by law has never been doubted or denied. In the administration of these laws, individual instances doubtless will occur when the voter loses his ballot, but this is no greater hardship than befalls the individual in the administration of other general laws.

In *State v. Cook*, 41 Mo. 593, where the whole vote of an election district was thrown out by the court of appeals because the officer making the registration was disqualified to act, this did not give a party who was a qualified voter, and who was registered as such, the right to demand that he should be entered as a qualified voter, in preparing the list of voters for a special election. The court held that it was a case of great hardship and deprivation. A citizen who had fought in the armies of his country, who was a qualified voter according to law, and had complied with all the forms of registration, was denied the privilege of voting because the board of revision pronounced the book in which he was registered a nullity, and the law had failed to provide for a new registration. Judge Wagner, speaking for the whole court, said: "But it is better that he should be deprived of a right temporarily than that this court should overstep the boundaries of established precedent and sound construction, and annihilate the line which separates judicial from legislative functions." "A court of law," says Lord Abinger, "ought not to be influenced or governed by any notions of hardship. Cases may require legislative interference, but judges cannot modify the rules of law." *Rhodes v. Smethurst*, 4 Mees. & W. 68. "It is not for courts of justice *proprio Marte* to provide for all the defects or mischiefs of imperfect legislation." Per Story, J., in *Smith v. Rines*, 2 Sumn. 354. In *West v. Ross*, 53 Mo. 350, in a statutory contest for the office of clerk of the circuit court of Gentry county, the statute required that all ballots cast should be numbered, and that ballots not numbered should not be counted. It appeared that none of the votes cast in Miller township were numbered by the judges of the election; that Ross received in said township 179 votes, and West 72 votes. It was further shown that the majority for Ross in the whole county, over West was 8; that, if the votes in Miller township which were not numbered had not been counted; West would have had a majority of

99 votes over Ross. It was also admitted that no fraud was intended by the judges in failing to number the ballots. If that case it was contended that the statute requiring the ballots to be numbered was merely directory. Judge Vories says: "After the Legislature by the statute directs that the ballots shall be numbered, it proceeds to declare the consequences of a noncompliance with the direction, which is that 'no ballot not numbered shall be counted.' Can we say this negative clause is only directory, and in that indirect way nullify, or repeal by a judicial decision, the whole provision of the statute requiring ballots to be numbered? If we deny the consequence affixed by the Legislature to the nonperformance of a regulation provided by the law, it, in effect, nullifies the law itself. This case may be a hard case, and doubtless is, but the legislative enactment is clear; and, although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases." The same statute received the same construction again in *Ledbetter v. Hall*, 62 Mo. 422. In *State v. Frazier*, 98 Mo. 426, the special act of the Legislature, incorporating the city of Rolla, required that the voters at city elections "shall register their names at least two weeks next preceding the election." A city election was held, and certain citizens elected councilmen. The election was held in every respect in compliance with law, save the voters were not registered. Barclay, J., said: "There was in this case a total failure to comply with a law making the registration of voters an essential preliminary to an election to the fullest extent; that it is peculiarly the province of the Legislature to prescribe the rules and regulations for conducting elections in this state; and that when the law prescribes certain requisites in the ballot, and follows it with the denunciation that, unless the ballot complies with the law, 'it shall not be counted,' then the statute is mandatory, and a noncompliance therewith will avoid the election."

Now section 4773 provides: "Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors, or any of the electors, within his county, participate, and to cause to be printed, in the appropriate ballot, the name of every candidate whose name has been certified to or filed with him, in the manner provided for in this article." "Ballots, others than those printed by the respective clerks of the county courts, according to the provisions of this article, shall not be cast or counted in any election." Section 4778 provides that "every ballot printed under the provisions of this article shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this article, and no other names." For the purposes of this discussion, it must be taken that the motion to strike out the allegations in the notice as to the names of

the Labor Union candidates confesses the truth of that averment, which I hold is a clear and concise statement, and its sufficiency as a pleading was not questioned by opposing counsel in the circuit or this court. It was reserved for this court to make the point, and its stands admitted that the ballot contained names not certified or filed in accordance with said article 3 of chapter 60. The statute provided said ballot should contain "no other names" than those certified. Here, then, is a positive violation of a plain law. What penalty follows in such a case? The statute answers: "Ballots other than those printed . . . according to the provisions of this article (3) shall not be cast or counted at any election." The words "shall not be counted" were construed as mandatory in *West v. Ross*, 58 Mo. 380, and the whole vote of a township excluded. Again in *Ledbetter v. Hall*, 62 Mo. 422, the whole vote of a township was excluded under the same provision. In *Gumm v. Hubbard*, 97 Mo. 311, it is true, the words "shall be considered fraudulent" were in the statute, but the words "and shall not be counted" affixed the punishment that should be visited upon the ballot declared by the statute to be fraudulent. The alternative is plain. We must either follow a statute which the Legislature has enacted, and had a perfect right to enact, or hold that it is optional with the county clerks to obey the electoral law or not, as their judgment may dictate. By holding that a violation of this provision does not affect an election, we in effect nullify the statute, and say to election officers it is not necessary to follow its commands. But it is argued by contestee that no fraud on the part of the clerk or of respondent is charged. In *West v. Ross* it was expressly admitted the judges were guilty of no fraud in failing to number the ballots, yet that did not prevent this court from declaring the election void. In *Gumm v. Hubbard*, Judge Black says the statute furnishes an absolute rule of evidence. It makes the ballot fraudulent "without regard to intent." So it would seem that neither averment nor evidence of fraud is necessary in such cases, but proof simply of a failure to comply with a mandatory provision of the statute will avoid the election. In 6 Am. & Eng. Encyclop. Law, p. 348, § 8, it is said: "In many of the states there are statutes prescribing the form of the ballot, the kind of paper, etc., and prohibiting any marks, figures, or devices by which one can be distinguished from another. These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted." And at page 325 of the same volume it is said: "A violation of mandatory provisions will avoid the election, without regard to the motive of the persons guilty of the violation, and without any inquiry into the effect of the result of the election." Again it is said: "No harm was shown to have resulted to contestor." It appeared from the evidence in the trial court that upon the recount contestee, Smith, had a majority of 33 votes only. It further appeared there were 164 votes cast in Sedalia that were

returned as "no votes." "In about three fourths of said ballots, the state of the case was that the same were not counted because one of the three candidates for sheriff was scratched, leaving the other two upon the ballot, and in a very large majority of such three fourths of said ballots the aforesaid result arose from the fact that the voter struck out one column of candidates, or the candidates of one political party, and left the candidates of the other two parties or columns intact." Now according to the statutes of this state, as only the nominees of two political parties had been certified to the county clerk, no other names could lawfully be placed on the ballots at said election; and, had there been only the two names of the contestor and contestee on the official ballot, the striking off of either of their names would have left the other a vote; but, when a third name illegally appeared on this ballot, the striking off of the name left a vote for two candidates, which rendered it void, or "no vote." There were 164 votes of this character in Sedalia alone, and the majority is only 83. Who will say that the placing of the third name illegally on these ballots did not render this election uncertain? It has often been said that if the irregularities in an election are so great as to render the choice doubtful, they will avoid the election. *Scranton Borough Case*, Brightly, Elect. Cas. 455; 6 Am. & Eng. Encyclop. Law, p. 323, note 3.

But it is argued that our Constitution secures to every voter the right to cast his ballot for whom he pleases. Certainly this is not denied, and, in order that he may not be restricted simply to those candidates whose names are printed on the official ballot, it is expressly provided in section 4778 that "at the end of the list of candidates for each office shall be left a blank space large enough to contain as many printed names of candidates as there are offices to be filled." We agree with counsel for appellee that if this new Election Law of May 16, 1889, should restrict the election to the names printed on the official ballot, and make no provision for his substituting any name he chose for any office to be chosen, it would be unconstitutional. On the contrary, it has expressly guarded against that in section 4778, by leaving space for him to write the names of as many candidates as there are offices to be filled.

But we are not certain that we fully comprehend the objection that this Act is unconstitutional, if it is construed that a ballot shall not be counted if it contains written matter not authorized by the statute. The term, "elections shall be free and open," is very general. If, by it, we are to understand that the citizen may defy all regulations prescribed by law, call and hold elections whenever he sees fit, and vote in any manner that may suit his fancy, then all elections laws are unconstitutional. But we hold that "the electoral franchise is not an unrestrained license. In a government of law, the law must regulate the manner in which it is to be exercised. The time, occasion, and mode of voting are to be prescribed by the Legislature in subordination to the provisions of the Constitution." Paine, Elections, § 5 (1868). A careful scrutiny of this Act has not revealed anything in the pro-

visions requiring the county clerk to print the ballots, and prescribing what names shall be printed thereon, that, in our opinion, conflicts with a free and open election. If an aspirant for office does not belong to any of the great parties in this country, and is not fortunate enough to have the nomination of a party that cast 3 per cent of the votes at the last election, he is still not debarred. He can procure the certificate of electors within his district or political division to the number equal to 1 per cent of the vote cast at the last general election. This system contains many features that are new, and they have not yet received construction by the courts of the several states.

In *Price v. Lush*, 10 Mont. 61, the Supreme Court of Montana held that as this was an English statute, and had been often construed by the courts of that country, the territory of Montana must be presumed, in adopting it, to take it with the construction it had received in England, and consequently held an election void where the successful candidate at the polls had not been nominated as required by law, but had succeeded in getting his name on the official ballot. That court reached that conclusion after a thorough examination of the English and Australian cases. In adopting that construction, it followed eminent authority. *Pennock v. Dialogue*, 27 U. S. 2 Pet. 1, 7 L. ed. 337; *McDonald v. Hovey*, 110 U. S. 628, 28 L. ed. 271; *Allen v. St. Louis Nat. Bank*, 120 U. S. 94, 30 L. ed. 576; *Pratt v. American Bell Teleph. Co.* 141 Mass. 225, 1 New Eng. Rep. 760; *Skouten v. Wood*, 57 Mo. 880. But the power of the Legislature to regulate elections has been elaborately reviewed by the Court of Appeals of New York very recently in the case of *People v. Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624. The Australian ballot system, with some modifications, was adopted by the Legislature of that state in 1891. The title of the Act was "An Act to Promote the Independence of Voters at Public Elections, Enforce the Secrecy of the Ballots, and Provide for the Printing and Distribution of Ballots at Public Expense." Laws N. Y. 1891, chap. 296. Section 31 of the Act provides that "no inspector of election shall deposit in a ballot box, or permit any other person to deposit in a ballot box, on election day, any ballot which is not properly indorsed and numbered, except in the cases provided for in section 21 of this Act." Section 17 of the Act required this indorsement, "Official ballot for ——" and it was provided that, after the word "for," in the blank, should follow the description of the polling place for which the ballot is prepared, the date of the election, and a *fac simile* of the signature of the county clerk, "and the ballot shall contain no caption or other indorsement." The town of Camillus, in Onondaga county, was divided into two election precincts. In some way it turned out that all the Republican ballots in district No. 1, in said town, were indorsed, "Official ballot for second district poll, town of Camillus," November 3, 1891; and in district No. 2 all the Republican ballots were indorsed "for first district." There were 1,252 of these ballots. The inspectors counted these ballots for Rufus T. Peck, Republican candidate for senator. A proceeding by man-

damus was begun in the supreme court to require the canvassers to reject these ballots as illegal, and the writ was made peremptory in that court. On appeal to the court of appeals that order was affirmed. Opinions were written by *Chief Justice* Ruger and *Judges* Gray and O'Brien, in which the decisions of this court in *West v. Ross*, 53 Mo. 350, and *Ledbetter v. Hall*, 62 Mo. 422, were quoted and approved. These opinions with one accord all hold that as "the Act provides that no ballots not properly indorsed shall be received, or, if received, shall be counted," it is imperatively the duty of the canvassing officers to reject them. Says *Chief Justice* Ruger: "But it is urged that a strict construction of the law must result in disfranchisement. This is true, but the law plainly contemplates such a result, and who can complain, except those who are opposed to any restrictions whatsoever upon the action of the election? No advocate of the Reform Ballot Law can justly criticize a result which was in the minds of its authors when the law was drafted and enacted. They clearly contemplated this effect, and determined that the injustice which a few might suffer through ignorance, willful blindness, or inattention to the requirements of law should not be permitted to defeat the great good to be secured to the whole people by the adoption of an effectual scheme for the purification of elections." Let it be conceded that the arguments of the judges in sustaining the law proceed principally upon the necessity of a secret ballot, and to permit the irregularity to go unpunished would destroy that secrecy, still the great underlying consideration was that "elections are a contrivance of government, which prescribes who are electors and how they may express their will, and it is a legitimate exercise of power to prescribe the description of ballots which shall be used."

This case fully meets the argument of respondent, that the ballots in this case at bar were official ballots prepared by the county clerk, and his illegal act cannot disfranchise a voter. In the New York case the ballot was indorsed "Official Ballot," but, by the willful or negligent act of the clerk, the wrong precinct was indorsed, and they were rejected. The point is identical in principle. It was the act of an official, and that court, as we have already said, but followed our own decisions, *supra*, wherein the act of the election judges disfranchised a whole township. The Supreme Court of Connecticut in *Talcott v. Philbrick*, 59 Conn. 472, 10 L. R. A. 150, had a question identical in principle with this. There, as in Missouri, this Australian Ballot System was adopted in 1889. By the first section of chapter 247, p. 155, Acts Conn. 1889, it is provided, among other things: "In addition to the official indorsement, ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same." And section 12 provided that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void, and not counted." Certain ballots (286 in number), bearing the names of all the Republican candidates, and in every respect complying with the law, save and except they bore

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the name "Citizens," were cast at that election. These ballots were issued by the Republican party. The court held these ballots were void, and should not be counted. Says the court: "We are relieved of any obligation to inquire as to the necessity or reason of this or that requirement, and we are not at liberty to dispense with anything that is required, whatever the reason for it may be, or even if without any apparent reason at all. The Legislature has spoken, and obedience is our first and only duty. It is at liberty to throw around the ballot box such safe-guards and regulations as it may deem proper, and it is the duty of the citizen to conform thereto. Some inconvenience is not too great a price to pay for an honest, pure ballot." And, as applicable to the notice of contest in this case, the court says: "The ballot does not speak the truth. It purports to have been issued by a Citizens' party, but it was in fact issued by the Republican party. It implies there was a Citizens' party, but there was not. In this case, the ballot implies there was a Union Labor Party, but the motion to strike out confesses there was not; and yet the names of candidates of such a party were placed on this so-called official ballot, to mislead and confuse the voter, and actually had that result. In *Fields v. Osborne*, 60 Conn. 544, 13 L. R. A. 551, this same Connecticut statute again came under review. This was an annual election for the town of Branford. Among other offices to be filled was that of town clerk. By the statutes this office is *ex officio* the registrar of births, marriages, and deaths in their respective towns. No vacancy existed, and by law no election for probate judge was authorized at this election. There were two tickets in the field. The Democratic ticket and a Citizens' ticket. On the Citizens' ticket were the words, "For judge of probate, Henry H. Steadman." On the Democratic ticket were the words "For town clerk and *ex officio* registrar of births, marriages, and deaths." The court held that the Citizens' ticket containing the words "judge of probate" were illegal, and should not be counted, and also rejected the Democratic tickets with the words "*ex officio* registrar," etc. *Judge* Seymour, delivering the opinion says: "A plain provision of the law is violated in a point concerning which the Act does not authorize us to inquire into the intent or the consequences of the violation. In short, the Legislature has seen fit to say, if a ballot contains the addition to the specified contents which these do, it shall be void. Unless we are prepared to hold the Act unconstitutional, we cannot disregard its requirements. If it is harsh and unreasonable, the remedy is with the Legislature that enacted it, and not with the courts, which are bound to respect it." See also *Re Vota Marks*, 17 R. L. —.

The Act of 1889 was confined to cities of 5,000 inhabitants. It was an experiment. The Legislature apparently hesitated to adopt it for the state at large, lest its requirements might confuse the officers and voters; but the city elections demonstrated that it was not difficult to comply with it, and it rapidly won the public favor, so that the present Legislature has applied its provisions to every precinct in the state. Except for the gravest reasons,

we ought not to set aside the plain mandate of the Legislature; but, if we permit the plain violation of that law that was committed in this case, we nullify the statute. But it is objected that, notwithstanding the county clerk placed upon the ballots at this election the names of candidates in positive violation of the statute, the contestor cannot complain, because section 4778 provides: "Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or, if the circuit judge is then absent from the county, a judge of the circuit court, may, upon application by any elector by order, require the county clerk of the county court to correct such error, or to show cause why such error should not be corrected." This section was intended to correct mistakes in the names of the candidates nominated, or the designation of the offices for which they were candidates, upon the application of any elector. It does not purport nor do we think it was intended as furnishing a mode of procedure to a candidate who was wrongfully denied a place on the ticket, nor a remedy for those lawfully on the ticket to purge it of names which had illegally been placed thereon. But, in any event, this case is here on the pleadings alone. There is nothing in the record that tends to show that contestor had any knowledge of the facts which would now estop him of complaining. In the absence of proof or allegation to the contrary, it will be presumed that he acted on the presumption that the county clerk, a public officer, would not put on the official ballot the name of any candidate whose nomination had not been certified or filed as required by law. In the absence of knowledge, no one will contend he is estopped.

2. Again, it is contended by the contestor, Bowers, that the vote of the Sedalia precinct should be excluded, for the reason that the county court ignored section 4678 in the appointment of judges of the Sedalia precinct. The statute (section 4777, in connection with 4678) provides that the court shall appoint six judges for each precinct, and in this instance the court appointed twelve judges. Instead of one polling place in the precinct, there were two, 75 feet apart. Different judges received and numbered the ballots. At one of these voting places 1,582 votes were cast, and at the other 1,578. By the statute (section 4777, in connection with 4678) the county courts are empowered to appoint six judges only for each election precinct. Three of the judges shall be selected from the party having the largest vote at the last election, and three from the party having the next largest. These judges shall select the two judges, one from each party, to have charge of the ballots, and furnish them to the voters. And minute direction is given in the statute for the conduct of the election. There is no warrant for the appointment of double this number and opening a new poll. After the court had appointed six, the power of attorney was exhausted, and those appointed after that derived no authority. If the county court of Pettis county may disre-

gard the election law by appointing six additional judges and a second polling place, they may establish a dozen in the same precinct, and, if that court may do this, all other county courts may do likewise. The precedent would be dangerous and pernicious. It would open wide the door for fraudulent practices, and practically nullify the statute.

Counsel for contestee says: "Certainly some of the judges acted legally, and how can it be decided as to which lot of ballots shall be thrown out, and which body of electors deprived of their votes?" We answer that, where the conduct of the election is so grossly irregular that the courts cannot determine which are legal and which illegal, the whole should be disregarded. In no other way can the laws be upheld, and the purity of the ballot preserved.

As to the provision of the statute, we think there is little trouble in ascertaining the reason upon which it rests. Observation and experience have taught that one of the greatest evils attending our popular elections has been the crowding of the polls. In this way the not over scrupulous partisan manages to delay voters, deter the timid and diffident voter, annoy the judges with frequent and unfounded challenges and other interruptions, and block the way for all but his own party. To avoid this, the statute is ampler in its authority to the county court to make the precinct or election districts small enough that six judges only will be required to receive and count the vote. The county court of Pettis county when it appointed twelve judges for one precinct by its very record disclosed the absolute necessity for dividing this precinct. It is a virtual finding that six judges could not receive and count the votes. Instead, in that city, of their following the plain provisions of the statute, and dividing the precinct, they made this unauthorized appointment of six additional judges, and in this way preserved all the objectionable features of a popular election, and secured to the people of that city none of the benefits that the statute was designed to secure. The statute wisely provides that "each voter shall vote only in the township in which he resides, or, if in a town or city, then in the election district therein in which he resides." This provision was made so that the judges and voters could more readily know who is entitled to vote, and the more easily detect any attempt to vote illegally, either from want of residence or non-age, or other disability. McCrary, Elections, § 651. Moreover, by having precincts small enough for two judges to receive and two to count, the judges may more deliberately hear challenges and decide them, without denying others the right to vote. Judge McCrary, in his work on Elections, expresses the opinion that no precinct should contain over 800 voters; indeed, he lays it down as a cardinal principle that multiplication of voting precincts will prove an effectual remedy for all the evils that flow from overcrowding the polls. And there are other considerations that doubtless controlled the Legislature. It was intended that the boundaries of each precinct should be defined, and every elector therein should know the voting place. It was never intended, as was done here, that the initial let

ter of a voter's name should subject him to the annoyance of going from one voting place to another, according to the initial letter of his name. It was the clear intention of the law that every voter in each precinct should vote at one and the same place, and that these precincts should be small enough to permit each voter to cast his ballot on the day of election without annoyance. The suggestion that this had been previously done is not in the case, and, if it was, is no justification. There was no evidence heard on this branch of the case that would tend to estop the contestor. As the judges in excess of six were not even *de facto* judges, it resulted that at least six persons unauthorized by statute were permitted to pry into the ballots of the voters, and thus destroy that secrecy which the Constitution secures against every one but a sworn and lawful election officer. The position taken by my learned brother that the two polling places within one precinct is not an abuse of the statute is not sustained by those judges of this court who hold that this violation of a positive enactment does not vitiate the election. The case from the supreme court of Texas (*Davis v. State*, 12 S. W. Rep. 957, 76 Tex. 420) is cited as authority. But the facts in that case show that the county court made the mistake of putting two wards in one precinct, and only appointing one set of officers for each precinct. I presume I may be permitted also to cite the dissenting opinion of Judge Henry, 12 S. W. Rep. 962, as furnishing to my mind the most satisfactory reasons why the election in that case should have been held void. I quote from his opinion: "The doctrine of *de facto* election precincts finds no place in the law. What it is unlawful for the commissioners' court and the voter to do in the first instance cannot become right or lawful by being repeated. The law, much less the Constitution, cannot be repealed or superseded by such methods. . . . The law does not, however, authorize two separate elections to be held in one ward or any one precinct. It directs and authorizes one only. For the purpose of preventing fraudulent voting, the policy of the law is that there shall be only one poll at which one person can cast his vote." I am glad that the judgment of this court does not, at least, approve the clear violation of the law in appointing two sets of election judges in one precinct, and that in the future the county court will avoid this clear violation of the spirit and letter of the law. This appeal will accomplish this much good, if no more. I cannot give my assent to the opinion of the majority. I understand that the Legislature has a right to enact laws regulating elections, and that it is the duty of the courts and the citizens alike to obey them, so long as they do not infringe the Constitution. When the Legislature adopted what is popularly known as the "Australian Ballot Law," its purpose was most clearly to throw around the voter and his ballot additional safe guards, and render him less liable to be deprived of his suffrage. All good citizens appreciate the importance of preserving the ballot in all its purity; the only difference that can arise is as to the method of so doing. We hold that the most effectual way of accomplishing this is to require these election officers to obey the stat-

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ute. It follows from these views that I hold the ballots containing the names of the Union Labor candidates void, and that the dividing of the city into two polling places was illegal and unauthorized, and resulted in placing the ballots in the hands of parties who had no authority to see them, and was a clear violation of the statute. In so doing, I follow the command of the law in a matter of the highest public concern. The judgment of the circuit court should be reversed, and the cause remanded for trial in accordance herewith. I am authorized by *Sherwood, Ch. J.*, to say he concurs fully in all I have said, and *Thomas, J.*, concurs in the result I would reach.

Thomas, J.:

I concur in the result reached by my Brother Gantt on the second point discussed in his opinion, but I fear he has stated the principles upon which he bases that result too broadly. I am not prepared to say that a county clerk's action in preparing a ticket under our election laws can be reviewed by the courts after the election in all cases, nor am I willing to say that it cannot be reviewed in any case. That would, in my judgment, depend on circumstances. Under the specifications in the notice of contest in this case which were stricken out on motion of the contestee, the contestor would have had the right to introduce evidence to show that the Union Labor party had no existence in Pettis county; that Sappington had not been nominated by any party, or by any number of electors; that his nomination had not been certified to the clerk at all; and that the clerk arbitrarily put his name on the official ballot without deciding, or attempting to decide, anything, simply because he was requested to put it there, and in that case the ballot would have been void. I fully concur in what was said by *Sherwood, P. J.*, in division No. 1, in *State v. Leueur*, 108 Mo. 253, that the secretary of state does not occupy "the attitude of a mere figurehead or automaton, moved about at the whim or touch of every eager applicant who desires the performance of duties which pertain to his office. When applied to for the discharge of such duties, although his discretion may not reach the height known as 'judicial,' . . . yet it cannot be doubted that some portion of the qualities and attributes of discretion inhere in the discharge of his official duties, requiring him to consider before acting, and to search and inquire before reaching and announcing a conclusion." These remarks are as applicable to the county clerk under our election statutes as to the secretary of state, but I do not believe the power of the secretary of state or clerk in preparing the official ballot is unlimited. It would be a pernicious doctrine for the courts to assert that the county clerk can arbitrarily and *ad libitum* put names on the official ballot that ought not to be put on it, and that the candidates who have a legal right to have their names on it must resort to the courts before the election or lose their remedy. On the other hand, if the clerk should receive the certificate of nomination, should examine into the facts in regard to it, should decide that the names of the parties mentioned therein ought to go on the official

ballot, and should print and publish it as required by law, and no objection to it should be made prior to the election, the courts, in a contest arising in regard to it after the election, might very well refuse to interfere with the clerk's decision, and hold the ballot good, though it should turn out that certain names were improperly printed on it. But the courts should hold the ballot void if it appear that names were illegally printed on it, unless it should be proved that the clerk did consider before acting, and that he did search and inquire before reaching a conclusion; that he did exercise his judgment and discretion; and that he did not arbitrarily, and without a pretense of authority or right, print the unauthorized names on the ballot. I take the position that the clerk has not a *carte blanche* to put the name of every eager applicant, who may so request, on the official ballot; nor should a

ballot be declared void in every case in which a name is on it which ought not to be on it, where the clerk exercised a sound discretion in preparing it. This leaves the courts to review the action of the clerk, and to adjudicate the issue as the very right of each case may demand. The court below ought to have refused to strike out the portions of the notice of contest it did strike out; ought to have heard the evidence in regard to how and why the names of the Union Labor candidates were printed on the ballot; and to have disposed of the issue on the evidence. I fully agree with my Brother Barclay in what he has said in his opinion in regard to the election precincts in Sedalia. For the reasons given above, I think the judgment of the lower court ought to be reversed, and the cause remanded for new trial on the merits.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Stephen B.
RANSOM, *Prosecutor*,
v.
Daniel BLACK.
(.....N. J.....)

- *1. The right to vote secured by the Constitution can only become operative by legislation; and any reasonable legislative regulation for the purpose of securing an enforced secrecy of the ballot is not a deprivation of a right to vote.
2. The clause in section 63 of the Election Act of 1890, prohibiting any electioneering on an election day within 100 feet of any polling place, is a reasonable police regulation to secure good order about the polls.
3. An objection that the clause in section 30, which provides that, if any ballot shall have thereon a mark, sign, signature, or device other than permitted by the Act, it shall be void, is unconstitutional, because the voter may lose his vote by the fraud or neglect of those preparing the ballots, is not sound. The most stringent directions are given respecting the preparation of the official ballots, and the law presumes that they will be obeyed.
4. The clauses which provide that only those parties casting a certain percentage of the vote at the last election, and those parties presenting petitions signed by a certain number of voters, shall be entitled to official ballots, is a valid regulation to restrain the number of ballots to be printed and distributed within reasonable limits.
5. The fact that a voter may be compelled, in exercising his right to vote, to deposit a ballot having upon it the name or style of a party of whose principles he disapproves is not an illegal deprivation of a right to vote; for if a voter exercises his right to erase the names of all the candidates on the ticket, and inserts the names of

*Head notes by REED, J.

persons who stand for an entirely different principle, the heading of the ticket becomes meaningless as an expression of the voter's sentiments.

(June 9, 1892.)

CERTIORARI to the Court of Common Pleas for Hudson County to review a judgment affirming a judgment of the Second District Court of Jersey City imposing a fine upon defendant as a penalty for the alleged violation of the election laws. *Affirmed.*

The facts are stated in the opinion.

Argued before Dixon, Garrison, and Reed, JJ.

Mr. Stephen B. Ransom, *in propria persona*.

Mr. Thomas J. Kennedy for defendant.

Reed, J., delivered the opinion of the court:

Section 63 of the new Election Act reads as follows: "No voter shall knowingly vote, or offer to vote, any ballot except an official ballot inclosed and sealed in an official envelope, as by this Act required. Any person violating this provision shall incur a penalty of \$25 for each and every offense, to be recovered by an action of tort, before any court of competent jurisdiction, by any person who bona fide shall first bring suit." The defendant below voted a ballot printed at his own expense, with no indorsement upon the back, as is required upon official ballots, and therefore admittedly contravened the section just mentioned. This is admitted by the prosecutor, but he attacks the judgment by challenging the validity of the statute prescribing the penalty. The indictment against the Act sets out a number of particulars in which it is charged that the statute is in conflict with the state Constitution. The parts of the statute which are thus attacked are the following: *First*, the clause in section 63 which prohibits electioneering, on election

NOTE.—As to the power of the Legislature to regulate the right to vote, see *Bloomer v. Todd*, 1 L. R. A. 111, and note, 8 Wash. Terr. 599.

As to discrimination between political parties in 16 L. R. A.

respect to printing official ballots, see *DeWalt v. Bartley* (Pa.) 15 L. R. A. 771.

As to the Australian Ballot System generally, see note to *Bowers v. Smith*, ante, 754.

day, within 100 feet of any polling place; *second*, the last clause of section 63, which provides that any marked ballot or official envelope shall not be counted; *third*, the provisions of section 28, which entails upon those voters who do not belong to a party who has nominated candidates, but who wish to vote a party ticket of their own, the trouble of procuring a petition signed by a certain per cent of the entire vote cast at the preceding election, as a condition precedent to adopting a party name, and having tickets printed officially; *fourth*, the provisions of section 38, limiting the number of votes officially printed for petitioners to one half of the total number of votes cast at the preceding election; *fifth*, the provision of section 82, which provides that the official ballot shall have upon it the name or title of the party or principles of the party or petitioner making the nomination. The clauses of the Constitution which are chiefly relied upon by the prosecutor are the first clause of the first article of the Bill of Rights, which guarantees the right to enjoy and defend life and liberty, to acquire, possess, and defend property, and to pursue and to obtain safety and happiness; and the second article of the Constitution, which provides that every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people.

It will be observed that all the points, except the first, made against the statute, have reference to a right to vote. In respect to these grounds of complaint, it may be remarked that the clause in the Bill of Rights seems to have no pertinency. The clause in the Bill of Rights is a general recognition of those absolute rights of the citizen which were a part of the common law. Whether any advantage accrues to the citizen from these declaratory clauses in the Constitution, has been questioned. 1 Kent, Com. 614. But whether or not some or all of these rights were inherent in the citizen without constitutional recognition is unimportant in the present discussion. It is unimportant because it will be observed that the material phases of the prosecutor's complaint is that he has been illegally limited in, or obstructed in, the exercise of his right to vote. If, therefore, the first-mentioned clause of the Constitution is to be invoked, it is essential that the right of suffrage shall be classed among those absolute rights therein recognized. Nothing, however, is established more unquestionably than that the right of suffrage is not an absolute right. No such right exists, unless specifically conferred by a constitution or a statute. It is a political right, and does not flow from the declaratory clauses of the Bill of Rights. 1 Story, Const. 580; Cooley, Const. Lim. 599. The question, then, is whether any of the features of the statute illegally obstructs the voter in exercising the right which is expressly conferred upon him. The right conferred is the right to vote for all elective offices. As to when, where, and how the voting is to take place is left to the Legislature. Without the intervention of the Legislature, the privilege conferred by the Constitution 16 L. R. A.

would be fruitless. A wide field, therefore, is left open for the exercise of legislative discretion. The days upon which elections are to be held, the hours of the day or night during which, or between which, votes shall be received, must be determined by the Legislature. So, too, the places where each election is to be held, and the size of the voting precinct, and whether the size shall be measured by territory or population, must also be settled by direct or delegated legislative authority. The widest field for the exercise of legislative wisdom and discussion is in adjusting the method by which the sentiments of the voter shall be obtained and canvassed. The Constitution does not even prescribe that the voting shall be done by ballot, and, in fact, long after the adoption of the present Constitution township elections were conducted otherwise. In adopting a scheme for these purposes, it will require little thought to perceive that many considerations besides that of the voters' convenience must be regarded. The problem has been, and still is, how to gather the prevailing sentiment of the voting body so as to best conserve the purposes of popular government. The objects which have seemed the most important have been to exclude unqualified persons, and to shield the legal voter from the influences of coercion or corruption. The discovery of a scheme of voting which would the best secure these objects had long been in the thoughts of statesmen and reformers. The ballot itself became the method of registering the will of the voter in Great Britain only after a long period of agitation. The advantage of a system of secret voting was stirred by the Benthamites as early as 1817. Encyclopedia Britannica, title, *Ballot*. In 1835 the judges of the court of kings' bench doubted whether by ballot was a legal mode of holding an election in a parish to fill a vacant curacy, under a custom that the parishioners should elect a successor to a deceased curate. *Paulkner v. Elger*, 4 Barn. & C. 449. The objection of the judges to the ballot was mainly that, if a person voted who was afterwards ascertained to have been disqualified, there was no way of telling how he had voted. After years of discussion, the ballot was adopted in local elections in Manchester and Stafford, in 1869, and was, in 1872, by the passage of Mr. Foster's Ballot Act (55 & 56 Vict. chap. 83), introduced in all parliamentary and municipal elections, except parliamentary elections for universities. But the mere use of the ballot has been shown by experience to be ineffectual to prevent coercion and corruption. The factor of supreme importance calculated to bring about this result is an enforced secrecy respecting the choice of the voter. So long as the ballot can be marked for identification, or the vote of the citizen can be disclosed in any way, the voter is liable to be called to an account for his conduct. The coercionist will treat his refusal to vote a marked ballot as an adverse vote. The corruptionist will have the means of assuring himself that the vote he has purchased will be delivered. The thoughts of those interested in pure elections were turned by these considerations to the device of some scheme for voting which would secure compulsory secrecy, and at the same time provide for an orderly,

equal, and convenient exercise of the right of suffrage. The honor of first devising such a plan belongs to the government of the province of South Australia. In 1856 a constitution was adopted by that colony, granting popular representation and manhood suffrage. In 1857-58 the election Acts were passed, which typify the system which has spread to two other continents under the name of the "Australian ballot system." The practical results of the introduction of this system is shown by the testimony of Sir Robert Richard Totten, who, as a member of the government of South Australia, had opposed the introduction of the secret ballot. His testimony, however, is that rioting and disorder had disappeared. Intimidation by landlords and trades unions alike had disappeared entirely, and the very notion of coercion or improper influences had died out. Wigmore's Australian Ballot. The good results of the Australian system induced the passage of the Act of 1873 in England, already mentioned, which is based substantially on the South Australian method. Whenever similar election acts have been put in operation the sentiment of the community has been generally favorable. While they do not accomplish all that is desirable in the way of extirpating corrupt practices, their effect has undoubtedly been to secure quieter elections, to greatly reduce corruption, and almost entirely destroy coercive influences. Now, I think this recapitulation of the purposes and results of the class of acts of which our own is a specimen has a pertinency to the questions mooted in this case; for I think that any provision in such Act which is likely to bring about a result which conduces to the purity of popular elections should receive a favorable consideration. It is of course true that, if the effect of any provision is to shut off a voter from the ballot box, such provision must fall before the constitutional guaranty of the right to vote. But in measuring cases of mere inconvenience, expense, or sentiment, the existence of a salutary purpose and the likelihood of the provision tending to accomplish that purpose must weigh greatly in determining the reasonableness of the statutory regulation. With these general remarks, let us look at the several points made against the constitutionality of the present Act.

The first ground of complaint is that no electioneering is permitted on election day within 100 feet of any polling place. Section 63. This clause is criticised as an infringement upon the constitutional right of every citizen to express his sentiments upon public men and measures, and his right to persuade his fellow citizens to vote for the advancement of his opinions. I find no substance in this criticism. The regulation is a proper one, to avoid disturbance and disorder immediately about the polls. While a man has a right to express his opinions, the exercise of this right, like all other general rights, is the subject of reasonable police regulation. A man cannot rise in church during service and deliver a political harangue, or shout his convictions about public measures, at midnight, in the streets of a city, without liability of being arrested as a disorderly person. The restriction is entirely proper, and also quite trivial; for all the electioneering citizen has to do is to invite the voter

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to whom he wishes to express his sentiments to come outside of the hundred feet limits. It is further observable that this clause has nothing to do with the voting of an unofficial ballot. If it should be regarded as unconstitutional, it is nevertheless a separable part of the Act, which does not, in any way, affect the present discussion.

The second point of attack is the part of section 63 which prohibits any person from putting a mark upon the face or back of a ballot or envelope, by which the ballot or envelope may afterwards be identified by any other person as the one voted by him; and section 39, which provides that if any ballot shall have thereon any mark, sign, designation, or device other than permitted by the Act, whereby the said ballot may be identified, or distinguished from other ballots cast at such election, such ballot shall be absolutely void. The point made against these provisions of the Act is that the voter has no hand in the preparation of the ballot; but that a mark or irregularity may get upon the ballot in its preparation, which may prevent its being counted. It is therefore argued that a voter, through no fault of his own, may be deprived of his vote. This criticism is grounded upon a presumed fraud or neglect of duty by the persons upon whom the duty of preparing the ballots is imposed. It is, of course, entirely true that it is possible for a vote to be rejected because of the fraud or carelessness of such person or persons; but the same remark is true under any scheme which may be devised. Votes have been suppressed, and are constantly miscounted, in making up the results of elections. An admission of the soundness of the present criticism would destroy the entire scheme of securing a secret ballot. Secrecy is impossible without uniformity in the appearance of the tickets and envelopes. That uniformity cannot be obtained unless the preparation of the ballots is put in the hands of some specified person or persons. The guards and restrictions placed around the preparation of the ballots are of the most explicit and stringent kind. The county clerks or municipal clerks, by section 32, are directed to cause the ballots to be printed on plain, white paper, etc., without any mark, word, device, or figure thereon, except as in the Act provided. By direction of section 40 the ballots are to be in the possession of the clerks five days before the election, subject to inspection by candidates and their agents. If any mistake is discoverable, the clerks are directed to correct the same without delay, by causing new ballots to be printed. By the terms of section 64 any printer is liable to conviction for printing a ballot otherwise than as directed by the clerk. The law presumes that these prescriptions of duty will be performed. It never presumes a neglect of official duty. I can perceive no substance in the objection raised against this feature of the Act.

The third and fourth grounds of attack upon the Act may be considered together. They are directed against the provisions of section 28, providing for the nomination of candidates by petition, and of section 38, regulating the printing of official ballots. The first of the complaints against this legislation

is that the voter who is not a member of a party which cast 5 per cent of the entire vote cast at the preceding election is subjected to hardships from which other voters are free. To apprehend the force of this complaint, it is necessary to observe that by the terms of section 28, any political party which, at the preceding election polled not less than 5 per cent of the votes cast in the election district, may nominate and certify the names of candidates to the secretary of state, in case they are state officers, or to the county clerk, if they are county officers, or to municipal clerks, if the officers are municipal. These names are printed, without further party action or expense, upon an official ballot; but voters who are members of a party which cast less than this 5 per cent of votes, or voters who desire to organize a new party, can only obtain an official ballot by a petition. This petition must be signed, in case of a state officer, by qualified voters in number not less than 1 per cent of the vote cast at the preceding election for members of Assembly; and in case of a district, county, city, or township office, by not less than 5 per cent of such vote; the number of such signers, however, need not exceed 200 altogether. It is insisted that the labor of gathering signatures and putting this petition into legal shape thus entailed upon a class of voters, is an unconstitutional discrimination against it, in favor of the members of the older and larger parties. The second complaint is that there is further discrimination in printing tickets. By directions contained in section 33, the county or municipal clerk is to provide, for each election district, 250 ballots for every 50 or fraction thereof of votes cast therein by such party at the last preceding election for members of the General Assembly, except in case of nominations by petition by any party that cast no votes for any candidate or candidates at the last preceding election for members of the General Assembly. In such case the ballots furnished at public expense shall be equal in numbers to one half of the total number of votes cast in the election district at such last preceding election. It may be observed, in passing, that this provision places no obstacle in the way of any party obtaining all the ballots it may wish. It only prescribes what number of said ballots shall be printed at public expense. The number of ballots printed for each party at the public expense bears relation to the number of voters of that party so far as that number can be approximated by the result of the preceding election. When an entirely new party puts candidates in nomination, this method of calculation is of course impracticable, and the rule adopted seems reasonable. It may give to the new party more or less ballots than to some of the parties entitled to make nominations by convention. Now, in passing upon the validity of both of these provisions, it is to be noted that they in no way impede the voter in exercising his right to vote for any particular person or persons for any office. He is at liberty to vote for any person by simply erasing a name from, and writing the name of the favored person upon, any official ballot. It is therefore apparent that the right in the exercise of which it is claimed the voter is embarrassed is not the right to vote, but the right

to form a party and vote as one of that party. By the very frame of the complaint the existence of parties is recognized as a part of the practical machinery for conducting elections. Now, the plan of providing official ballots, which plan is the keystone of the secret ballot system, involves necessarily some limitation upon the number of party tickets, and the number of party candidates. Of all the Acts which have been passed to bring about this system of voting, I am sure none can be found which does not in some way circumscribe the privilege of demanding a place upon the official ballot as a party, or as a candidate of a party. If it was left in the power of each voter, or each coterie of three voters, to adopt a party name, and demand that an official ballot should be printed at public expense, and distributed to each voter at the polls, the polls would probably be littered with ballots "thick as autumnal leaves that strew the brooks in Vallambrosa." Great expense, labor and inconvenience would result, without any appreciable benefit to the voter or to society. These regulations may not be the wisest that could have been adopted, still they are regulations which do not seriously impair the right of any citizen to vote. They are intended to restrict the number of party tickets within reasonable limits, while at the same time permitting any body of citizens whose number is sufficient to give importance to a concerted political movement to organize as a party.

The last ground of complaint which I shall consider is the following: That a voter whose sentiments are not in accord with the principles of any party having an official ticket is practically deprived of his vote, because he cannot vote unless he votes a ticket having upon it the name of a party of whose principles he disapproves. This point is based upon the provisions contained in section 32, which directs that the nominees of each party or group of petitioners shall be printed on separate tickets, underneath the title or name of the party or petitioners making such nominations, as designated by them in their certificate or petition except when there is no designation of name or title, then under the title of "Independent Nominations." It is obvious, therefore, that every official ballot distributed at any polling place may have upon it the name of a party. It is therefore insisted that while a voter has a right to replace any name upon one of such ballots with the name of a candidate of his choice, yet he cannot deposit his ballot without signifying his approval of the principles of the party whose name heads and remains upon the ticket. This, it is urged, couples with the privilege of voting a condition which may practically deprive a conscientious voter of his suffrage. The point of this complaint, of course, rests upon the assumption that if the voter deposits his ballot, he must do so with the name or style of the party still upon it. It is suggested that the voter has the privilege, under the statute, to erase the name of the party from the ballot. The language of section 40 is as follows: "Nothing in this Act contained shall prevent any voter from erasing from his ballot any name or names thereon printed, or from writing or pasting thereon the name or names of any

person or persons for whom he desires to vote for any office." Now, it is suggested that this language leaves the voter free to erase the name of a party. This construction is put upon the literal words of the Act, which, while leaving power to add only names of persons, has no express limitation upon the license to erase names. The name of a party, it is thought, is therefore included in the latter class of names. If I was driven to say that either the Legislature intended to leave this power in the hands of the voter, or else they stripped him of a constitutional right, I would yield my assent to this view; but I do not think that it can be said that if the voter is denied this privilege he is deprived of his constitutional right. Viewing the clause of the Act without being hampered by any question of constitutionality, I think that the Legislature did not intend to leave the voter free to mark off the heading of a ballot. In my judgment, the names he is privileged to erase are of the same kind as the names he is permitted to add. The references to this heading of the ticket are in section 28, where it is directed that "the certificate of the officers of the nominating convention shall designate, in not more than three words, the title or name of the party or principles" which such nominating body represented. In section 28 it is provided "that the petition may also designate, in not more than three words, the title of the party or principles which the candidates therein represent." It is this title or name of the party or petitioners, as designated by them in their certificate or petition, under which the nominations are to be printed. I think it will appear that throughout the statute, whenever the heading is alluded to, the word "name," when used, is accompanied by the word "title." Now, a title may be, and often is, a name. But I think it has a signification different from "name," as it is used in the Act. A "title of principles" may mean something which is not properly styled a name. A ballot headed "For ballot reform," or "For free coinage," would be, I think, entirely legal; and yet the caption of the ticket could not be properly called a name. The use of the word "title" in section 28 gives color to this notion. Speaking of printing the ballots for petitioners, the language of the section is, "if there be no designation of name or title, [in the petition,] then under the title of 'Independent Nominations.'" This heading is not a name, and so is styled a title, using the word "title" in the sense in which it is used as indicating the contents of a chapter in book. Now, I think if it had been intended to leave the voter free to erase all such headings, the word "title" would have been used in section 40, coupled with the word "name," as it was employed elsewhere in the Act. Then, again, it is to be kept in mind that every possible prohibition is enacted against marking a ballot. The power to erase the names of candidates was absolutely necessary under the system adopted. For this reason alone was it permitted. But, aside from the constitutional difficulty now suggested, and which probably

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never occurred to the Legislature, there was no reason for leaving the voter free to score the ballot by marking out, in any way he pleased, the caption of the ticket. It is not probable that it was intended to put in the hands of the voter this additional opportunity to mark his ballot for identification. For these reasons I conclude that such license does not exist. But this conclusion does not lead me to think that the voter is deprived of a constitutional right. Although I regard this as the only serious question raised by the prosecutor, I have, upon reflection, concluded that the obstruction put in the way of the voter is sentimental rather than substantial. We must view the question in a practical aspect. The object to be obtained is one of great importance. As already remarked, the plan is necessarily one of considerable intricacy. In planning it, conflicting requirements had to be adjusted and accommodated. The practical operation of the scheme has shown defects, and will display further deficiencies, which the Legislature will have the opportunity to amend. While the courts should see to it that no real or unnecessary bar is put in the way of the voter, yet such bar should clearly appear to exist before an inseparable feature of the Act is branded as unconstitutional, and the statute annulled. Many features of the Act may offend a voter of sensitive feelings and peculiar views. Some voters have sulked and refused to vote because of the compelled seclusion in preparing the ballot, and like requirements. But these exceptional instances cannot create a standard of what should be regarded as an unconstitutional deprivation of the right to vote. Now, assuming that occasions may arise when a voter is compelled to use a ballot with a heading indicating a party or principle of which he disapproves, what significance has it? If he leaves the printed name of a single candidate on the ticket, he of course has no right to complain of the title. The candidate stands for the principle indicated by the title. If, on the other hand, he erases each printed name, and adds the names of persons who stand for a different principle, what meaning is left in the title? The title is lost when the ballot is deposited. It is not displayed. It is not counted. The only purpose of the title, in respect to the voter, is to aid him to distinguish readily and speedily the different groups of candidates. The whole force and meaning of the vote is in the character of the principles of the candidates for whom the vote is counted. In any sensible view, how can it be said that the deposit of such a ballot carries with it an approval of the principles indicated by the title, when the name of every person upon it is an indication to the contrary? I am of the opinion that no illegal impediment is put in the way of the voter by this requirement.

As to the other matters discussed at the argument, it is enough to say that we find no material criticism of the provisions of the statute.

The judgment below must be affirmed.

MAINE SUPREME JUDICIAL COURT.

George H. M. BARRETT
v.
ROCKPORT ICE CO.

(.....Me.....)

An appropriation of ice on a great pond belonging to the public is not made by one who has made no preparations to cut the ice except to dig a ditch the preceding fall for the purpose of floating in the ice and who merely stakes out a portion of the pond in the night-time and serves notice the next morning of his claim thereto as against another whose workmen are engaged in cutting it when the notice is served and who had not only kept it free from snow and surface water, but had cut the lily pads in the pond before the ice began to form and who continued to cut the ice without regard to the notice and without any further action by the former.

(December 22, 1891.)

REPORT by the Supreme Judicial Court for Knox County for the opinion of the full court of an action brought to recover damages for the alleged wrongful cutting and carrying away of a quantity of ice to which plaintiff claimed title. *Judgment of nonsuit.*

The facts are stated in the opinion.

Mr. W. S. Fogler for plaintiff.

Meers, C. E. Littlefield and *A. S. Littlefield* for defendant.

Virgin, J., delivered the opinion of the court:

This is an action for cutting and carrying away more or less of fifteen acres of ice from Lily pond. The case comes up on report with the stipulation that, if the action is maintainable, it is to stand for trial; otherwise a nonsuit to be entered.

The owner of the bed of a mill-pond raised by a dam across an unnavigable stream has, as an incident to such ownership, the right to cut the ice therefrom whenever the exercise of such right does not appreciably diminish the head of water to the detriment of the millowner. *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Paine v. Woods*, 108 Mass. 160, 173; *Higgins v. Kusterer*, 41 Mich. 818, 82 Am. Rep. 160.

But the law governing ponds of more than ten acres in extent, denominated "great ponds" by the Colonial Ordinance of 1641-1647, is different. Of such no individual owns the subjacent soil. That and the ponds themselves are held by the state for the public. The right to take fish or ice therefrom is common and free to all, unless abridged by the Legislature. *Barrows v. McDermott*, 73 Me. 441; *West Roxbury v. Stoddard*, 7 Allen, 158. Neither the shore proprietor, nor any corporation with simple charter authority to cut ice thereon, has any greater or different right, in respect to that, than every other inhabitant who can gain legal

access to the pond. *Brastow v. Rockport Ice Co.* 77 Me. 100; *Hittinger v. Eames*, 121 Mass. 589; *Gage v. Steinkrauss*, 181 Mass. 223; *Roswell v. Doyle*, 181 Mass. 474.

As the state holds such ponds and their contents and products for the people, the Legislature may regulate the essential acts of possession which shall constitute a legal appropriation of a given quantity of the ice. *Barrows v. McDermott*, *supra*. Although the ice business has developed so enormously within the last eight or ten years, the Legislature has not yet taken the subject in hand, and hence all rights pertaining thereto necessarily rest upon judicial interpretation. *Woodman v. Pitman*, 79 Me. 456, 460, 4 New Eng. Rep. 699.

Neither have the courts fully settled the definitive rules which shall govern the rights of the public, though they have with more or less harmony laid down a few general rules pertaining thereto. Thus this court, in an action in which this defendant was a party, has declared that the rights of individuals are equal, to be exercised in a reasonable manner, with a due regard to the rights of all who may wish to take ice from this pond. *Brastow v. Rockport Ice Co.*, *supra*. So the court in Massachusetts has made a like decision, that every inhabitant, who can obtain access to a great pond without trespass, may cut ice thereon for use or sale, so long as he does not interfere with the reasonable exercise by others of like rights. *Roswell v. Doyle*, 181 Mass. 474. And the court in Kansas has said that he who first appropriates and secures the ice owns it. *Wood v. Fowler*, 28 Kan. 682, 40 Am. Rep. 330.

What is essential to constitute such an appropriation is not fully settled.

Where the plaintiff inclosed with marked stakes, and with a snowplow plowed around, a certain field of ice upon the Mississippi river; had a flatboat on the spot to remove the ice; held constant possession by a body of employes, who kept it swept; and, after expending more than \$200 in preserving it, and it was fit to cut, the defendant, with a crew armed with clubs, drove the plaintiff and his employes away, and cut and carried off the ice,—the defendant was held liable for the ice. *Hickey v. Hazard*, 8 Mo. App. 480.

So, on the Detroit river, where the channel was 1800 feet in width, an ice company extended a boom parallel with and fifteen feet from the shore on which its ice houses stood, the defendant was held liable for unnecessarily running its ferryboat up and down the river so near to the boom as to break up and destroy the ice which had formed inside of it. *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229.

In the case already cited, lessees of a tract of land on the bank of Kansas river were denied an injunction against the defendant's taking ice opposite and next the lessee's land. The court concluded their opinion by saying: "The one who first appropriates and secures the ice which is formed is entitled to it, and

NOTE.—As to the right to cut and appropriate ice, see *Brown v. Cunningham* (Iowa) 12 L. R. A. 583, and *note*.
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on the same principle that he who catches a fish in one of these rivers owns it." *Wood v. Fowler, supra.*

Again, where lessees of ice houses on the shore of a great pond scraped the snow from a portion of it, and then left it for a day and two nights in order that it might increase in thickness, it was held that they thereby acquired no such title thereto as would enable them to maintain an action of tort against one who cut holes through the ice for the purposes of fishing, and knew the purposes for which it was cleared and the usual manner of harvesting ice. Gray, *Ch. J.*, said: "At the time of the acts of which the plaintiffs complain, they had not cut any ice, nor were they engaged in cutting, or otherwise in the actual possession of any." *Rosell v. Doyle*, 131 Mass. 474, 478. So, in the very late case of *People's Ice Co. v. Davenport*, 149 Mass. 322, it was held that scraping the snow from about one half of the ice of a great pond, and marking it off with stakes, and then suspending further active operations, give no such title as will enable the party to maintain trover against another who five days later cut and gathered the ice. Morton *Ch. J.*, after reaffirming the previous cases decided by that court, said: "The case is not like one of capturing animals *ferre natura*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of a part of the common estate, by staking it off and thus excluding his co-tenants."

The latest decision which has come under our observation is *Brown v. Cunningham*, (Iowa) 12 L. R. A. 588. The government had meandered the shores of the unnavigable Wapsipinicon river, retaining title to the bed thereof when disposing of the adjacent lands. The plaintiff, not a riparian owner, obtained lawful access to the river, harvested a large quantity of ice, and cut and made preparations for moving more, when he was enjoined at the suit of the defendant. In an action upon the injunction bond, the court, after a learned discussion of the case both on principle and authority, rendered judgment against the defendant. Beck, *Ch. J.*, said: "Any citizen who may lawfully go upon the stream may gather ice from it under the regulations prescribed by law. He is entitled to the ice he prepares by his labor to be removed. It is plain that if he cuts ice for transportation to his ice house, another cannot rob him of his labors by carrying away his ice; and it is plain that when he makes preparations to use the ice upon a certain part of the stream, prepares its surface for cutting, erects machinery to handle the ice, makes walks or ways for workmen, or in any other proper manner indicates the part of the stream which he occupies in his operations, which must be reasonable in extent and in all other respects, he has a property right to the occupation of such locality during the ice season and to the ice formed there," and added that analogous rules were adopted by settlers and miners in every territory in the Union.

In this state, in an action on the case for 16 L. R. A.

the value of a two-horse team of a traveler upon the Penobscot river, drowned by breaking through the thin ice formed in a place from which the thick ice had been removed by the defendant, Peters, *Ch. J.*, by way of illustration, said: "The ice fields, after they have been staked and fenced, and scraped, . . . have so far become the property of the appropriator that an action would lie against one who disturbs his possession." *Woodman v. Pitman*, 79 Me. 456, 4 New Eng. Rep. 699.

The pond in question contains about thirty-two acres, and is therefore a "great pond." The plaintiff was in possession of seventeen rods of the shore owned by his mother. In the fall of 1889 he dug a ditch extending several rods back from the pond, through which ice could be floated to the upland. On the night of January 27, 1890, commencing at 10 o'clock and finishing at 6 the next morning, the plaintiff run a line of stakes marked "B. Ice Co." from his land diagonally across the pond, then covered by four inches of snow, and thence near to the shore, around one end of the pond, to his land, thereby inclosing some fifteen acres, — or nearly one half its surface. He owned a set of ice tools which he had not used since 1884, when he last cut ice, and his ice houses were in a dilapidated condition.

The defendant had annually, for fifteen years, cut large quantities of ice, employing a large number of men and teams therefor, had and claimed possession of nearly all the accessible shore property except the seventeen rods in possession of the plaintiff, and had cut the ice on the same territory the season before, and had commodious ice houses. Late in the fall of 1889, but before the ice began to form, the defendant cut out and removed the lily pads which covered much of the surface, and unless removed rendered the ice worthless; subsequently, as the rains fell, bored holes through the ice to let off the surface water, which otherwise injures the ice; scraped off the snow that had thus far fallen during the season, employing several men therefor on January 18, 1890, several days before the erection of the plaintiff's stakes, in that business; and after the plaintiff left the ice, on the morning of January 28, 1890, the defendant's employes went upon the pond, and commenced opposite the plaintiff's ditch to scrape, fit, and haul the ice. They were delayed by a storm several days, and finished the fore part of February.

After the defendant's employes had been at work a few hours, the plaintiff served a notice in writing on the defendant of his staking out the territory described, therein forbidding meddling with his stakes, scraping the snow or cutting the ice inclosed, and declaring the plaintiff's intention to cut the same, which the defendant ignored, but continued to cut and take away the ice, without any further action by the plaintiff.

Now, assuming that this court intended by the few clauses quoted in *Woodman v. Pitman, supra*, to define the acts essential to an appropriation of a field of ice, the plaintiff's acts, as above recited, fall far short of constituting him an appropriator. The only

acts looking in that direction were his digging the ditch, his nocturnal erection of stakes, and serving the written notice. He scraped no snow; he removed no lily pads; he ignored the surface water; made no preparations whatever to cut the ice, though twelve to fourteen inches thick. No one prevented him or forbade him.

We are of the opinion, therefore, that the action is not maintainable against the defendant who did proceed to cut without any molestation from any source.

Plaintiff nonsuit.

Peters, Ch. J., and Walton, Emery, Foster, and Haskell, JJ., concurred.

SOUTH CAROLINA SUPREME COURT.

Elizabeth HOLLEY, *Resp't.*,

v.

Stella A. GLOVER, *Appt.*,

And Fifteen Other Cases.

(.....S. C.....)

1. The inchoate right of dower of the wife of a tenant in common is defeated by a sale in partition of the common property, although she is not a party to the proceedings.
2. The wife of a tenant in common is not a necessary party in the suit for partition.
3. A prior sale by a tenant in common of his undivided interest does not prevent the bar of his wife's inchoate right of dower by a subsequent sale in partition.

(July 14, 1892.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Aiken County in favor of plaintiff in sixteen actions brought to recover dower rights in a tract of land of which plaintiff's husband had been tenant in common, and which was sold for purposes of partition and afterwards came into the hands of the defendants. *Reversed.*

The following is the agreed statement of facts upon which the case was tried:

"It is agreed by counsel representing the parties in the sixteen actions above stated that said actions be tried by the court in place of a jury, upon the following statement of facts and the pleadings: (1) That, previous to the year 1839, William H. Carey and Alfred Holley (who was the husband of the defendant in said actions) were the owners as tenants in common of all that tract

of land now situate in the county of Aiken, but then in the districts of Edgefield and Barnwell, containing five thousand acres, more or less, known as the 'Hollow Creek Tract,' and including the various tracts described in the respective complaints in the foregoing actions. (2) That, said Wm. H. Carey having died, his son John L. Carey, by his next friend D. J. Walker, instituted a suit in the court of equity for the district of Edgefield against the other heirs-at-law of said Wm. H. Carey, deceased, and Alfred Holley and Wise Holley, for the partition of the said Hollow Creek land; that in said suit a writ in partition was duly issued to commissioners pursuant to an order of the court and the statute in such case made and provided, who returned that it was best for the interest of all parties concerned that the land should be sold, and the proceeds divided, as justice could not be done by a division in kind; that upon said return one of the chancellors of the court, in term-time, by regular decree in said action for partition, ordered and directed that said tract of land should be sold by the commissioner of the court, and the proceeds divided between the parties according to their respective rights, which was stated in said decree; that pursuant to said decree the commissioner of the court, S. S. Tompkins, Esq., after due advertisement, at public outcry on sales day in January, 1849, sold said tract of land to John Holley for \$4,175, and executed a deed of conveyance to him for the same; that said commissioner, after receiving said purchase money, divided and paid out the same among the parties to said suit pursuant to the provisions of said decree, and that said sale to said John Holley was duly confirmed by the

NOTE.—Effect of partition sale upon dower rights of one not a party.

Little of value can be added to the exhaustive discussion of this subject contained in the above case.

The New York statute provides that those having dower rights in property sought to be partitioned may be made parties to the suit, and the court in *Knapp v. Hungerford*, 7 Hun, 590, states that before it will order a sale of land in partition cases it will require that all those having an interest in them should be made parties to the action to the end that the purchaser may get a perfect title. Hence, the wives of those entitled to a share of the land must be made parties.

The Missouri case of *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 263, which is cited in the principal case, was followed in that state in *Sire v. St. Louis*, 22 Mo. 206, and also in *Hinds v. Stevens*, 45 Mo. 290.

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In *Rowland v. Prather*, 53 Md. 232, in which the wife was held to be bound, the decree of sale had passed before the marriage took place although the sale was not made until afterwards, and in *Mitchell v. Farrish*, 12 Cent. Rep. 393, 69 Md. 235, it was decided that a partition sale under the Maryland statute bars the inchoate right of dower of the wife of one of the tenants in common of the land; but the question whether or not she was a necessary party to the partition proceedings was left undecided although the court states that upon the reasons given in *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, why her right was barred, they saw no necessity for making her a party.

In *Greiner v. Klein*, 28 Mich. 12, it was held that a sale in partition proceedings to which the wife of one of the tenants was not made a party would not bar her dower.

H. P. F.

court. (3) That the defendants in the aforesaid actions for dower now hold the various tracts of land described in the complaints in said actions from parties who trace their titles back to John Holley, who purchased from the commissioner as aforesaid. (4) That on the 5th day of March, 1841, Alfred Holley, by his deed of conveyance, conveyed to Wise Holley his undivided one-half interest in the Hollow Creek tract of land aforesaid, which said deed was duly executed and recorded at Barnwell court-house. (5) That on the 6th of March, 1842, the sheriff of Barnwell district, in the case of Elisha Carson against Alfred Holley, sold the said Hollow Creek tract of land under judgments obtained prior to the 5th day of March, 1841, and the same was bid off by Wise Holley for \$80, but no deed to the same from the sheriff appears on the record. (6) That the defendant, Elizabeth Holley, was not a party to the proceedings in the partition heretofore mentioned, and received no proportion or share of the proceeds of sale of said premises, nor was any provision whatever made by the court in said proceedings for the assessment of the value or protection of the inchoate right of dower of said Elizabeth Holley. (7) The said proceedings in partition mentioned in paragraph two (2) hereof were instituted subsequently to the execution of the conveyance from Alfred Holley to Wise Holley, heretofore mentioned, and subsequently to the sale of said Hollow Creek tract of land by the sheriff of Barnwell district under the execution aforesaid in favor of Elisha Carson against Alfred Holley.

"Jno. Gary Evans, E. S. Hammond, Plaintiffs' Attorneys.

"Henderson Bros., O. C. Jordan, Defendants' Attorneys.

"(8) It is further agreed and admitted that Alfred Holley, the husband of the defendant herein, died on the fourteenth (14th) day of February, A. D. (1881,) eighteen hundred and eighty-one.

"O. C. Jordan, Henderson Bros., Defendants' Attorneys.

"Jno. Gary Evans, E. S. Hammond, Plaintiffs' Attorneys."

The following decree was filed by Judge Izlar, and judgments duly entered:

"These several actions (sixteen in number) are brought by the plaintiff to recover her dower in the land described in the respective complaints. The facts in each of the said actions are the same, and all involve the same questions of law. The facts agreed on are, briefly, as follows: Previous to the year 1839, William H. Carey and Alfred Holley (who was the husband of the plaintiff) owned as tenants in common a tract of land containing five thousand acres, known as the 'Hollow Creek Tract.' The Hollow Creek tract included all the lands in which the plaintiff now claims dower. Carey and Holley purchased the said tract jointly, and the same was conveyed to them as tenants in common. Alfred Holley, during his coverture with the plaintiff, sold and conveyed by deed, dated March 5, 1841, his undivided moiety in the Hollow Creek tract to Wise Holley, his wife not joining in said conveyance. Afterwards

William H. Carey died testate, and John L. Carey, his son, instituted proceedings in the court of equity by his next friend, D. J. Walker, against the other heirs-at-law of the testator, and Wise Holley and Alfred Holley, for partition of said lands. To this suit the plaintiff herein was not a party. The commissioners named in the writ in partition returned that said lands could not be fairly and equally divided without injury to one or more of the parties in interest. Thereupon a decree for the sale of said lands was made, and in pursuance of this decree said lands were sold in January, 1849, by the commissioner in equity, and were at said sale purchased by John Holley, who complied with the terms of sale, and received from the commissioner a conveyance of said lands. The proceeds arising from said sale were distributed among the parties in interest, and the sale confirmed. In said proceedings for partition no provision was made for the protection of the plaintiff's contingent right of dower. On the 6th day of March, 1842, the sheriff sold all the right, title, and interest which Alfred Holley then had in said lands, under an execution issued upon a judgment obtained against him prior to the 5th day of March, 1841. At the sheriff's sale the interest of Alfred Holley in said lands was bid in by Wise Holley, to whom Alfred had previously conveyed. No deed from the sheriff to Wise Holley appears of record. Alfred Holley, the husband of the plaintiff, died on the 14th day of February, 1881. The defendants in the aforesaid actions are in possession of the various portions of the Hollow Creek tract described in the respective complaints.

"Mr. Scribner, in his work on Dower, (volume 1, p. 323,) says: 'The statutes of most, if not all, the states provide for the sale of lands held in common, where, upon proceedings for partition, it is ascertained that a division cannot be made without serious detriment to the estate. In such cases the money arising from the sale is brought into court, and distributed to the several tenants in common in proportion to their respective interests in the common property. From these statute regulations has sprung a question of great interest and importance, namely, whether a sale made in conformity thereto operates to divest the contingent right of dower of the wife of a cotenant, and to pass the entire estate absolutely to the purchaser, and, if so, whether for that reason it is proper that the court under whose direction the sale is made should require a portion of the husband's share of the proceeds of the sale to be invested for her benefit in case she should survive him, and her right thus becomes absolute.' This question of 'great interest and importance' is the one presented in these cases, and upon which we are now required to pass.

"It is contended that there was no statute authorizing the sale of lands, under the circumstances of this case, for partition; that the Act of 1791 is only applicable to the settlement of intestate estates; and that the long-established practice of the court of equity, derived from an assumed jurisdiction

in such cases, should not be allowed to override and defeat the rights of the parties. As was said by *Chancellor Harper* in *Pell v. Ball*, 1 Rich. Eq. 387: 'It is not questioned that by the rules and practice of the English court of chancery it has no power to direct the sale of lands for the purpose of partition.' Neither can it be questioned that the court of equity exercised the jurisdiction to make such sales long before the Act of 1791. This learned chancellor adds: 'That the words of the Act of 1791 are not necessarily confined to the case of intestate estates. These words are that "it shall and may be lawful for any person who may be entitled to a distributive share of any estate, real or personal, to have the writ of partition." Now the words "distributive share" are commonly understood to relate to intestate estates, and, in an act providing for the distribution of intestate estates, this meaning might seem still more appropriate, yet they are very capable of a different construction. Every tenant in common may very well be said to be entitled to a distributive share of the common property; and, if courts heretofore have made this construction, I should not be prepared to pronounce it an erroneous one.' This case is authority for the doctrine that the jurisdiction of the court of equity to sell lands for the purpose of partition, against the consent of a party, is not confined to the case of intestate estates. The reason given by *Chancellor Harper* in support of this doctrine seems to us sufficient to sustain the conclusion reached. It does not seem to us to be an unwarranted extension of the provisions of the Act of 1791, so as to include other than intestate estates held in common. At any rate, we consider the question settled.

Again, it is contended that, even if the court of equity has power to direct a sale for the purpose of partition, only those persons who are parties to the proceedings are bound thereby. To support this proposition, section 2, Act 32 Hen. VIII. chap. 32, is relied on by the plaintiff herein. It is argued that the court of equity, in the exercise of its jurisdiction in directing sales of real estate for the purpose of partition among joint tenants and tenants in common, cannot prejudice the rights of those not parties to the proceedings; that it derives its authority to make compulsory partition alone from the statutes of 31 Hen. VIII. chap. 1, and 32 Hen. VIII. chap. 32; and that section 2, Act 32 Hen. VIII. chap. 32, is applicable to all cases of partition among joint tenants and tenants in common, whether made in kind, or by sale under the extended jurisdiction of the court of equity by reason of the Act of 1791. This section reads: 'Provided, always, that no partition or severance hereinafter to be made by force of this Act be prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties unto said partition, their executors or assigns.' Admitting the view contended for to be correct, we do not think this proviso applicable to the present case. The Statute of 31 Hen. VIII. chap. 1, relates to joint tenancies and tenants in common. 2 Stat. p. 471. This statute was extended by 16 L. R. A.

32 Hen. VIII. chap. 32, to joint tenants for term of life or years. 2 Stat. p. 474. By reference to these statutes it will be seen that the statute of 31 Hen. VIII. chap. 1, did not contain the above proviso. It is annexed only to the Act of 32 Hen. VIII. chap. 32. Let us notice the language of this proviso. It is 'that no partition or severance hereinafter to be made by force of this Act.' What Act? Certainly the Act of 32 Hen. VIII. chap. 32; which, as we have seen, applies only to 'joint tenants for terms of life or years.' It will hardly be questioned that this is a wise provision in regard to tenancies of this nature.

"This brings us to the main question in the case. In the outset it is necessary to ascertain, if we can, what is the nature and quality of this right denominated 'the wife's inchoate right of dower.' 'It is difficult,' says Mr. Scribner, (2 Scribner, Dower, 5,) 'to state with precision the nature and quality of inchoate dower interest when considered as a right of property.' It is 'a right attaching by implication of law, which, although it may possibly never be called into effect, (as when the wife dies in the lifetime of the husband,) yet, from the moment that the fact of marriage and of seisin have occurred, is so fixed on the land as to become a title paramount to that of any other person claiming under the husband by a subsequent Act.' Park, Dower, 237; *Cunningham v. Shannon*, 4 Rich. Eq. 140. It is a substantial right, possessing, in contemplation of law, attributes of property, and to be estimated and valued as such. 2 Scribner, Dower, 5. It is not a lien. *Shell v. Duncan*, 31 S. C. 565. 'After this right has once attached, it is held by the wife entirely independent of the husband, and it cannot be affected by any act or omission on his part.' *Shell v. Duncan*, *supra*, and cases there cited.

"Now, while Carey and Alfred Holley held these lands as tenants in common, what was the situation of the parties? Mrs. Alfred Holley had a contingent right of dower in the one undivided moiety thereof, subject to the paramount right of Carey to compel partition between her husband and himself. Had a voluntary or an involuntary partition of said lands in kind been made, then it is clear that the inchoate right of dower of Mrs. Alfred Holley would have been transferred immediately to the portion allotted to her husband; and had he conveyed after partition his share to another, without the renunciation by his wife of her dower according to the statute, his grantee would have taken the land subject to, and burdened with, the contingent right of dower of Mrs. Holley; and, when this right became consummate by the death of her husband, she could have recovered her dower interest therein. So, when Alfred Holley conveyed his undivided interest therein to Wise Holley, he took it subject to and incumbered with the inchoate right of dower of Mrs. Alfred Holley, she not having renounced this right according to the statutory mode provided. The seisin of Alfred Holley in these lands was broken and ceased when he conveyed his undivided interest therein to Wise Holley.

This transfer created no priority of estate between Wise Holley and Elizabeth Holley, the wife of his grantor, respecting her right of dower in the lands conveyed; for, as we understand the rule, the wife is in privity of estate with her husband only until the right of dower attaches. Her interest is not only independent of him, but against him. In all transactions subsequent to the occurrence of marriage and seisin there is no privity of the wife with her husband respecting her dower. If this be so, how can it be said that there is privity respecting her dower between the wife and the husband's grantee,—a mere stranger. Wise Holley's seisin, however, while burdened with the contingent right of dower of Mrs. Elizabeth Holley, was also burdened with Carey's paramount right of compulsory partition. The question is therefore presented, Was the inchoate right of dower of Elizabeth Holley in these lands divested and defeated by the compulsory sale for partition and division ordered by the court of equity in an action to which she was not a party, but in all other respects regular? This question has never been directly decided in this state, so far as we are informed or advised. Now, what is the nature and force of this paramount right to compel partition? Does it involve anything more than that this right shall not be abridged or taken away by the contingent right of dower in the wife of a tenant in common? or is it so potent as to destroy altogether the wife's contingent right of dower in case of its exercise? There is no doubt that if actual partition is made the wife's right of dower will attach to the share allotted in severalty to her husband. This result follows as a matter of course, without any decree or order of the court, and without the wife's being a party to the proceeding in partition. Hence, when actual partition is made, the paramount right to compel it does not defeat the subordinate right of dower, and the paramount right in such case, it would seem, involves nothing more than that its exercise should not be abridged or taken away by the subordinate right. Is the result different when the property is sold by order of the court of equity for partition and division of the proceeds? Here we enter upon debatable ground. It therefore becomes necessary to review at some length the cases bearing upon this difficult and important question, and to deduce therefrom a conclusion in consonance with the principles of law applicable to this highly favored right.

"Vice Chancellor McCoun, of New York, 'twice expressed the opinion that a sale so made does not divest the inchoate right of dower; and one ground upon which he bases this conclusion is that courts possess no power to compel the wife to accept a provision in money in lieu of her interest in, and consequent right to the enjoyment of, the land itself.' *Jackson v. Edwards*, 7 Paige, 386, 3 L. ed. 310; *Matthews v. Matthews*, 1 Edw. Ch. 565, 6 L. ed. 248. On appeal Chancellor Walworth was of a different opinion. He concluded as follows: 'I am therefore compelled to declare that

the opinion of the vice-chancellor in this cause, [*Jackson v. Edwards*,] and in the case of *Matthews v. Matthews*, [*supra*,] as to the effect of a sale in partition upon the inchoate right of dower of the wife of a tenant in common, who has been made a party to the suit in conjunction with her husband, is erroneous, and that a purchaser under the judgment or decree will be protected against any further claim on her part, both in equity and at law.' In *Matthews v. Matthews*, *supra*, the vice-chancellor held that it was immaterial whether the wife was made a party to the suit or not, 'because a decree of sale and conveyance by a master will not bar her dower in her husband's share of the lands in the event of her surviving him.' He justified this decision on the ground that as nothing in the statute of that state expressly declared, 'a divestment of the dower initiate of a wife of a joint tenant or tenant in common upon a sale . . . nothing so materially affecting her legal rights ought to be taken by implication.' The case of *Jackson v. Edwards* was carried to the court of errors and was finally decided upon other grounds, the members of the court differing on the question as to whether the inchoate right of dower was divested by the sale. Mr. Freeman, after reviewing the New York cases, says: 'So the question of the effect of a sale in partition upon the dower interest of wives of cotenants in the absence of provisions in the statutes directly controlling the subject, may be considered as still unsettled in New York.'

"In Missouri and Ohio the courts have taken the opposite view, and have been disposed to treat sales made in partition as conveying title paramount to the wife's inchoate right of dower. The case of *Lee v. Lindell*, 22 Mo. 282, 64 Am. Dec. 262, holds that a partition sale during coverture of lands held by a woman's husband in common divests her right of dower therein, although she was not made a party to the proceeding. The reasoning in this case commends itself to our judgment, and is so pertinent to the present inquiry that we feel warranted in quoting from it at length. The court says: 'When it is established that a proceeding in partition is binding on the wife, and confines her right to dower in the lot assigned to her husband, it would seem to follow as a consequence that she would be bound, however the proceedings might eventuate, whether in a portion of land being allotted to her husband or any other result. The wife must be bound or not at the time the suit is instituted, and she being bound by it when the Legislature took up the subject, and directed that instead of a partition in kind it be most advantageous to the parties interested that the land should be sold, and its proceeds divided among the cotenants, and the land is accordingly sold, and a purchaser pays his money for it, on no principle can the ground on which the suit was instituted be raised, and the wife be exempted from the binding influence of the judgment, and be favored with a right to dower in the land sold, when, by the proceedings as originally begun, they were binding on her. If this was a contro-

versy between the husband and the wife for the proceeds of sale, there would be some justice in her claim; but as between her and the purchaser, who has intervened in a proceeding which was binding on her, her claim has no foundation in equity. It may be that, as between the husband and wife, the law should have provided some security for her dower out of the proceeds of sale; but that such failure should be visited on the purchaser would be a great hardship. The omission to make it could, on no principle, vary the nature of the proceeding, and make that of no force which was before binding.' The court then proceeds to show, by way of illustration, the innumerable difficulties which would attend this matter, if it is held that proceedings in partition are not binding on the wives of the cotenants.

"Mr. Freeman, in his work on Cotenancy and Partition, says the case in which this question is best discussed is that of *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355. The statute of Ohio providing for partition of real estate (as we understand from this case) is very similar in its terms and conditions to our Act of 1791. The court, after considering the statute, says: 'We are of opinion, therefore, that it was the intention of the Legislature by a sale in partition to divest the wife of her inchoate right of dower;' and then add: 'On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seisin of the husband, and this right is always subject to any incumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage, or at the time the husband became seised. The liability to be divested by a sale in partition is an incident which the law affixes to the seisin of all joint estates, and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seisin, and turns the realty into personality, she is by the act and policy of the law, remitted, in lieu of her inchoate right, to a distributive share of the personality into which it has been transmitted.' Mr. Scribner, in his work on Dower, (vol. 1, pp. 828-841,) reviews the foregoing cases from New York, Missouri, and Ohio. He says: 'The statutes regulating the partition of lands in Ohio, in force at the time the sale was made, differed materially from the New York statute before referred to; the latter Act, as has been seen, requiring all persons having any contingent interest in the premises to be made parties to the proceedings. . . . The [Ohio] statute did not require, nor in the case referred to [*Weaver v. Gregg*], had the wife been made a party to the proceedings in which the sale was made. The court, nevertheless, held that the inchoate right of dower was extinguished by the sale.' Mr. Scribner, while he questions the reasoning of the court in certain particulars in *Weaver v. Gregg*, says: 'The reasoning addresses itself to the understanding with great force and cogency, and tends strongly to support the conclusion to which the court arrived.' And again: 'It is manifest, however, that in pro-

ceedings in partition the interest of all parties would be promoted by a sale free from the incumbrance of dower. An uncertain and contingent interest of this character would undoubtedly affect the market price of the property to an extent greatly disproportioned to the actual value of that interest.' Mr. Freeman also reviews these cases in his work on Cotenancy and Partition (sec. 474.) As we understand Mr. Freeman, he favors the views expressed by the courts of Missouri and Ohio.

"The cases of *Lee v. Lindell*, and *Weaver v. Gregg*, rest upon a principle clearly recognized in this state, namely, that the contingent right of dower of a wife of a tenant in common is not paramount to the right of the cotenant of the husband to compel partition; and upon the further principle that dower, being the creature of positive law, founded upon reasons of public policy, is subject to such incidents as are affixed to it by laws existing and operative at the time of the marriage, and, when the sale for partition is the act of the law, the proceedings are as binding upon the wife as though actual partition had been made. The result of this is to give to the paramount right of partition such force as to divest and extinguish in case of its lawful exercise the inchoate right of dower, and this result follows whether the wife be made a party or not to the proceedings in partition; and here we would remark that while a wife of a tenant in common may be made a party, and may be a proper party to proceedings in partition, (in the absence of any statute on the subject), we do not see that she is a necessary party to such proceedings. Her inchoate right of dower is no estate or interest in the land. It is a valuable right, it is true, and has some of the incidents of property, yet it cannot be bargained and sold. It is no lien, in the legal sense of that term. The wife of a cotenant is not a tenant in common with her husband and his cotenants, neither is she an incumbrancer having a lien upon the property held in common, in the strict sense of the term. Upon what principle, then, can it be contended that she is a necessary party? We confess that we fail to see. Our own case of *Keckelely v. Moore*, 2 Strobb. Eq. 21, bears strongly upon the question now under consideration; and the reasoning of Chancellor Dunkin, who delivered the opinion of the court, is clear, forcible, and convincing. In this case, which was brought for the purpose of making partition of the estate of one James Moore among his heirs, the land had been sold in pursuance of a decree made in the cause, and the purchaser at such sale, refusing to comply with the terms of sale, had been ruled to show cause. The purchaser showed for cause that before the filing of the bill a judgment had been recovered against two of the heirs, and that their shares in the land were bound by the lien of said judgment, and that these heirs were married, and that their wives were living and entitled to dower out of their shares in said lands. The learned chancellor says: 'The only question is whether the title of a purchaser at such sale can be affected by prior judg-

ment against one of the children. It is quite manifest that until partition is made it is impossible to determine whether the child will be entitled to any or what portion of the estate. The right, whatever it be, is the creature of the Act of 1791, and must be held in subordination to the provisions of law. If a sale for partition be ordered, the title of the purchaser is just as complete as if the land had been sold to satisfy a debt of the intestate. To require the judgment or other lien creditors of all the distributees to be made parties to a suit for partition of the estate of an intestate would introduce a novelty in the practice of the court, and would incur the proceedings with delay and expense not calculated to promote the final settlement and adjustment of estates between the parties in interest, which is the leading object of the Act of 1791.' The court does not seem to have attached any weight to the objection raised by the purchaser that certain of the heirs were married, and that their wives were living, and entitled to dowers out of their shares in the lands; but, notwithstanding this alleged defect in the title to the premises, the court held the cause shown insufficient, and the purchaser bound by his bid, and the title such as he must accept. Upon what principle? Our courts have held 'that, even during the lifetime of her husband, a wife's dower, unrelinquished, may be shown by a purchaser as an excuse for his refusal to comply with a contract for sale.' *Polk v. Sumter*, 2 Strobb. L. 81; *Jeter v. Glenn*, 9 Rich. L. 380.

"It has also been held that the doctrine of *caveat emptor* does not apply in sales by the master or sheriff under a decree for partition. *Commissioner in Equity v. Smith*, 9 Rich. L. 515; *Bolivar v. Zeigler*, 9 S. C. 287. And in *Rorer on Judicial Sales*, § 150, we find the following: 'But such purchaser at a judicial sale may not be thus compelled to complete the sale if the title be defective, nor pay the consideration money until the defect, if there be one, is obviated; for although the rule *caveat emptor* applies after the sale is closed by payment of the purchase money and delivery of the deed, if there be no fraud, yet the buyer, if he discovers the defect beforehand, will not be compelled to complete the sale.' This objection, had there been no other principle applicable to the case by which the objection was silenced, must, under the foregoing authorities, have offered to the purchaser a sufficient excuse for his refusal to comply. We find this principle by applying the rules laid down in the case of *Keckelely v. Moore*, as to judgment creditors of cotenants, to the wives of the cotenants. The purchaser, under the principle laid down in said case, takes a good title, free and discharged from all liens by judgments against the tenants in common. When lands are sold by order of the court of equity, for the purpose of partition, whether such lien creditors be parties to the proceedings or not, the same principle applied to the wives of the cotenants would give to the purchaser a complete title, divested of the inchoate right of dower

of the wives of the cotenants, and we confess that we do not see any good reason why the same principle should not apply as well in the latter as in the former case. It certainly will not be contended that the rule should be different on the ground that this contingent right of dower of the wife is a more favored right. This ground would be without reason to sustain it, and based upon no sound principle of either equity or justice. As was well said in *Weaver v. Gregg*, *supra*: 'The sale is the act of the law, designed to do justice to joint owners and render estates available, and put forth only when, from the fact that the estate is incapable of actual partition, the necessities of the case require it. The Legislature has deemed it more important to the public interest to render estates available to their owners without sacrifice of their value by a sale in case of necessity, than to preserve in all cases whatsoever the wife's remote and contingent interest at the expense of parties on whom she can have no proper claim.' The case of *Keckelely v. Moore* is, as we understand it, authority for the rule that, when lands are sold in this state under a decree of the court of equity for partition, the purchaser at such sale takes a complete title, not only freed from the lien of all prior judgments against the cotenants, but divested of the inchoate rights of dower of the wives of the cotenants, and that neither the judgment creditors of the cotenants nor their wives are necessary parties to such proceedings. It therefore seems to us that not only reason and public policy, but the clear weight of authority, is on the side and in favor of the rule that, where lands are sold under a decree of the court of equity for partition, the reality is converted into personalty, and thereby the dower interests of the wives of the cotenants are extinguished and destroyed, and the purchaser at such sale takes a title free from any defect or incumbrance as to such dower rights. But in the present case it appears that Alfred Holley conveyed his undivided interest in said premises to Wise Holley before the sale for partition of said land was made, and that his wife, Elizabeth, the present plaintiff, did not then, nor did she during the lifetime of her husband, renounce her right of dower in the premises so sold to Wise Holley, as required by the statute in such case provided. This state of facts presents another question of equal importance and difficulty. The authorities above referred to arise out of cases in which the husband was still a cotenant when the sale for partition was ordered. In these cases the husband, it may be claimed, represented his wife's inchoate right of dower; for in such cases the practice has always been in the distributing the proceeds of sale to pay to the husband, he being the sole representative of the estate. But in the present case, although Alfred Holley was a party, he did not represent the estate. He had no share in the proceeds of sale. When the proceedings for partition were instituted he was not the owner in fee of one undivided moiety of these lands, with a wife having a contingent right of dower, for he had voluntarily parted with his interest to another

prior to such proceeding. In the cases above discussed the seisin of the husband had been devested by the act of the law; in the present case the husband's seisin had been devested solely by his own act.

"Mr. Freeman, in his work on Cotenancy and Partition, (sec. 475,) in discussing this question, says: 'As it was clear that the act of the husband could not defeat the wife's right of dower, it was thought that the subsequent partition, to which she was not a party, and in which her estate had no representative, must be equally powerless to prejudice her interests.' In support of the text, Mr. Freeman cites the case of *Verry v. Robinson*, 25 Ind. 19, 87 Am. Dec. 846. By the sale of Alfred to Wise, the title of Alfred, which, to use the language of *Mr. Justice Elliott* in *Verry v. Robinson*, *supra*, 'was directly united with the contingent right of the wife growing out of the marriage relations under the law, became severed from it. The title was no longer a unit. The estate of the husband, out of which sprung the claim of the wife, became devested, and passed into the hands of a stranger, not an absolute and unincumbered fee, but subject to the contingent claim of the wife, depending, however, upon the then uncertain contingency that she should survive her husband.' Alfred was seised of an unconditional and unincumbered fee in one undivided moiety of the Hollow Creek tract of land. The contingent right of his wife was a mere incident under the law of that seisin, and, though the entire fee was in the husband, he could not sell the interest of the wife, unless she voluntarily joined in the conveyance. The wife of Alfred did not join in the conveyance of Alfred to Wise; therefore Wise's purchase was subject to the contingent right of Mrs. Elizabeth Holley, the wife of Alfred. By this purchase Wise did not acquire a title to that right. Alfred did not own it; consequently could not sell and convey it; therefore Wise's title was subject to it. As was said by *Mr. Justice McIver* in *Shell v. Duncan*, *supra*, in answering the question, 'What is the right, title, and interest which a married man has in land of which he is seised during coverture?'—'It certainly is not such an absolute, unqualified interest as would enable him to alienate it, free from the claim of dower, either by deed or devise, but his alienation is always subject to the wife's right of dower, which can only be released or extinguished by her own act. Nothing that the husband may do can in any way affect it. From this it follows that when the right, title, and interest of the husband is sold, either directly by himself, or through the medium of an officer of the law, the purchaser takes no more than what was sold, the right, title, and interest of the husband, which does not include the dower interest, and hence the purchaser must take his title subject to the wife's right of dower.' In the suit for partition instituted by John L. Carey, Wise Holley only represented the interest purchased by him, and no more and no other; and the sale of the premises, so far as his interest was concerned, could not invest John Holley, the purchaser at said 16 L. R. A.

sale with any better title or greater interest than was held by Wise, and which he represented in that suit; and, as we have already seen, Alfred, although a party, had no interest in the premises, and could not, under the circumstances, represent his wife in said suit.

"It is apparent that there is a very material difference between the case at the bar and the cases of *Weaver v. Gregg* and *Lee v. Lindell*. In the cases of *Weaver v. Gregg* and *Lee v. Lindell* the seisin of the husband was devested by the act of the law, at the time of the sale under the decree for partition, and the husband was a party to the proceeding, and represented his own title, which was then directly united with the contingent right of the wife. In the present case the seisin of the husband was devested by his own voluntary act at a period long before the suit for partition was instituted, and the husband, although a party to the proceeding, had no title then directly united with the contingent right of the wife; the title and the contingent right having been previously severed by the voluntary sale of the husband. We therefore conclude that Wise Holley's purchase of said premises was subject to the inchoate right of dower of Elizabeth Holley; was not extinguished or destroyed by the sale for partition made under the decree of the court of equity in the suit instituted therein by John L. Carey, she not being a party to said proceedings; that John Holley, the purchaser at said sale, also took his title to said premises subject to the inchoate right of dower of Elizabeth Holley; and that said inchoate right having become consummate by the death of her husband, Alfred Holley, she is entitled to her dower in said premises. It is therefore ordered and adjudged that Elizabeth Holley, plaintiff, recover against the several defendants, in each of the above entitled actions, her dower in the several tracts or parcels of land mentioned and described in the respective complaints, and that a writ in dower in each of the said actions do issue out of and under the seal of this court in the usual form of words, and according to the rules and practice of this court, directed to fit and proper persons as commissioners, commanding them, or a majority of them, to admeasure and mete out to the plaintiff her dower in the lands described in the several and respective complaints, and that the costs of said actions and expenses of said admeasurement be paid by the defendants, respectively."

Messrs. Henderson Bros. and O. C. Jordan, for appellants:

The wife's interest or claim was derivative from the husband and cannot rise higher than its source.

Pergues v. Warley, 14 S. C. 190; 2 Scribner, Dower, p. 80.

A cotenant's title is "qualified and limited by the right of his codistributees to have partition made of the property."

Burris v. Gooch, 5 Rich. L. 6; *Pendergrass v. Pendergrass*, 26 S. C. 29.

The wife must take her dower as she takes her husband, *cum onera*.

Crafts v. Crafts, 2 McCord, L. 54; *Shiell v. Sloan*, 22 S. C. 152; *Hay v. Hay*, 4 Rich. Eq. 878; *Jones v. Miller*, 17 S. C. 880.

The right of the wife to dower is subject to the right of the cotenants of her husband to compel partition.

Freeman, Coten. & Partition, § 107; 1 Hill. Real Prop. 171; 1 Washb. Real Prop. 158.

Purchase-money mortgages will defeat dower when enforced.

Crafts v. Crafts, *supra*; *Stoppelbein v. Shulte*, 1 Hill, L. 208; *Wilson v. McConnell*, 9 Rich. Eq. 512; *Tibbets v. Langley Mfg. Co.* 12 S. C. 474.

In the partition suit between the Careys and the Holleys, both Alfred, the husband, and Wise Holley, his grantee, and then owner of the land, were made parties.

The two together certainly represented all the interest and title that Alfred acquired when he purchased his individual interest in the land.

Pitts v. Wicker, 8 Hill, L. 199; *Hood v. Archer*, 2 Nott & McC. 151.

Wise Holley, the grantee of Alfred, represented in this suit whatever interest Alfred did not represent.

Freeman, Coten. & Partition, § 451; *Charles-ton, C. & C. R. Co. v. Leech*, 83 S. C. 175.

As matter of representation she was clearly represented as fully as the court of equity with all its power could require. To have made her a party would not have bound her *ipso facto*, as she could elect after death of husband.

Labatut v. Schmidt, Speers, Eq. 426; *Davis v. Townsend*, 82 S. C. 116.

This was a proceeding *in rem*, acting directly on the title it takes hold—the title that came to Holley and Carey.

As to effect of *in rem* proceedings, see,—

Rabb v. Aiken, 2 McCord, Eq. 125; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; Freeman, Coten. & Partition, §§ 411, 474; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855.

A fixed and vested claim like a judgment lien against a cotenant is subject to being divested by decree and sale in partition.

Riley v. Gaines, 14 S. C. 457.

And this is the effect whether the judgment creditor is a party or not.

Ketchin v. Patrick, 32 S. C. 452.

The court of equity always had power to sell any lands for partition, and including this court in the Act of 1791 was only cumulative and did not restrict it to the partition of intestate estates; the Act only gave new powers to the court of common pleas and did not take away any power previously exercised by the court of equity.

Pell v. Ball, 1 Rich. Eq. 387; *Steedman v. Weeks*, 2 Strobb. Eq. 147, 49 Am. Dec. 660; Freeman, Coten. & Partition, § 424.

When power to sell in partition was given the Legislature intended a good title and this could only be given by divesting contingent dower rights, and it had the power to divest it.

Cooley, Const. Lim. *p. 361; *Randall v. Krieger*, 90 U. S. 23 Wall. 148, 23 L. ed. 126; *Shell v. Duncan*, 81 S. C. 568; *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 478.

Messrs. John Gary Evans and E. S. Hammond, for respondent:

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A wife is entitled to her dower in lands held by her husband in common with another.

Reed v. Kennedy, 2 Strobb. L. 67; *Shiell v. Sloan*, 22 S. C. 157; 4 Bl. Com. 181, *note*; S. C. Gen. Stat. 1796 *et seq.*; *Hordé v. Landrum*, 5 S. C. 213.

Mrs. Holley's inchoate right of dower attached to the land from the date of marriage and seisin of her husband. What, then, are the nature and extent of her husband's title, and what could he convey? As was said by Mr. Justice McIver in *Shell v. Duncan*, 81 S. C. 568: "It certainly is not such an absolute, unqualified interest as would enable him to alienate it free from the claim of dower, either by deed or devise, but his alienation is always subject to the wife's right of dower which can only be released or extinguished by her own act; nothing that her husband may do can in any way affect it."

Sondley v. Caldwell, 28 S. C. 580; *Tibbets v. Langley Mfg. Co.* 12 S. C. 463; Park, Dower, *41; Scribner, Dower, chap. 29, § 1.

In order to bind her in any proceeding it was necessary that she be a party to such proceeding. This was not done in the partition proceedings, but appellants contend that she was a privy in estate with her husband and his grantee, and is therefore bound. Since she holds under "a title distinct, separate and paramount, to that of her husband," there can be no privity, and the grantee of the husband certainly could occupy no higher position than that of his grantor.

A privy is one whose interests have been legally represented at the trial.

McMullin v. Brown, 2 Hill, Eq. 457; *Tibbets v. Langley Mfg. Co. supra*; *Mongin v. Baker*, 1 Bay, 78.

When dower once attaches, all privity between husband and wife ceases.

Shell v. Duncan, supra.

The purchaser at said sale could take only the title of the parties to the suit, and that title was incumbered with the dower right of Mrs. Elizabeth Holley.

Ibid.; Freeman, Coten. & Partition, § 475; *Very v. Robinson*, 25 Ind. 14, 87 Am. Dec. 846.

Prior to the Act of 1882 there was no statute in this state authorizing sales of land in partition cases except in cases of partition of intestates' estates.

At common law there was no such thing as compulsory partition of lands held in joint tenancy and in common.

This remained so until the Statute of 81 Hen. VIII, chap. 1, was passed, giving one cotenant the right to compel partition in like manner as parceners by the common law of the realm were compelled to do. This statute was made of force in South Carolina in 1791.

See Acts 1791, 5 Stat. p. 162.

A subsequent statute, 32 Hen. VIII, chap. 32, was passed allowing joint tenants for term of life or years the same rights. These statutes, however, confer no rights upon the courts to sell the lands in partition and divide the proceeds; they relate only to partitions in kind and such a thing as a sale by the court was unknown to the common law of England and of this state. The only case where a sale was authorized was in the distribution of intestates'

estates, and the Act of 1791 only authorizes a sale in such cases.

Freeman, Coten. & Partition, chap. 19, § 421; *Orompton v. Ulmer*, 2 Nott & McC. 429; *Spann v. Blocker*, Id. 598; *Gibson v. Marshall*, 5 Rich. Eq. 260; *Rabb v. Aiken*, 2 McCord, Eq. 119; *Witherspoon v. Dunlap*, 1 McCord, L. 546; *Barns v. Branch*, 8 McCord, L. 21; *Pell v. Ball*, 1 Rich. Eq. 384.

Not until 1868, when the Statutes of 34 & 35 Vict. were passed authorizing such sales, did the courts of law or chancery in England presume to sell lands in partition without the consent of all parties.

Pell v. Ball, *supra*; Story, Eq. Jur. § 654, note a; Bispham, Eq. § 498, and notes; *Gibson v. Marshall*, *supra*.

The inchoate right of dower of a wife in lands held by her husband in common with another is not divested or defeated by a sale of said lands for partition in any proceeding to which she was not a party.

In our state partition is the same as that written of by Mr. Allnatt, viz.: "A right of division of lands or tenements by coparceners, joint tenants, or tenants in common, so as to put an end to the cotenancy, and to vest in each person a sole estate in a specific purparty or allotment of the lands or tenements."

Allnatt, Partition, 1; Freeman, Coten. & Partition, § 898.

The law never contemplated anything but a partition in kind; courts of equity alone sold lands for partition.

The partition did not divest or defeat the title of one cotenant; it simply determined and made definite what before was indeterminate and indefinite.

A lien is the power to levy and sell.

Pergues v. Warley, 14 S. C. 190.

A wife is entitled to dower in lands held by her husband in joint tenancy and tenancy in common, and in cases of partition in kind to dower in the purparty allotted to her husband, it is not defeated or divested but simply limited to her husband's share.

Horde v. Landrum, 5 S. C. 218; Freeman, Coten. & Partition, § 107.

Neither the husband nor the courts nor any human power can compel the wife to relinquish her right of dower, inchoate though it may be, when she is not asking the aid of the court. Should she become a suitor seeking the aid of the court the case would be different.

Royston v. Royston, 21 Ga. 172; Allnatt, Partition, *183.

Where the wife joins in a bill for partition and the property is sold under a decree, her potential right of dower is barred; the court has full power to provide therefor.

1 Hill, Real Prop. 212.

All persons interested in the real property sought to be partitioned should be made parties, or they are not bound, and the wife of a tenant in common may be made a party defendant in an action by him for partition.

Lawson, Rights, Rem. & Pr. § 2736.

Nor will a sale in partition cut off the dower of a married woman not made a party although her husband be made such.

Rorer, Judicial Sales, 168, § 402.

A wife, whose husband has an interest in

lands, should be made a party to a bill for partition in order to bar her right of dower or claim to homestead.

Hawes, Parties to Action, § 28; 5 Am. & Eng. Encyclop. Law, 921, and cases cited; 4 Kent, Com. 365, note; *Jackson v. Edwards*, 7 Paige, 326, 4 L. ed. 200; *Wilkinson v. Parish*, 8 Paige, 638, 8 L. ed. 810; *Jordan v. Van Epps*, 85 N. Y. 427; *Matthews v. Matthews*, 1 Edw. Ch. 565, 6 L. ed. 248.

A person whose title is distinct, paramount, and independent is not bound in an action for partition unless such person is a party to the suit.

Pearson v. Carlton, 18 S. C. 53; *Rabb v. Aiken*, 2 McCord, Eq. 118; *Dorn v. Beasley*, 7 Rich. Eq. 84.

Under *Shell v. Duncan*, 81 S. C. 566, the inchoate right of dower is such a substantial right of property as to claim for it the protection of the Constitution.

Wilson v. Kelley, 19 S. C. 166.

The inchoate right of dower is as much entitled to protection as the vested rights of the widow. She may, during the lifetime of the husband, maintain an action to protect it.

Boone, Real Prop. § 58; *Shell v. Duncan*, *supra*; 5 Am. & Eng. Encyclop. Law, 905.

The right of dower is certainly entitled to as much protection and consideration as contingent remaindermen, yet under our decisions a contingent remainderman not before the court is unprejudiced in his rights; and may go upon the lands.

Mosley v. Hankinson, 23 S. C. 328; *Farr v. Gilreath*, 23 S. C. 512; *LeRoy v. Charleston*, 20 S. C. 71.

McIver, Ch. J., delivered the opinion of the court:

All the cases named in the title were actions for dower, and as they all grew out of the same state of facts, and rest upon the same principles of law, they were heard together both on the circuit and in this court, and will therefore be considered together. By agreement, the cases were heard upon the pleadings and an agreed statement of facts, set out in the "case," by the court without a jury. The plaintiff as the widow of Alfred Holley, claims dower out of the several parcels of land in the possession of the several defendants in the above stated cases, which several parcels originally constituted a single tract of land known as the "Hollow Creek Land." From the "agreed statement of facts," which should be incorporated in the report of this case, it appears that some time prior to the year 1839 the said Alfred Holley and one William H. Carey purchased jointly the Hollow Creek land, and the same was conveyed to them as tenants in common; and on the 5th of March, 1841, Alfred Holley conveyed his undivided one-half interest to Wise Holley. Subsequently, W. H. Carey having died, his son John L. Carey instituted proceedings in the court of equity against the other heirs-at-law of W. H. Carey, together with Alfred Holley and Wise Holley, for the partition of said land, which resulted in a sale of said land under the orders of said court. At such sale one John Holley became the purchaser, and, having paid the purchase

money, received titles from the commissioner in equity, and the defendants in the several cases above stated claim under the said John Holley. The purchase money was divided among the several parties to the proceeding in pursuance of the provisions of the decree of the court under which the sale was made, but the plaintiff herein was not a party to the proceedings, and neither received any portion of the proceeds of the sale, nor was there any provision made for the protection of her inchoate right of dower. Alfred Holley, the husband of plaintiff, having died in February, 1881, these actions were commenced (when is not stated) by the plaintiff to recover her dower in the several tracts held by the several defendants. The circuit judge held that, while a sale for partition would bar the contingent or inchoate right of dower of the wife of one of several tenants in common upon proceedings to which he was a party, though the wife was not a party, yet in this case, inasmuch as Alfred Holley had sold and conveyed to Wise Holley his undivided interest in said land, before the proceedings for partition were instituted, the plaintiff was not barred of such right, because, although Alfred Holley as well as Wise Holley was a party to the partition proceedings, yet neither, nor both of them together, represented the rights and interests of the plaintiff in such proceedings. He therefore rendered judgment in favor of the plaintiff in each of said cases. From these judgments the several defendants appeal upon the several grounds set out in the record; and the plaintiff, according to the proper practice, gives notice that if the supreme court should find itself unable to sustain the judgment appealed from, upon the ground taken by the circuit judge, the plaintiff will ask this court to sustain said judgments upon other grounds, likewise set out in the record. These various grounds raise substantially the following questions: (1) Whether the wife of one tenant in common can be barred of her inchoate right of dower by a sale for partition under proceedings instituted by another tenant in common against her husband and the other cotenants, but to which the wife was not a party. (2) If so, whether the same rule would apply where the husband, though made a party to the proceedings for partition, had previously conveyed his undivided interest to a third person, who was also made a party. (3) Whether the circuit judge erred in finding as matter of fact that William H. Carey died testate. (4) If not, whether the former court of equity had the power to sell lands of a testator for partition among those entitled thereto; and, if so, whether the inchoate right of dower of the wife of one of the tenants in common would be barred by such sale, under proceeding to which she was not a party.

As to the first question, we are of opinion that, while the wife of one of several tenants in common has an inchoate right of dower in her husband's portion of the real estate held in common, yet such right is subordinate to the paramount right of the other tenants in common to have partition of the common property in any of the modes by which such

partition may be lawfully made. Hence, if a sale for partition becomes necessary, the wife's inchoate right of dower in the land is barred, even though she is not a party to the proceedings for partition, and the purchaser at such sale takes his title disincumbered of such subordinate right of dower. As is said in 1 Washb. Real Prop. 8d ed. bk. 1, chap. 7, § 2, par. 10, p. 185: "The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate that she not only takes her dower out of such part only of the common estate as shall have been set [off] to her husband in partition, but if, by law, the entire estate should be sold in order to effect a partition, she loses, by such sale, all claim to the land, although no party to such proceedings." Whether, in such a case, some provision should be made for the protection of the wife's inchoate right of dower, in the event it should afterwards become absolute, out of the husband's share of the proceeds of the sale, is not a matter now before us, and will not, therefore, be considered. So far as our experience extends, this rule has always been recognized in this state, and we are not informed that it was ever before questioned. The reason of this rule is this: The right of the other cotenants to demand partition being paramount to the inchoate right of dower in the wife of any one of the cotenants, whenever the paramount right is exercised the subordinate right cannot properly be allowed to interfere with or abridge the full enjoyment of the paramount right. Inasmuch as the inchoate right of dower springs out of and is necessarily dependent upon the concurrence of marriage and seisin of the husband during coverture, it must necessarily depend upon and be qualified by the nature of such seisin. If, therefore, the nature of the husband's seisin be such as will not support the claim of dower,—as, for example, the husband be seised as trustee,—it is competent for the defendant in dower to show such defect in the seisin as a defense to the claim of dower. See what is said in *Whitmire v. Wright*, 22 S. C. 451, 53 Am. Rep. 725, commenting on the case of *Gayle v. Price*, 5 Rich. L. 525. So, also, the husband's seisin may be shown to be subject to the lien of a purchase-money mortgage, and therefore not of such a character as will be sufficient to support the claim of dower, as against such paramount right, (*Crafts v. Crafts*, 2 McCord, L. 54;) and the same doctrine applies where the inchoate right of dower is subordinate to the lien of a judgment recovered before the marriage, (*Jones v. Miller*, 17 S. C. 380.) Again, the rule is well settled that while a judgment against one of several tenants in common is a lien upon the undivided interest of such tenant in common, under which such undivided interest may be levied on and sold, yet such incumbrance is subordinate to the paramount right of the other tenants in common to demand partition; and, if a sale of the undivided property is made for that purpose, the purchaser takes his title freed and discharged from such subordinate incumbrance on the share of the judgment debtor,

and the creditor is remitted to his debtor's share of the proceeds of the sale, even though the judgment creditor is not a party to the proceedings for partition. *Keckeley v. Moore*, 2 Strobb. Eq. 21; *Riley v. Gaines*, 14 S. C. 454; *Ketchin v. Patrick*, 33 S. C. 443. See also *Shiell v. Sloan*, 23 S. C. 157. Now, while these are cases of liens or charges upon the common property, or rather upon the interests of one or more of the tenants in common, and while the inchoate right of dower may not, properly speaking, be a lien, yet the principle upon which they rest is applicable here, to wit, that the enforcement of a paramount right must not be interfered with or abridged by persons holding subordinate rights, whatever be their character. Hence, as the inchoate right of dower arises out of and is dependent upon the nature of the husband's seisin, such inchoate right must necessarily be affected with any infirmities of such seisin, and be qualified by any paramount right subject to which it has been acquired; and where, as in this case, the husband's seisin was qualified by and subject to the paramount right of the other cotenants to demand partition, the plaintiff's inchoate right of dower, growing out of and dependent upon such seisin, was subject to the same qualification. When, therefore, the seisin of the husband was devested by the exercise of the paramount right of the other cotenants to demand partition, the inchoate right of dower was likewise destroyed, so far, at least, as the land was concerned, and the plaintiff was no more a necessary party for that purpose than is a judgment creditor of one of several tenants in common, in case of a sale of the common property for partition. *Keckeley v. Moore*, *supra*, where, as pointed out in the circuit decree, the point here involved, though not discussed, was practically decided.

The second question involves an inquiry as to the effect of the sale by Alfred Holley to Wise Holley of his undivided one half of the common property prior to the institution of the proceedings for partition, under which the land was sold to John Holley. It seems to us that the conveyance to Wise Holley placed him in the shoes of Alfred Holley, invested him with the same seisin, subject to the same qualifications, with which his grantor, Alfred Holley, had previously been invested, and made him a tenant in common with the other joint owners of the land. When, therefore, such seisin was devested by the sale for partition, the effect, so far as any subordinate right dependent upon such seisin was concerned, was the same as if the title and such seisin had remained in Alfred Holley. When the basis upon which the subordinate right of dower rested was destroyed by the exercise of a right paramount to the inchoate right of dower, such right necessarily fell with it, and could not be asserted against one claiming under a right paramount to it. We are therefore unable to see how the conveyance by Alfred Holley to Wise Holley could affect the question which we are called upon to determine. The view taken by the circuit judge that, by reason of such sale, the plaintiff's inchoate right of dower was

not sufficiently represented in the proceedings for partition, does not seem to us to be sound, for we do not think it is a question of representation at all. If Alfred Holley had never sold and conveyed his undivided interest to Wise Holley, we would not be disposed to hold that the plaintiff's inchoate right of dower was barred by the sale for partition, because, though she was not a party to the partition proceedings, yet her interest was represented therein by her husband, who was a party. On the contrary, our view is that such inchoate right of dower was defeated by the exercise of a right paramount to it; practically that such inchoate right of dower in her husband's share of the common property was contingent upon the nonexercise of the paramount right to demand partition by a sale of the common property; but, when such paramount right was exercised, the contingency upon which such subordinate inchoate right of dower rested could never happen, and hence it could never afterwards become absolute. Indeed, it would be anomalous to hold that the purchaser, at a sale made under the exercise of a paramount right, should take his title subject to one claiming under a subordinate right. Under this view, we do not see how it is possible that the transfer by Alfred Holley of his interest to Wise Holley, prior to the proceedings for partition, can affect the question; nor do we see any necessity for making the plaintiff a party to the partition proceedings, for she then had no such interest in the property sought to be partitioned as rendered her a necessary party, in any sense of those terms, and since the sale she never could have any such interest.

The third question, under the view which we shall take of the fourth, becomes wholly unimportant, and, as it is a mere question of fact, will not be considered.

The fourth question has been so fully and satisfactorily discussed by the circuit judge in his decree (which should be incorporated in the report of this case) that we find it very difficult to add anything to what is there so well said. It is there shown that the power of the former court of equity to order a sale of land for partition, owned by several tenants in common, either as distributees of an intestate's estate or otherwise, is not derived from, or dependent upon, the provisions of the Act of 1791, but existed and was exercised long before the passage of that Act, an instance of which will be found in the case of *Dinkle v. Timrod*, 1 Desauss. Eq. 109, decided in 1784, seven years before the passage of the Act of 1791. This was expressly decided in the case of *Pell v. Ball*, 1 Rich. Eq. 361, and the doctrine was recognized in the subsequent cases of *Steedman v. Weeks*, 2 Strobb. Eq. 145, and *Gibson v. Marshall*, 5 Rich. Eq. 254. While, therefore, it may be true that the court of common pleas, deriving its power, in this respect, only from the Act of 1791, can only order a sale for partition in cases of intestacy, as has been held in the cases of *Crompton v. Ulmer*, 2 Nott & McC. 429; *Spann v. Blocker*, Id. 598; and *Barns v. Branch*, 3 McCord, L. 19,—yet these decisions cannot affect, and do

not purport to question the long-established, and, as we may say, the universally recognized, powers of the court of equity, in this respect, under which, as is said by Harper, *Ch. J.*, in *Pell v. Ball*, *supra*, "titles have accrued and money has been paid and invested, thus involving, perhaps, the titles of a large portion of the property of the country." We would not feel a liberty, at this late day, to disturb or even question what may be called a rule of property, so long established, even if we entertained much graver doubts than we do of the authority of the rule. We concur, therefore, in the conclusion reached by the circuit judge as to this matter,—that the power of the former court of equity to order a sale for

partition is not confined to cases of intestacy, and that the inchoate right of dower of the wife of one of the several tenants in common is defeated by such a sale, even though such wife be not a party to the proceedings for partition. But, as we differ with the circuit judge as to the effect of the transfer of Alfred Holley's interest to Wise Holley, as we have hereinbefore indicated, the judgments below must be reversed.

The judgment of this court is that the judgment of the Circuit Court in each of the cases stated in the title be reversed, and that the complaints therein be dismissed.

McGowan and Pope, *JJ.*, concur.

ARKANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO R. CO.,

Appt.,
v.

A. P. MURRAY.

(.....Ark.....)

1. That those in charge of a railroad train used sufficient precaution to prevent collision with a train standing on the track ahead of it and no collision in fact occurred will not relieve the company from liability for injuries received by a passenger in leaving the forward train to avoid being injured by the collision which appeared to him to be imminent.
2. A reasonable cause of alarm occasioned by the negligence or misconduct of the carrier must have existed to render it liable for injuries received by a passenger while leaving a train in an effort to escape an apprehended danger.
3. The prudence of a passenger's leaving a railway train to escape an apparent danger must be judged by the circumstances as they appeared to him at the time and not by the result.
4. Testimony as to the impressions upon the passenger's mind at the time of leaving the train, and his purpose in so doing, as to the actions of other passengers, and as to the possibility of real danger, are admissible upon the question of the prudence of his act when he sues for injuries received, claiming that he was seeking to avoid imminent peril.
5. Testimony that a short time after the alleged infliction of a personal injury witness assisted the injured person to remove his coat and that he complained of being hurt in the shoulder is admissible in an action to recover for the injury, not as part of the *res gesta*, but as tending to show present pain and injury.]

[(December 19, 1891.)]

A PPEAL by defendant from a judgment of the Circuit Court for Washington County

in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. D. Kenna and E. E. Davidson, for appellant:

The admission of the statements of Belleiter, "I got off the train and got off to avoid danger." "From the circumstances I thought it prudent to get off the car,"—was erroneous. It is never admissible for a witness to testify to conclusions. The damaging nature of the testimony is apparent at a glance, and its admission was a violation of the elementary rules of evidence.

Dickerson v. Johnson, 24 Ark. 251.

While there are authorities that say that the statements of a fellow passenger may be received in evidence, we submit that the better rule is to the contrary.

Illinois Cent. R. Co. v. Green, 81 Ill. 19; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

Rivercomb was allowed to testify that Murray asked him to pull his coat off, and to help him put it on the next morning, and that "he complained of being hurt in his arm and shoulder." It will hardly be contended that these statements and acts were a part of the *res gesta*.

Fordyce v. McCants, 51 Ark. 510; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 478; *St. Louis, I. M. & S. R. Co. v. Weakly*, *supra*; *Martin v. New York, N. H. & H. R. Co.* 5 Cent. Rep. 793, 108 N. Y. 626; *Amil v. Chicago, B. & Q. R. Co.* 70 Iowa, 130, 28 Am. & Eng. R. R. Cas. 487; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 7 Am. & Eng. R. R. Cas. 414.

Such statements even made to a physician are not admissible, and to allow one to corroborate his testimony by them is reversible error.

Rochs v. Brooklyn City & N. R. Co. 7 Cent. Rep. 702, 105 N. Y. 294; *Reed v. New York Cent. R. Co.* 45 N. Y. 574; *Winter v. Central*

NOTE.—That mere error in judgment in case of apparent danger is not contributory negligence, see note to *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.), 6 L. R. A. 186.
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For a valuable case as to the necessity of real danger to raise a liability for injuries received in an attempt to escape it, see *Kleiber v. People's R. Co.* 14 L. R. A. 613, 107 Mo. 240.

Iowa R. Co. v. 74 Iowa, 448; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 Am. St. Rep. 840; Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 23 Am. & Eng. R. R. Cas. 433; Barber v. Merriam, 11 Allen, 322; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 587, 31 Am. Rep. 321.

If defendant was not put in peril he could not recover. To willfully or wantonly frighten one, and cause him to injure himself, might form the basis of an action, but if one takes fright at the acts of another pursuing a legitimate calling, where there is no danger whatever—where he is not put in peril—and injures himself, he certainly has no cause of action.

Gulf, C. & S. F. R. Co. v. Wallen, 65 Tex. 568, 26 Am. & Eng. R. R. Cas. 219; Chicago, R. I. & P. R. Co. v. Felton, 24 Ill. App. 376, 33 Am. & Eng. R. R. Cas. 533.

One guilty of negligence is only liable for the natural and ordinary results of the same.

Sellers v. Richmond & D. R. Co. 94 N. C. 654, 25 Am. & Eng. R. R. Cas. 451.

The court instructed the jury that the information of the employes as to the situation of the trains and cars was material for them to consider, and yet denied the railroad company the privilege of showing by conductor Wade that he communicated this very information to the conductor and engineer of the rear train. There was nothing allowed to go to the jury to show that those in charge of the rear train were informed that the advance train was going to stop for cars on the main track, and they, under the instructions of the court, may have construed the failure to communicate this fact to them as an act of negligence.

The ninth instruction assumes that plaintiff was injured, that he did it himself through fear and apprehension of danger. The eighth instruction assumed that defendant ran the rear train in close proximity to the other, and the seventeenth also assumed that he was injured. These assumptions in instructions are contrary to law and reversible error.

St. Louis, I. M. & S. R. Co. v. Rosenberg, 45 Ark. 256; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Folk v. State, 38 Ark. 117; Montgomery v. Erwin, 24 Ark. 540; Atkins v. State, 16 Ark. 563; Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; State Bank v. McGuire, 14 Ark. 530; Armistead v. Brooke, 18 Ark. 531.

The allegations in the complaint are for negligence in operating the rear train. The special findings are that it was not running at a dangerous rate of speed under the existing circumstances and that the engineer and conductor were keeping a proper lookout. This should have concluded the case, and judgment should have been rendered for defendant under these special findings.

Dun v. Seaboard & R. R. Co. (Va.) 16 Am. & Eng. R. R. Cas. 353; Hogan v. Chicago, M. & St. P. R. Co. (Wis.) 15 Am. & Eng. R. R. Cas. 439; Chicago, R. I. & P. R. Co. v. Felton 24 Ill. App. 376, 33 Am. & Eng. R. R. Cas. 533. See also Gulf, C. & S. F. R. Co. v. Wallen, 65 Tex. 568, 26 Am. & Eng. R. R. Cas. 219.

Meers. L. Gregg and J. D. Walker, for appellee:

When a passenger by the wrongful or careless act of the company is required to choose between leaving the cars while they are moving

slowly, or submitting to the inconvenience of being carried beyond the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised wantonly or unreasonably.

Filer v. New York Cent. & H. R. R. Co. 49 N. Y. 47, 10 Am. Rep. 327.

Where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in the same situation might make, and injury results therefrom, the fact that if he had chosen the other hazard he would have escaped injury does not prove contributory negligence.

Thomley v. Central Park, N. & E. R. R. Co. 69 N. Y. 160; Jones v. Boyce, 1 Stark. 493; Stokes v. Saltonstall, 38 U. S. 18 Pet. 181, 10 L. ed. 115; Buel v. New York Cent. R. Co. 31 N. Y. 814, 38 Am. Dec. 271.

If, through the negligence of the carrier, a passenger is placed in a situation of great peril, the attempt of the passenger to escape the danger, even by doing an act also dangerous, and from which injury results, is not necessarily an act of contributory negligence.

Wilson v. Northern Pac. R. Co. 26 Minn. 278; Filer v. New York Cent. & H. R. R. Co. 49 N. Y. 47, 10 Am. Rep. 327; 1 Suth. Damages, p. 63.

Testimony of declarations of injured party made to other parties was admissible.

Bridge v. Oshkosh, 71 Wis. 363; Kane v. Troy, 16 N. Y. 8. R. 241; Atkinson, T. & S. F. R. Co. v. Johns, 86 Kan. 769.

Battle, J., delivered the opinion of the court:

Murray sued the St. Louis & San Francisco Railway Company for damages which were occasioned by the negligence of the company in operating its trains.

At the trial evidence was adduced tending to prove the following facts: On the 29th of November, 1897, plaintiff was a passenger on the defendant's train from Delaney to St. Paul. One and a half or two miles from St. Paul the train, immediately after it passed a curve in the road, stopped and remained standing for a short while. This was in the night. There were two red lights on the rear of the train. Plaintiff was in a coach, it being the last coach in the train, except one, which was a caboose. While the train was standing still another train was heard approaching from the rear on the same track. The conductor immediately went down the track about 20 feet, and with his lantern signaled to it to stop. About this time a passenger in the coach with plaintiff looked out of the window, and saw the locomotive of the approaching train, and hallooed out to the passengers, "Here comes another train running into us," and said to them that they "had better get out." The plaintiff and other passengers, hearing and seeing the approaching locomotive, immediately and in haste left the train. In getting off plaintiff fell into a ditch and hurt one of his shoulders. The second train proved to be a locomotive and a caboose, and was running about 10 miles an hour, and

stopped within about 80 feet of the passenger train. Two or three witnesses testified that the distance was 80 or 100 feet. For the damages suffered by plaintiff on account of his fall this action was brought.

Evidence tending to prove other facts was adduced, but sufficient has been stated for the purposes of this opinion.

One witness, who was a passenger on the train at the time the plaintiff was, was allowed to testify, over the objection of the defendant, as follows: "I got off the train, and I got off to avoid danger. . . . I have been working at business that requires me to ride on railroads much of my time for the last ten years, and from the circumstances I thought it prudent to get off the car." Murray was allowed to testify that a passenger on the same train said, as the locomotive and caboose approached, "Here comes another train running into us, and said we had better get out of there." Rivercomb testified that during the night on which plaintiff was hurt he assisted him in pulling off his coat, and on the next morning assisted him in putting it on, and that he complained of being hurt in the shoulder. C. M. Levisse testified that he was a brakeman on the second train, and as follows: "If we had had a train of loaded cars of the usual length, he could not have stopped the train so quick. An engine and caboose can be stopped sooner than a train of cars. The ordinary train of cars could not have been stopped in time to have prevented running into the train." To the foregoing testimony of Murray, Rivercomb, and Levisse, the defendant objected at the time it was introduced, and saved his exceptions.

The following instructions were given to the jury over the objections of the defendant:

"The burden is upon the plaintiff to show by a preponderance of evidence the truth of the allegations in his complaint.

"The main issues for your consideration are—*First*, did the plaintiff receive an injury? *Second*, was such injury occasioned or caused by the negligence, carelessness, or improper management of the defendant? *Third*, did the plaintiff by his own negligence contribute to the injury? Each of these propositions you are to determine from the evidence.

"If you should find that there was an injury received by the plaintiff, and that the same was caused by the negligence, carelessness, or improper management of the defendant, you will find for the plaintiff, unless you find also that the plaintiff by his negligence contributed to such injury. In case you should find that the plaintiff's negligence occasioned or contributed to such injury, (if any), you will find for the defendant.

"The mere fact that the plaintiff, through fear and apprehension of danger, did an act which was the immediate cause of injury to himself, is not of itself sufficient to authorize a finding for him; but to authorize such finding you must also find that the defendant was guilty of some act of negligence, carelessness, or improper management in running his train in close proximity to plaintiff, which was sufficient to create in the mind of a reasonable and prudent person such fear and apprehension.

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"Should you find that the defendant was guilty of negligence, carelessness, or improper management, and that an injury to the plaintiff was occasioned thereby, you will consider then whether the plaintiff was himself guilty of contributory negligence.

"If you should find from the evidence that by the negligence of the defendant the plaintiff was put in a position of great peril, and in attempting to escape that peril he did an act also dangerous, from which an injury resulted to him, such act would not necessarily be an act of contributory negligence, such as would prevent him from a recovery for such injury.

"The test of contributory negligence, under such circumstances, is, Was his attempt an unreasonable, precipitate, or rash act, or was it an act which a person of ordinary prudence might do under the like existing circumstances?—and it is not to be determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made.

"If you should find from the evidence that the plaintiff was carelessly, negligently, or improperly placed by the defendant in a position of danger while in the car of the defendant, by reason of the defendant running a locomotive and caboose in close proximity to the car in which the plaintiff was, (if he was in such car), then the plaintiff would have the right to judge of the danger in remaining in such car, as also the danger in attempting to escape, from the circumstances as they appeared to him, and not by the result; and if he, in making such an attempt to escape, used such care as a prudent man, under such circumstances, should have used, and in doing so received an injury, he should recover."

A verdict for \$1,000 was returned in favor of plaintiff against the defendant; judgment was rendered accordingly; and, a motion for a new trial having been filed and overruled, the defendant appealed.

It is contended on the part of appellant that, if the train on which appellee was a passenger was standing still upon the track, and the engine and caboose approaching it from the rear were under full control of those in charge of them, and the persons in charge were keeping a proper lookout, and could have stopped them, at the rate of speed at which they were running, at any time, without collision, the appellee had no cause of action, notwithstanding he was frightened, and leaped from the train and injured himself. According to this contention, the appellant was not liable for damages to appellee if it was using every precaution to prevent a collision of its trains; and was under no obligations to avoid frightening him, and thereby causing him to do an act which might have resulted in injury; and would not have been liable, if appellee had reasonably believed he was in great danger of being killed by a collision, and in the exercise of ordinary prudence had leaped from the train in order to save his life, and thereby injured himself. In other words, it could have, with impunity, scared him to any extent, and forced him to make dangerous leaps to save his life, and thereby injure himself, provided the precaution it used was sufficient to prevent

a collision, and the fact was the appellee would not have been hurt if he had remained on the train. But this is not true. Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security reasonably consistent with their business, and "appropriate to the means of conveyance employed by them," and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains. *Arkansas M. R. Co. v. Canman*, 52 Ark. 517. If they recklessly, unskillfully, or negligently operate their trains, and thereby place their passengers in situations apparently so dangerous and hazardous as to create in the minds of the passengers reasonable apprehensions of peril and injury, and thereby excite alarm, and induce them to make efforts to escape, and in the attempt to escape they receive personal injuries, the railroad companies are responsible for damages. *Jones v. Boyce*, 1 Stark. 493; *Stokes v. Saltonstall*, 88 U. S. 13 Pet. 181, 10 L. ed. 115; *Cannell v. Boston & W. R. Corp.* 98 Mass. 194; *Troomley v. Central Park, N. & E. R. Co.* 69 N. Y. 158.

In order to render the railroad company liable for injuries received in an effort to escape an apprehended danger, there must have been a reasonable cause of alarm, occasioned by the negligence or misconduct of the company. If the effort of the passenger to escape resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. But if, on the other hand, he be placed, through the negligence or unskillful operation of its trains by the railroad company, in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained on the train.

On occasions where a passenger is suddenly confronted by imminent danger and peril, he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but must of necessity judge hastily of the danger in remaining where he is, as also of the danger in attempting to escape, by the circumstances as they, at the instant, appear to him, and not by the result. He acts upon the probabilities as they appear to him, and if he acts as a man of ordinary prudence, "placed in the same circumstances and under a like necessity of immediate action and decision," would have acted, and in so doing makes an effort to escape and is injured, the railroad company is responsible to him for his damages. See cases above cited and *Wilson v. Northern Pac. R. Co.* 26 Minn. 278.

(*Chicago, R. I. & P. R. Co. v. Felton*, 125 Ill. 458, and *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568, cited by appellant to sustain its contention, do not controvert the rule as we have stated it, but recognize it as correct. In the former case the plaintiff's intestate was a passenger on the defendant's train. He was going

from Ottawa to Joliet, in Illinois. From Ottawa to Chicago the defendant used a double track, and trains going in the same direction, generally, used one track, and those going in the opposite direction used the other. At the time plaintiff's intestate was a passenger the tracks were covered with snow. The train on which he was riding ran into a snow-bank and stopped. At a point a short distance from where it stopped, and in the rear of it, the road curves. It was impossible for a person looking from the point where the snow-bank was, in the direction of the curve, to tell whether a car beyond the commencement of the curve was upon the one track or the other. While the train was stopped at the snow-bank, plaintiff's intestate, on looking back, saw an engine, with a snow-plow attached, approaching from the direction of the curve. About this time a fellow passenger remarked that it would run into the passenger train. One witness said, "It looked as if it was coming into the train." About the same time an engine in front of the passenger train gave sharp, quick whistles. Whereupon plaintiff's intestate became alarmed, and leaped from the car in which he was riding to the ground, and was fatally injured. This was about 8 o'clock in the morning. The passenger train was standing on one track, and the engine, with the snow-plow attached, approached running on the other. There was no collision, and the intestate would not have been hurt if he had remained in the car. Justice Scholfield, in delivering the opinion of the court, said: "Since the right of recovery is here based upon the negligence of the defendant, it is not sufficient merely that plaintiff's intestate became alarmed by reason of appearances produced wholly or in part by the defendant; it must appear that that which produced the alarm, and through it the injury, was negligence of the defendant." Treating the signals given by the whistles as presenting the only question of negligence, he further said: "The burden is upon the plaintiff to prove this negligence, and that is not done by proof, alone, that a peculiar signal was given by an engine of the defendant, and that it caused or aggravated the alarm of the intestate. If the signal given was, under the circumstances, a proper one, it cannot have been negligence to give it."

In *Gulf, C. & S. F. R. Co. v. Wallen*, *supra*, "the plaintiff and his wife were passengers on a train on defendant's road, which stopped between two stations, and remained standing for about an hour. While the train was so standing another passenger called out, "Here comes a train right on us." Other passengers jumped to their feet and scrambled to get out of the car door. Plaintiff looked through the rear door and saw a freight train coming towards the passenger train, and about 800 or 400 yards off. . . . He called to his wife, and both ran to the car platform and jumped to the ground. His wife was seriously injured. The freight train stopped 100 yards in the rear of the passenger train. The court said: "The defendant neither caused nor contributed to the injury of plaintiff's wife, unless it allowed the freight train to come so near to or so rapidly towards the passenger-coach as to frighten the passen-

ger. It does not appear from the testimony that a single one of those who leaped from the train, except the plaintiff, saw the freight train coming. When plaintiff saw it, it was 300 or 400 yards distant, and, as he says, appeared to be moving rapidly. He does not state that he supposed from what he saw there would have been a collision. No one left the train upon his own perception of danger.

... The statement of facts develops no cause whatever for the panic which seized some of those in the cars, except the remark of some one that 'the freight train is upon us.'

... The plaintiff's wife may have done only what a prudent person would have done under the same circumstances, and the defendant still not be liable. If a ruffian had commenced the discharge of a revolver in the cars, it would be prudent for the people to get out, but the carrier would not be liable unless he had committed some fault. The ruffian could be held, as could a passenger who in brutal sport raises a false alarm and causes damage. . . . We can find, in the statement of facts in the record here, no proof that the defendant was guilty of any act of negligence contributing to the injury of plaintiff's wife."

The instructions which were asked by the plaintiff and given by the court, and are set out in this opinion, were substantially correct. They fairly submitted to the jury the question of fact upon the decision of which the plaintiff's right of recovery depended.

The testimony of the witness, to the effect that he thought it was prudent to get off the train, and that he left it for the purpose of avoiding danger, and the testimony of another, that a fellow passenger said, "Here comes another train running into us, and said we had better get out of there," and of Levisse, were admissible for the purpose of showing in some degree how the situation of appellee ap-

peared to him and his fellow passengers at the time he leaped from the train and was hurt, and that in doing so he acted as a man of ordinary prudence would have acted under the same circumstances. The testimony as to Rivercomb assisting appellee in pulling off and putting on his coat, and appellee complaining of being hurt in the shoulder, was not admissible as a part of the *res gestæ*, but was admissible to show the existence of present pain and injury in the shoulder. And whether this action and complaint as to injury in the shoulder were real or feigned was for the jury to determine. *Travelers Ins. Co. of Chicago v. Mosley*, 75 U. S. 8 Wall. 397, 405, 407, 19 L. ed. 437, 440; *Bridge v. Oshkosh*, 87 Wis. 195; *Bacon v. Charlton*, 7 Cush. 586; *Barber v. Merriam*, 11 Allen, 822, 824; *Hatch v. Fuller*, 131 Mass. 574; *Atchison, T. & S. F. R. Co. v. Johns*, 38 Kan. 769, and cases cited; *Bridge v. Oshkosh*, 71 Wis. 363; 1 Greenl. Ev. 14th ed. § 102.

Appellant contends that the verdict of the jury was against the decided preponderance of evidence, was not sustained by sufficient evidence, and should be set aside. If such was the case, the circuit court had the right and should have set aside and granted a new trial. But the judge, who was present and saw and heard the witnesses testify, and heard the testimony as it was heard by the jury, and ought to be a better judge of the credibility of witnesses and the weight of the testimony than we, considering it as it appears on paper, can be, it seems, did not think as appellant contends. But, be this as it may, it is not necessary for us to approve the verdict. There was evidence to sustain it, and according to the rules which govern this court, we cannot disturb the same.

Judgment affirmed.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* George H. HASTINGS, Attorney-General,

v.

Howard B. SMITH.

(.....Neb.....)

*1. The Act approved April 9, 1891, by which section 145, chap. 12, Comp. Stat. 1889, (charter of the city of Omaha,) was so amended as to provide for the appointment as fire and police commissioners of said city of members of the three parties casting the largest vote at the last election, does not take effect until the expiration of the terms of office of the two commissioners who were appointed May, 1889.

2. The general provision in section 172 of the charter of the city of Omaha for the removal of officers of the city by the district court does not apply to members of the board of fire and police commissioners.

*Head notes by POSEY, J.

NOTE.—As to the right to remove officers summarily, see *Trainor v. Wayne County Auditors*, 15 L. R. A. 96, and note, 89 Mich. 162.
16 L. R. A.

3. The provision of section 12, art. 5, of the Constitution, empowering the governor to remove all officers appointed by him, applies only to officers mentioned in the Constitution.

4. Where by law there is no fixed term of office, and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary, and may be exercised without notice or hearing.

5. Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there have been preferred against him specific charges, of which he shall have notice, and an opportunity afforded him to be heard in his defense.

6. By the charter of the city of Omaha the governor is authorized to remove members of the board of fire and police commissioners only for the cause therein named, viz., official misconduct, and upon charges specifying the particular act or acts to be proved, and an opportunity to be heard in their own defense.

7. The question whether the power to remove is judicial, in the sense that the

officers named are entitled to have the question of cause therefor heard by the courts, and, if not, whether the action of the executive can be reviewed by the courts, is not raised in this case, and is not determined.

(June 11, 1892.)

PETITION for a writ of mandamus to compel respondent to surrender the office of Fire and Police Commissioner of the City of Omaha to one who had been appointed by the governor as his successor in office. On demurrer to answer. *Demurrer overruled.*

The facts are stated in the opinion.

Messrs. George H. Hastings, Atty-Gen., V. O. Strickler, J. W. Edgerton, and Charles Ogden, for relator:

As to the power of the Legislature to abolish offices, see—

People v. Haskell, 5 Cal. 357; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 381; *People v. Bancard*, 27 Cal. 470; *Taft v. Adams*, 3 Gray, 126; *People v. Auditor of Public Accounts*, 2 Ill. 537; *Conner v. New York*, 2 Sandf. 355; *Territory v. Pyle*, 1 Or. 149; *Coffin v. State*, 7 Ind. 157; *Walker v. Peelle*, 18 Ind. 264; *Benford v. Gibson*, 15 Ala. 521; *Bryan v. Cattell*, 15 Iowa, 533.

Messrs. Lake, Hamilton & Maxwell, for respondent:

The source of the governor's power to remove is to be found in the section of the statute under which the board was originally created. That section provided as follows: "For official misconduct the governor may remove any of said commissioners," etc. This limits the power of the governor to remove to one cause only, to wit: "Official misconduct."

Section 2475 of the same charter expresses the legislative will not only as to the persons who shall determine the existence of such official misconduct but as to the manner in which and the procedure by which it shall be determined. By that section the inquiry is made one for the courts.

The argument of the relator is in effect this: that the governor is the sole and final judge of whether or not a cause, whatever it may be, exists and that, in reaching a conclusion as to the existence or nonexistence of a cause, he may act without any charges being filed against the officer, may decide without an investigation, or upon an *ex parte* investigation, and may then defend his decision upon the ground that the judicial department of the state cannot inquire into or question his decision, citing *Wilcox v. People*, 90 Ill. 186; *State v. McGarry*, 21 Wis. 499; *Eckloff v. District of Columbia*, 135 U. S. 240, 34 L. ed. 120; *Keenan v. Perry*, 24 Tex. 253; *Cooley, Const. Lim. p. 52*; *Wright v. Defrees*, 8 Ind. 298; *State v. Doherty*, 25 La. Ann. 119, 18 Am. Rep. 181; *Atty-Gen. v. Brown*, 1 Wis. 518; *People v. Stout*, 19 How. Pr. 171; *Territory v. Cox*, 6 Dak. 501; *State v. Oleson*, 15 Neb. 247,—none of which it is believed are conclusive of this case.

Neither under section 12 of article 5 of the Constitution, nor under section 2448 of the Act Governing Metropolitan Cities can the governor of the state determine the existence of one of the causes for removal specified in said section 12 or said section 2448, but that such de-

termination is a judicial question and must be determined by the judicial department of the state.

Page v. Hardin, 8 B. Mon. 648; *Honey v. Graham*, 89 Tex. 1; *State v. Pritchard*, 36 N. J. L. 101; *State v. Harrison*, 18 West. Rep. 370, 118 Ind. 434; *People v. Stuart*, 74 Mich. 411.

The governor of the state cannot remove one of the fire and police commissioners of the city of Omaha until each of these three conditions have been complied with, to wit: (1) Specific charges must be made; (2) notice of such charges must be given to the commissioner; (3) an opportunity must be furnished the commissioner to be heard in his own defense.

Const. art. 1, §§ 8, 13, 24, art. 2, § 1, art. 6, § 1; 1 Dill. Mun. Corp. 4th ed. § 250; *Com. v. Stifer*, 25 Pa. 23, 64 Am. Dec. 680; *State v. Seay*, 64 Mo. 89; *Hogan v. Carberry*, 4 Cin. L. Bull. 118; *State v. Hawkins*, 3 West. Rep. 125, 44 Ohio St. 98; *Duham v. Willson*, 53 Mich. 392; *Ham v. Boston*, 2 New Eng. Rep. 642, 142 Mass. 90; *State v. St. Louis*, 6 West. Rep. 464, 90 Mo. 19; *Denver Board of Aldermen v. Darrow*, 18 Colo. 460; *Biggs v. McBride*, 17 Or. 640; *Hallgren v. Campbell*, 9 L. R. A. 408, 82 Mich. 255.

Post, J., delivered the opinion of the court:

This is an original proceeding by the attorney-general against the respondent for the purpose of testing the title of the latter to the office of member of the board of fire and police commissioners of the city of Omaha. The material parts of the petition is as follows: "That on or about the 2d day of May, 1890, Howard B. Smith, respondent herein, was appointed by the Hon. John M. Thayer, who was at that time governor of the state of Nebraska, as a member of the board of fire and police commissioners of the city of Omaha, and thereupon entered into said office, and continued to occupy said office, and to exercise the duties thereof, until the 28d day of February, 1892. On the said 28d day of February, 1892, the Hon. James E. Boyd, who was then and is now the governor of the state of Nebraska, by virtue of the authority vested in him by the Constitution and laws of the state of Nebraska, removed the respondent for cause from said office of fire and police commissioner of the city of Omaha. That on the 28d day of February, 1892, D. Clem Deaver was duly appointed and commissioned by the Hon. James E. Boyd, governor as aforesaid, a member of the board of fire and police commissioners of the city of Omaha, to succeed Howard B. Smith, respondent. That he accepted said appointment, and immediately took the oath of office, and filed with the city clerk of the city of Omaha a good and sufficient bond, as required by law, and claims the right to exercise the duties and to enjoy the privileges of said office. Notwithstanding the appointment of said D. Clem Deaver to said office, said Howard B. Smith, respondent, did on the 28d day of February, 1892, and has continuously since that time, without any legal warrant, claim or right, used and exercised, and still does unlawfully use and exercise, the office of fire and police commissioner in the city of Omaha, in place of said Deaver, and claims to be a member of said board of fire and police

commissioners in place of Deaver, and to have, use, or employ all the rights, privileges, and franchises of said office, to the damage and prejudice to the rights of said city of Omaha, and also against the peace of the state of Nebraska. That the said Deaver is a member of the Independent party, one of the three political parties casting the highest number of votes at the municipal election held in the city of Omaha in December, 1890. That prior to the appointment of said Deaver on the 28d day of February, 1892, as aforesaid, no member of the Independent party had been appointed as a member of the board of fire and police commissioners of the city of Omaha, as required by law, and that said Deaver is the only member of said board appointed who belongs to said party. Said relator, therefore, prays judgment that the respondent be declared not entitled to said office, and that he be ousted therefrom, and that D. Clem Deaver be declared entitled to said office, and installed therein, to assume the execution of the duties thereof."

The answer, omitting formal and immaterial parts, is as follows: "That in the month of May, 1887, the Hon. John M. Thayer, governor of the state of Nebraska, appointed Christian Hartman, George I. Gilbert, L. M. Bennet, and this respondent fire and police commissioners of the city of Omaha. That said Hartman and Gilbert were reputed to be and were members of one political party, to wit, of the Democratic party, and said Bennet and Smith of a different political party, to wit, of the Republican party. That said Hartman and Bennet were appointed to serve for the term of four years. That said Gilbert and this respondent were appointed to serve for the term of two years. That all of said appointees duly qualified and entered upon the discharge of their duties as such commissioners, and continued in the discharge of their duties until the month of May, 1889. That in said month of May, 1889, George I. Gilbert and this respondent were reappointed and duly commissioned by the Hon. John M. Thayer, governor of the state of Nebraska, to serve for a term of four years thereafter. That said Gilbert and this respondent duly qualified and entered upon the discharge of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge of said duties down to the present time. That respondent's term of office does not expire until May 16, 1893. That in the month of May, 1891, the Hon. John M. Thayer, governor of the state of Nebraska, reappointed and commissioned Christian Hartman as fire and police commissioner of the city of Omaha for a term of four years, and appointed and commissioned Wm. Coburn, a member of the Republican party, for the term of four years, to succeed L. M. Bennet. That said Hartman and Coburn duly qualified and entered upon the discharge of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge thereof since said time. That on the 28d day of February, 1892, the Hon. James E. Boyd, governor as aforesaid, without authority of law, and without cause therefor, assumed to remove this respondent from his said office of fire and police commissioner of the city of Omaha. That on and before said day there

were no charges of any name or nature, or of any description, against this respondent filed in the office of the governor of the state of Nebraska, or in the office of any other officer of the state of Nebraska, or of the city of Omaha. That notwithstanding the absence of any cause for such action, and notwithstanding the provisions of the Constitution and statutes of Nebraska, said Boyd, on said 28d day of February, 1892, without any notice given his respondent, and without giving this respondent any opportunity to be heard, wrote this respondent the following letter: 'State of Nebraska, Executive Department. Lincoln, February 28, 1892. Howard B. Smith, Esq., Omaha, Nebr.—Dear Sir: In accordance with the Constitution and laws of the state of Nebraska, you are hereby notified that I have this day removed you, for cause, from the office of fire and police commissioner for the city of Omaha, and have declared said office vacant. Yours, truly, James E. Boyd, Governor.'—and then and thereby assumed to remove this respondent arbitrarily from his said office. That letters of like import were also sent to said Gilbert and Hartman and Coburn. That thereupon said Boyd assumed, without authority of law, to reappoint, on the 28d day of February, 1892, said Coburn to succeed himself, and to appoint one George W. Shields to succeed said George I. Gilbert, and to appoint one C. V. Gallagher to succeed Christian Hartman, and to appoint D. Clem Deaver to succeed this respondent."

To this answer a general demurrer has been filed by the state, thus presenting the real question involved, viz., the power of the governor, under the charter of the city of Omaha, to remove members of the board of fire and police commissioners for cause other than official misconduct, or for the cause named, without charges and an opportunity to be heard in their own defense. The office in controversy was created by provision of the Act approved March 30, 1887, entitled "An Act Incorporating Metropolitan Cities, and Defining, Regulating, and Prescribing Their Duties, Powers, and Government," which, for convenience, will be referred to as the charter of the city of Omaha. Section 145 of said charter, as enacted, so far as material to the question under consideration, is as follows: "In each city of the metropolitan class there shall be a board of fire and police, to consist of the mayor (who shall be *ex officio* chairman of said board) and four electors of said city, to be appointed by the governor. The governor shall appoint, as the commissioners above, four citizens, not more than two of whom shall be of the same political party; two of them, of different political party faith and allegiance, shall be designated in their appointment to serve for two years, and the other two, also of different political party faith, shall be designated to serve for four years. And thereafter, at the expiration of said term, and each period of two years, the governor shall appoint two members of said board. For official misconduct the governor may remove any of said commissioners; and all vacancies in said board, by death, resignation, or removal, shall be filled by the governor for the unexpired term; and all vacancies, from whatever cause, shall be so filled that

not more than two of the members of the said board shall be of the same political party, or so reputed. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be prescribed by ordinance, shall be vested in and exercised by said board."

In 1891 this section was amended so as to provide that at least one of the members of said board shall belong to each of the three political parties casting the largest vote for city officers at the last preceding election. It is provided, however, by the section as amended, that "the terms and powers of the members of said board heretofore appointed by the governor of the state shall not be affected or changed by any amendments hereto." If we understand the position of counsel for the state, they claim that this proviso was intended to have a prospective effect only; that the amendment took effect immediately upon its approval, without exception or reservation in favor of the members of the board as then constituted; that it should be construed, not as exempting the then members of the board from its operation, but as a limitation upon the power of future legislatures. The evident purpose of the provision for commissioners from the different parties is to remove the police department of the greatest city of our state from the influence of partisan politics. This object is one to be commended, certainly, and to which the courts will give effect when possible without violating the recognized rules of construction. The wisdom of a division of the powers and responsibilities of the board between the three parties will not be called in question. For the purpose of this case, we will assume that the Legislature has power to authorize the removal of the respondent or any member of the board in order to give place thereon to a representative of the independent party. It is plain to us, however, that they have not done so. "Construction," as defined by Dr. Leibner, is the "drawing of conclusions respecting subjects that lie beyond the direct expression of the text,—conclusions that are without the spirit, but not the letter, of the text." Tested by this definition, the language of the amendatory Act leaves no room for construction. Respondent was appointed in May, 1889, for the term of four years. He was in office when the amendment took effect, in 1891, and his term, in the language of the Act, is not "affected or changed" thereby.

The solution of the next question presented is attended with greater difficulty. viz., Are the provisions of the charter relating to the removal of members of the board of fire and police commissioners of the city of Omaha in conflict with the provisions of the Constitution upon the subject? The constitutional provisions upon the subject are found in sections 10, 11, and 12 of article 5, entitled "Executive Department," as follows: "Sec. 10. The governor shall nominate, and, by and with the advice and consent of the senate (expressed by a majority of all the senators elected voting, by yeas and nays), appoint, all officers whose offices are established by this constitution, or

which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the Legislature. Sec. 11. In case of a vacancy during the recess of the Senate, in any office which is not elective, the governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate (a majority of all the senators elected concurring by voting yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. Sec. 12. The governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same, as herein provided in other cases of vacancy."

It is claimed, on one hand, that the provision of section 12 is applicable to all officers appointed by the governor regardless of their character, and is therefore a limitation upon the power of the Legislature; while, on the other hand, it is contended that it can have application only to officers named in or contemplated by the Constitution. The case of *Wilcox v. People*, 90 Ill. 186, relied upon by counsel for the state, is in many respects similar to this, and calls for especial notice in this connection. In 1869 an Act was passed incorporating the West Chicago Park Commissioners. The members thereof were appointed by the governor for the term of seven years. They were given power, among other things, to lay out, govern, and manage parks; to pass ordinances for the government of the same; to levy special assessments upon property to be benefited; and to possess in that regard all the power then possessed by the city of Chicago in respect to public squares; to acquire property for said purpose by condemnation or otherwise, etc. The Act further provides that the members thereof might be removed by the circuit court after trial and conviction, upon sworn charges, etc. In 1870 the present Constitution of that state was adopted, and which includes the provisions for appointment and removal by the governor, from which ours appears to have been copied. In 1877 the governor removed the relator, Wilcox, and other members of said board for incompetency. In determining the question of his power under the Constitution to remove officers, the supreme court held—(1) That the commissioners named were "officers," within the meaning of the Constitution,—not mere municipal officers, but agencies of the state at large,—although their functions were to be performed within the town of West Chicago. (2) The effect of the Constitution was to make the power of removal by the governor coextensive with his power of appointment. (3) The prior Act for removal of the commissioners by the court after trial, etc., was in conflict with the Constitution, and was superseded thereby. (4) Since the Constitution had invested the governor with power to remove officers, but was silent as to the mode of its exercise, he might determine for himself whether any of the statutory causes therefor existed, and that his discretion when

exercised is final and binding upon the courts. That case, although decided subsequent to the adoption of our Constitution in 1875, is entitled to a careful consideration in placing a construction upon it. It may be said to be an elementary rule of construction that whenever a legislative Act can be so construed as to avoid a conflict with the Constitution, and give it the force of law, it will be so construed, although such construction may not be the most obvious or natural one. *Cooley, Const. Lim.* 184; *Pleuler v. State*, 11 Neb. 547.

Another recognized rule of construction is that constitutional limitations upon the power of the Legislature in respect to offices will be confined to those offices which are specially enumerated in the Constitution, unless the contrary clearly appears therefrom. All others may be abolished, or the terms, functions, and emoluments thereof changed by law. This rule is fully sustained by the authorities cited by relator. Contemporaneous constructions by the Legislature of the constitutional provisions quoted indicate that they were understood from the adoption of the Constitution to apply only to offices named therein. For instance, the first Legislature elected under the Constitution, in 1877, provided for a commission to revise the laws of the state to be appointed by the governor without the consent of the Senate. In 1879 the Legislature created what is known as the "fish commission," the members of which were to be appointed by the governor with the consent of the Senate. In 1883 the Legislature authorized the governor to appoint a superintendent, etc., for the hospital for the insane without the consent of the Senate. In 1885 the governor was authorized to appoint a superintendent of the census, also an inspector of bees and honey in each county, without the consent of the Senate, and a live-stock commission, to be confirmed by the Senate. These and many other acts which might be cited as showing the understanding of the different Legislatures that the constitutional provisions in question were to have no application to offices created by law. We are unable to believe, when viewed in the light of twelve years of legislative and judicial history under the Constitution, that it was ever intended as a restriction upon the power of the Legislature over officers not within the contemplation of the men who framed it, or of the people who adopted it. Police commissioners of Omaha are in one sense state officers, since they are charged with a duty in the interest of the public at large. But so far as their appointment, government, and removal were concerned, at the time of the adoption of the Constitution they were essentially municipal agents, and not state officers. To our minds, therefore, to hold that such officers are within the constitutional prohibition is neither a necessary nor reasonable construction thereof.

There is still a more cogent objection to the decision in *Wilcox v. People*, viz., it is in conflict with the course of decisions in this state. In *State v. Seavey*, 22 Neb. 454, it was, in effect, held that the constitutional provisions in question did not apply to these particular officers; hence it was not essential to a valid appointment that it should be with the consent of the Senate. The case of *Douglas County v. Tim-*

me (Neb.), 49 N. W. Rep. 266, we regard as decisive of the question. The provision under consideration in that case was section 16, art. 8, of the Constitution, which in terms provides that the compensation of no public officer shall be increased or diminished during his term of office. It was held that the above provision applies only to offices created by the Constitution. The foregoing conclusion is in harmony with *State v. Kalb*, 50 Wis. 176, cited in the opinion of the present chief justice. The reason of the courts in the cases named must control in this.

We come now to an examination of some of the provisions of the charter of the city bearing upon the question at issue. In addition to the provision for removal of fire and police commissioners in section 145, it is provided by section 172 as follows: "Sec. 172. Removal from Office. The power to remove from his office the mayor, or any councilman or other officer mentioned in this Act, in any city of the metropolitan class, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated; and whenever any two of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and showing that he is guilty of malfeasance or misfeasance as such officer, or that he is incompetent, or neglects any of his duties as mayor, or that for any other good and sufficient cause stated he should be removed from his office as mayor; or whenever the mayor shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this Act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent, or neglects any of his duties, or that for any other good and sufficient cause stated he should be removed from his office,—the judge of such court may issue the proper writ, requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications upon such officer, to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil cases, and be conducted according to the rules of such court in such causes made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court."

It is urged by counsel for respondent that the above provision should be construed as a limitation upon the powers of the governor, and that he is authorized to remove the officer above named only upon a trial and finding by the district court. To this proposition we cannot assent. The governor is by section 145 empowered to remove these particular officers for a specific cause. This special provision will prevail rather than the general provision for the removal of officers of the city. The question, however, to which most prominence is given by counsel, is that of the power of the governor to remove without giving the officer an opportunity to be heard in his defense. It is claimed by relator that the removal of an officer is a purely executive act, and therefore

the governor may remove without charges, serving notice, or hearing of any kind. Before referring to the contention of the respondent, we will examine some of the authorities relied upon by the relator in addition to *Wilcox v. People*, *supra*.

State v. McGarry, 21 Wis. 505, is substantially as follows: The county board were, by a special provision, applicable to M county only, authorized to remove the inspector of the house of correction for incompetency, improper conduct, or other cause satisfactory to the board, which cause should be particularly assigned in writing, and entered upon the minutes of the board, with the yeas and nays, upon a vote of removal. It was held that the board might remove *ex parte*, without notice or a hearing of any kind. Chief Justice Dixon in the opinion of the court says: "The only question of judicial cognizance is whether the board has kept within the jurisdiction, or whether the cause assigned is a cause for removal under the statute."

In *Keenan v. Perry*, 24 Tex. 253, the plaintiff was removed by the governor as superintendent of the asylum for the insane. The law provided for his removal for incompetency, misconduct, and refusal to discharge the duties of his office. It was held that the law invested the governor with exclusive power to remove, and that his action was final and conclusive. This case, however, appears to be inconsistent with a later case in the same court, which will be noticed hereafter.

In *Wright v. Defrees*, 8 Ind. 298, it was held that the power of the executive to remove an officer for a given cause implies power to judge of the existence of such cause, and the power, being vested exclusively in the executive, cannot be controlled in its exercise by any other branch of the government.

In *State v. Doherty*, 25 La. Ann. 119, 18 Am. Rep. 181, the same reasoning is used as in the last case, with the same conclusion.

In *Atty-Gen. v. Brown*, 1 Wis. 442, it is held that where the law authorizes the removal of an officer for cause or upon notice, in the absence of express authority for an appeal or review, the courts have no authority to inquire into the grounds for removal. But in that case the governor was expressly authorized to remove the commissioner when he should believe that the best interest of the state demanded such removal.

In *People v. Stout*, 19 How. Pr. 171, the term of office was not fixed by law, and the mayor was authorized to remove with the consent of the board of aldermen.

In *Territory v. Cox*, 6 Dak. 501, there is an able and exhaustive discussion of the character of the power of the executive to remove officers, concluding with the opinion that it is purely executive, and in no sense judicial. The judgment of the court is, however, placed upon the statute which provides for an examination of the accounts of all public officers charged with the disbursement of public money. The examiner is required to report to the governor any failure of duty by financial officers when he (the governor) is authorized in his discretion to take such action for the public security as the exigencies of the case demanded. It was held that the executive had

authority, in his discretion, to remove the trustees of an asylum for the insane upon the report of an examination of their accounts by the public examiner.

In *Eckloff v. District of Columbia*, 135 U. S. 240, 84 L. ed. 120, the commissioners by statute had power to abolish any office, reduce the number of employes, remove from office, etc. The only contention in that case was that the unrestricted right above was subject to the limitation of a prior Act of Congress, but the court held that the prior Act had been superseded by the law first above mentioned. It is contended, on the other hand, that the governor has no power, under the charter of the city, to remove the respondent without—*first*, specific charges; *second*, notice of such charges; *third*, an opportunity to be heard in his own defense. Sustaining this proposition are two classes of authorities, as will be hereafter noticed,—one class holding that the determination of the existence of cause for removal is a function of the judiciary, and that, as a condition to removal by the executive, the incumbent is entitled to have the question determined by the courts. The others hold that the executive is possessed of limited judicial functions, and that he has power to determine upon a hearing the question of cause for removal.

In *Paye v. Hardin*, 8 B. Mon. 648, the Constitution of Kentucky provided that the secretary of state should hold office during the term of the governor, if he so long behave himself well. The governor, by an instrument in due form, declared that the secretary appointed was guilty of willful neglect, and refusal to live at the seat of government, and perform his duties as secretary, had abandoned the said office, and, in the judgment of the governor, the said office had become vacant for causes aforesaid. The successor appointed was held not entitled to the office. The court says: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof."

In *Honey v. Graham*, 89 Tex. 1, the governor, during the absence from the state of the defendant, issued a proclamation declaring his office of treasurer vacant, and in an action to determine his title to the office it was held that the action of the governor was void. The court says: "The power of the governor to fill a vacancy, whenever one exists, is not disputed. The power to create a vacancy is denied by every authority, except where the office is filled by the governor's choice of an incumbent, without concurrence of the Senate or election by the people, and the term of office is undefined by law."

In *State v. Pritchard*, 86 N. J. L. 101, the police commissioners of Jersey City had been convicted of malfeasance in office, whereupon the governor declared their offices vacant.

This Act was held to be void, on the ground that the right to remove an officer for misbehavior calls for the exercise of judicial functions. *Chief Justice* Beasley in the opinion, in which he refers with approval to *Page v. Hardin*, *supra*, says: "Indeed, among all other cases that I have examined, I find no exemplification of the exercise of such an act of authority. On the contrary, it seems to me quite clear that the removal of an officer, holding for a definite term, by the sovereign *mero motu*, on the plea of misbehavior, would have been a plain usurpation. I can find nowhere any traces of such a right having been claimed."

In *Com. v. Slifer*, 25 Pa. 23, 64 Am. Dec. 650, it is said: "We are unwilling to believe that the governor intended, without cause, to remove an officer appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded, but the power is to be exercised upon cause shown. It exists only where 'the officer fails and neglects faithfully to perform the duties of his office.' It is true that the executive is made the judge, and that his opinion or judgment is conclusive, so far as relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense. The reputation and the right of the incumbent to the office for the term specified in his commission are involved, and he has a right to know the accusation, and to be heard in his defense."

The case of *Dullam v. Willson*, 53 Mich. 392, is strikingly similar to this in all essential respects. By the Constitution of that state the governor is authorized to remove from office any officer for gross neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance. The notice of removal in that case is as follows: "Executive Office, Lansing, July 2, 1893. To Jas. C. Willson—Sir: I have this day, for your official misconduct and habitual neglect of duty, removed you from the office of trustee of the Michigan Institute for the Deaf and Dumb. . . . Respectfully, J. W. Begole." The court, in passing upon the power to thus remove, held that the authority conferred upon the governor to remove officers can only be exercised upon charges which shall specify the particular act relied upon to make out the cause alleged, of which the incumbent shall have notice, and a reasonable opportunity for a hearing thereon, at which he may produce proofs. *Judges* Champlin and Campbell filed carefully prepared opinions, in which they cite the authorities bearing upon the subject in this country and England, the former of whom concludes as follows: "I have examined carefully the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed, not only to the decided weight of authority, but also to the fundamental principles of justice."

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In *Hallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408, it is said: "We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and, wherever cause must be assigned for the removal of an officer, he is entitled to notice and a chance to defend."

In *Ham v. Boston*, 142 Mass. 90, 2 New Eng. Rep. 642, the board of police were authorized to remove for cause. It was held that they had no power to remove until after notice and an opportunity by the official in question to be heard in his own defense.

In *State v. St. Louis*, 90 Mo. 19, 6 West. Rep. 464, the statute authorized the removal of any elected officer of the city of St. Louis for cause. The court says: "When the removal is not discretionary, but must be for cause, as is the case here, and nothing is said as to the procedure, a specification of the charges, notice, and an opportunity to be heard are essential. This, we think, is the result of the authorities before cited. The proceedings in this case are wanting in all those requisites; for if, indeed, any charges were ever made against the relator at all, they were the product of the minds of the members of this committee, and by them kept from the knowledge of the accused."

In 1 Dillon, Mun. Corp., 4th ed. § 250, the author says that, where the right of removal is confined to specific causes, such power cannot be exercised until there have been formulated charges against the officer, notice thereof, and an opportunity for defense.

The following cases also support the principle of the foregoing: *Biggs v. McBride*, 17 Or. 640; *State v. Hawkins*, 44 Ohio St. 98, 3 West. Rep. 125; *Hogan v. Carberry*, 4 Cin. L. Bull. 118. It seems plain to us that the doctrine of these cases is in accord with the weight of authority, and is supported by the soundest reasons. The tendency of current opinion is strongly in the direction of fixed and definite terms of office, and in favor of making the office holder, so far as practicable without impairing the public service, independent of the appointing power. It is in obedience to a settled public conviction upon the subject that Congress annually appropriates large sums of money to accomplish reforms in the civil service of the general government. It is this sentiment that is expressed in procuring the charter of the city of Omaha under consideration. The purpose of the Legislature in adopting the provision under consideration was twofold: *first*, as has been said, to provide an efficient police department for a great city by removing it from the influence of local politics; *second*, to provide against the effects of fluctuation in state politics by fixed terms for the police commissioners to be removed for specific causes only. Without further elaboration, our conclusion is that the charter of the city of Omaha does not authorize the removal of the fire and police commissioners thereof except for official misconduct, nor until they have been notified of the particular act or acts of misconduct with which they are charged, and an opportunity has been afforded them to be heard in their own defense. The

questions whether the power of removal is judicial. In the sense that the officers aforesaid are entitled to have the question of cause for removal submitted to the courts for determination, and, if not, whether the courts have jurisdiction to review the action of the gov-

ernor, are not raised by the record, and are not determined. *Since the answer states a complete defense, it follows that the demurrer thereto should be overruled.*

The other Judges concur.

RHODE ISLAND SUPREME COURT.

John ALLEN and Wife

v.

Owen KEILY.

(.....R.I.....)

A landlord can forcibly eject a tenant without legal possession after the expiration of the tenancy although he holds possession in good faith under a color and reasonable claim of right.

(June 4, 1892.)

PETITION by defendant for new trial of an action brought to recover damages for alleged assault and battery in forcibly ejecting plaintiffs from certain real estate in which a verdict had been returned in plaintiffs' favor. *Granted.*

The case is stated in the opinion.

Messrs. George J. West and John Palmer for defendant in support of the petition.

Mr. John M. Brennan for plaintiffs, *contra.*

NOTE.—*Liability of landlord to tenant for forcible expulsion after termination of tenancy.*

In England.

It will be seen that the English rule has been unstable.

A landlord is not liable in trespass *quare clausum* for forcibly breaking into and resuming possession of premises after the tenant's right to possession thereof has terminated. *Turner v. Meymott*, 1 Bing. 158.

A *nisi prius* ruling in *Hillary v. Gay*, 6 Car. & P. 284, is to the effect that the landlord has no right to forcibly enter and eject his tenant after the tenancy has terminated, and this is regarded as the doctrine of *Newton v. Harland*, 1 Man. & G. 644, where it was held that if a landlord after the expiration of the term enter upon the premises with such force as is prohibited by the statute against forcible entry and detainer, an assault committed in ejecting the tenant is not justifiable. *Newton v. Harland, supra.*

Cresswell, J., in *Davis v. Burrell*, 10 C. B. 821, says that the doctrine of *Newton v. Harland, supra*, "has been very much questioned;" and it is said in *Blades v. Higgs*, 10 C. B. N. S. 713, to have been overruled by *Harvey v. Brydges*, 14 Mees. & W. 442.

The rule established by *Turner v. Meymott, supra*, was followed in *Pollen v. Brewer*, 7 C. B. N. S. 871.

In *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, 189, *Newton v. Harland* is said to have established that there is a cause of action, when in the course of a forcible entry an independent wrong has been committed by the person entering which could only be justified if his possession was lawful, which doctrine was approved, and while damages for the entry were denied, yet damages for injury to the occupant's furniture were allowed. *Edwick v. Hawkes*, L. R. 18 Ch. Div. 199, 210.

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Tillinghast, J., delivered the opinion of the court:

The only question raised by the exceptions taken to the rulings of the court in this case is whether a landlord can forcibly eject a tenant from his premises, after the expiration of the tenancy, if the tenant holds possession, in good faith, under a color and reasonable claim of right. The defendant requested the court to charge the jury as follows, viz.: *First*. "If the landlord enter and expel the occupant who wrongly holds a tenement, but uses no more force than is reasonably necessary to accomplish this, he will not be liable to an action of assault and battery, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to an indictment at common law for a breach of the peace, or under the statute for making a forcible entry." *Second*. "If the plaintiff was in possession, but the rent was due more than fifteen days after demand, the plaintiff was a mere trespasser, and could be expelled by the defendant." These requests

The prevalent American rule.

Notwithstanding the statutes of forcible entry and detainer a landlord may enter after the termination of the tenancy and expel the tenant without incurring liability to the tenant as a tortfeasor. *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258; *Jackson v. Morse*, 16 Johns. 197; *Meador v. Stone*, 7 Met. 147; *Todd v. Jackson*, 26 N. J. L. 525; *Jackson v. Farmer*, 9 Wend. 201.

A landlord incurs no liability to a tenant holding over after the determination of the tenancy by entering and removing the latter's goods doing no unnecessary damage. *Weeks v. Sly*, 61 N. H. 89; *Whitney v. Swett*, 22 N. B. 10, 58 Am. Dec. 223; *Adams v. Adams*, 7 Phila. 160; *Curl v. Lowell*, 19 Pick. 25; *Overdeer v. Lewis*, 1 Watts & R. 90, 37 Am. Dec. 440; *Souter v. Codman*, 14 R. I. 119; *Freeman v. Wilson*, 16 R. I. 524.

After the tenant's lease is terminated the landlord has full right of entry and is not liable in trespass *quare clausum*. *Curtis v. Galvin*, 1 Allen. 215; *Moore v. Mason*, 1 Allen. 406; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Moore v. Boyd*, 4 Me. 242; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Ives v. Ives*, 13 Johns. 235.

A landlord is not liable for assault for the exertion of force upon the person of his tenant necessary to effect his removal after the termination of his tenancy (*Low v. Elwell*, 121 Mass. 300, 23 Am. Rep. 272; *Twombly v. Monroe*, 130 Mass. 464; *Stone v. Lahey*, 183 Mass. 428); nor for an assault in using force necessary to overcome resistance by the tenant (*Mugford v. Richardson*, 6 Allen. 76); nor for damage to the tenant's goods by rain after their removal from the house and while out of doors. *Clark v. Kellher*, 107 Mass. 406.

He is not justified in using such force as would tend to a breach of the peace, but may lawfully use such force as would sustain a plea of justification of *molitor manus impositum*. *Fifty Associates*

were refused by the court, and the following were charged in lieu thereof, viz.: "One in possession under a reasonable claim and color of right, honestly believing it, has a right to maintain his possession, and no personal violence can be used to expel him." "If Mrs. Baldwin was in possession under a claim of right the defendant had no right to use any degree of personal force to expel plaintiff." In explanation of its charge, and refusal to change as requested, the court stated the law applicable to the case on trial to be as follows, viz.: "That an owner has the right to put an undoubted trespasser off his premises. But if one is out of possession of property held by another, under a color and reasonable claim of right, he has no right to use personal violence to regain possession." "Hence, if Mrs. Baldwin was in possession under a fair claim of right to remain as tenant, or under her husband's tenancy, on the ground that the defendant had money belonging to one of them in his possession, more than the amount of rent due, on account of which her occupation had been recognized, he had no right to use personal violence to eject her."

We think this was error. The question at issue, in so far as the tenancy in question was concerned, was whether or not it had been terminated. If it had, the plaintiff was a mere trespasser, and the defendant had the right to use so much force as was reasonably necessary to expel her. If the tenancy had not been terminated, she was not a trespasser, and the defendant had no right to interfere with her. But the question as to whether Mrs. Baldwin

was entitled to possession was a mere question of right, depending upon the fact as to whether the tenancy had been legally terminated, and not upon the belief of the tenant as to her right to remain. That is to say, the mere fact that a person honestly believes that he is lawfully in possession of a tenement or messuage does not prevent him from being a trespasser, and liable to be dealt with as such. Possession of real estate is either rightful or wrongful. And the right to the possession thereof, like the right of ownership, is to be determined solely by the evidence submitted, and the law applicable thereto, and is not dependent upon, or in any degree affected by, the belief of the claimant as to such right. If this were not so, it would be in the power of any one in the wrongful possession of real estate, who believes his possession to be rightful, to compel the person who is legally entitled to the possession thereof to resort to an action at law to recover the same; thus practically nullifying the right which the law confers upon the owner to take forcible possession by expelling the trespasser. Nor do we see that the distinction made by the court between "an undoubted trespasser" and one who holds possession "under a color and reasonable claim of right" changes the legal aspect of the case. Mrs. Baldwin was either a trespasser or she was not. If she was, neither her belief that she was not, nor the fact that she held "under a color and reasonable claim of right," was of any importance. The only question of importance concerning this branch of the case was whether she was in fact a trespasser; and this was a question to

v. Howland, 5 Cush. 214; Winter v. Stevens, 9 Allen, 528.

Upon the termination of a lease the lessor may peaceably enter the premises and if the lessee attempt to remove him by force he may resist by so much force as is necessary without incurring liability for an assault upon the lessee. Gillespie v. Beecher, 85 Mich. 347.

Where a landlord has peaceably entered upon the premises and removed the tenant's goods, he is not liable for an assault for forcibly removing the tenant attempting to resume possession. Marsh v. Bristol, 8 West. Rep. 791, 85 Mich. 378.

"Without determining the effect of a forcible entry on the rights of parties, after the due termination of a tenancy, it seems to be fully settled by the weight of judicial authority, when a tenancy has been legally terminated, that the landlord may enter peaceably upon the premises, that thus entering, he may remove the tenant therefrom, using such force as would sustain a plea of *molitor manus impositit*; and that he may remove his goods, if the tenant after a sufficient opportunity, neglects to do so, using due care and caution in their removal and depositing them in a near and convenient place." Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442.

A different view.

In Dustin v. Cowdry, 23 Vt. 681, it is maintained that the effect of the Statute of Forcible Entry and Detainer is to take away the common-law right of entry by the landlord after the expiration of the tenancy, and that for such entry by force and expulsion of the tenant the landlord is liable. Whitaker v. Perry, 38 Vt. 107.

But it is ruled that the landlord may rightfully enter if the tenant at the time of such entry and removal of his goods be absent from the premises

although only temporarily, and may maintain trespass against the tenant for a re-entry. Mussey v. Scott, 52 Vt. 82.

The Illinois Statute of Forcible Entry and Detainer has taken away the common-law right of a landlord to forcibly enter and take possession against the will of the tenant after a forfeiture of the lease, and for such entry and an assault committed in effecting it the landlord is liable to the tenant. Westcott v. Arbuckle, 12 Ill. App. 576; Reeder v. Purdy, 41 Ill. 279; Page v. De Puy, 40 Ill. 506; Wilder v. House, 43 Ill. 279; Dearlove v. Herington, 70 Ill. 251; Briggs v. Roth, 23 Ill. App. 313.

But it is otherwise if the lease expressly authorize such entry and taking of possession and only the necessary force be used. Fabri v. Bryan, 80 Ill. 182; Kavanagh v. Gudge, 7 Man. & G. 816.

The Connecticut Statute against forcible entry and detainer expressly gives the party forcibly ejected a right of action for trespass against the person ejecting him though he be the true owner. Bliss v. Bange, 6 Conn. 78.

In that state a landlord is held liable in trespass *quare clausum* and *vi et arms* for forcible entry and ejection of his tenant, the court holding that "a possession, commenced under a tenancy, cannot be put an end to in fact, by forcibly removing the tenant, without process." Larkin v. Avery, 23 Conn. 304, 307; Mason v. Hawes, 52 Conn. 12, 52 Am. Rep. 552.

Where a landlord, instead of resorting to the means provided by law for obtaining possession of his premises, takes upon himself, without authority, to remove the property of his tenant and turn him out, he will be liable in damages, though the ejectment was effected without personal violence and in the tenant's absence. Boniel v. Block, 44 La. Ann.—. J. G. G. /

be determined by the jury, upon all the proof bearing upon that point.

The doctrine laid down by this court in *Souter v. Codman*, 14 R. L. 119, and subsequently followed in *Freeman v. Wilson*, 16 R. L. 524, is in harmony with the current of both the American and English decisions as to the right of a landlord to use physical force in expelling a tenant whose term had expired, and

we see no reason to overrule or modify the opinions therein expressed. See also 2 Taylor, Land. & T. 8th ed. §§ 531, 532, and cases cited.

We are therefore of the opinion that the court erred in refusing the defendant's requests to charge and in charging to the contrary as above set forth.

Petition granted.

UNITED STATES CIRCUIT COURT OF APPEALS (8th Cir't).

UNION PACIFIC R. CO., *Plff. in Err.*,

James J. LAPSLEY, Admr., etc., of Eliza J. Lapsley, Deceased.

(51 Fed. Rep. 174.)

The negligence of the owner of a carriage in driving his team is not imputable to one riding with him at his invitation, and who has no authority over him.

(June 13, 1902.)

ERROR to the Circuit Court of Appeals of the United States for the Northern District of Iowa to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

Argued before Brewer, Justice, and Caldwell and Sanborn, *Circuit Judges.*

Statement by **Sanborn, Circuit Judge:**

The defendant in error, who was the plaintiff below, was the administrator of the estate of Eliza J. Lapsley, deceased, and brought this action against the Union Pacific Railway Company to recover damages for the negligent killing of the decedent. The evidence disclosed the following facts: On November 27, 1890, the decedent was living on a farm near Dakota City, Neb., which had belonged to her father, and continued to be the homestead of the family after his death. She was forty-eight years of age, and was a capable woman, in good health, and accustomed to manage the affairs of the homestead. The plaintiff was her brother, and lived in the same neighborhood. They had a brother living in Sioux City, Iowa, one of whose family was ill, and decedent proposed to go to Sioux City with a younger sister to visit the sick one and do some shopping. The plaintiff informed her that he was going to that city the next day to do some business of his own, and they could wait and go with him. On the next day the plaintiff and his two sisters went to Sioux City in plaintiff's open two-seated democrat wagon, where they each attended to their respective business matters, and, after taking dinner at their brother's, started to return home. Plaintiff, who was forty-five years old, sat on the

front seat with the younger sister and drove his team, while the decedent sat on the back seat of the wagon. Leech street, in Sioux City, crosses the street upon which defendant's railroad is operated; and, owing to the lay of the ground and to the buildings and other obstructions, it was impossible for one approaching the crossing on this street to see a train coming from the south for quite a distance along said street until one was close to the track. Plaintiff drove down towards the crossing on this Leech street at a slow trot, looking for trains in the usual way. No bell, whistle, or other signal was heard, and just as the team was on the track an approaching train was seen, which struck the wagon, and so seriously injured the decedent that she died in a few minutes. Both plaintiff and his sister knew the surroundings of this crossing, and they came down in the wagon without stopping to look or listen. The court below charged the jury that if the defendant was negligent in operating its railway, and that negligence was the proximate cause of the injury, the plaintiff was entitled to recover unless they found that the decedent was herself negligent in approaching the crossing, or controlled the driver as he approached the crossing and he was negligent, and such negligence contributed to the injury; but that if the decedent was herself negligent, or if she controlled the action of her brother, the driver, as he approached the crossing, and he was negligent, and such negligence contributed to the injury, plaintiff could not recover. The defendant company insisted that the negligence of the plaintiff, the driver, must be imputed to the decedent as a matter of law; but the court refused to so hold, and charged the jury upon this question that if they found as a matter of fact that the decedent had and exercised actual control or direction of the driver as he approached the crossing, and he was negligent, then his negligence must be imputed to her and she could not recover; but that, if they found she did not have or exercise such control, the negligence of the driver could not be imputed to her from the mere fact that she was riding in her brother's wagon on his invitation, and he was driving the team. This holding and charge of the court is the only error assigned in this court, and, judgment having been rendered against the defendant, it sued out this writ of error to review this portion of the charge.

Mr. J. M. Thurston for plaintiff in error.
Messrs. A. S. Wilson and S. M. Marsh, for defendant in error:

NOTE.—For a collection of authorities upon the question of imputing the negligence of the driver to his passenger, see notes to *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. R. A. 143; *Becke v. Missouri Pac. R. Co.* (Mo.) 9 L. R. A. 157.
16 L. R. A.

In *Neabitt v. Garner*, 75 Iowa, 814, the court goes over the Iowa cases and says they have never decided that when one rides upon the public highway in the vehicle of another, the driver, as a matter of law, becomes his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, regardless of the real relations of the parties; that this doctrine finds support in some adjudicated cases; but that many American courts, whose opinions are of the highest authority, have pronounced it unsound, citing,—

Bennett v. New Jersey R. & Transp. Co. 86 N. J. L. 226, 18 Am. Rep. 435; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Chapman v. New Haven R. Co.* 19 N. Y. 341, 75 Am. Dec. 844; *Dyer v. Erie R. Co.* 71 N. Y. 238; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, St. L. & P. R. Co. v. Hackett*, 105 Ill. 864; *Little v. Hackett*, 116 U. S. 386, 29 L. ed. 652.

Thorodd v. Bryan, 8 C. B. 114, was expressly overruled in the case of *The Bernina*, 12 Prob. Div. 58.

In *Wymore v. Mahaska County*, 78 Iowa, 396, the court held that the negligence of the parents could not be imputed to the child, saying that a large number of courts hold that it is so imputable; citing,—

Hartfield v. Roper, 21 Wend. 615; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 337; *Lynch v. Smith*, 104 Mass. 53, 6 Am. Rep. 188; *Gibbons v. Williams*, 135 Mass. 335; *Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 336; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 38; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 542; *Meeks v. Southern Pac. R. Co.* 52 Cal. 608; *Stilson v. Hannibal & St. J. R. Co.* 67 Mo. 674.

A list of cases is also cited holding to the doctrine that the negligence of the parent cannot be imputed to the child, as follows:

Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 599; *Huff v. Ames*, 16 Neb. 189; *Galveston & H. H. R. Co. v. Moore*, 59 Tex. 64; *Erie City Pass. R. Co. v. Schuster*, 4 Cent. Rep. 919, 113 Pa. 412; *Robinson v. Cone*, 22 Vt. 214, 54 Am. Dec. 67; *Daley v. Norwich & W. R. Co.* 26 Conn. 501; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 476; *Boland v. Missouri R. Co.* 38 Mo. 489; *Whitely v. Whiteman*, 1 Head, 619; *Beach, Contrib. Neg.* §§ 41-43. See *Battisall v. Humphreys*, 14 West. Rep. 563, 64 Mich. 514; 1 Shearm. & Redf. Neg. §§ 70-88, and notes.

The court says: "It seems to us that the authorities last cited announce the better rule." The following cases hold that the negligence of the driver is not imputable to his guest:

Noyes v. Boscawen, 5 New Eng. Rep. 70, 64 N. H. 361, 10 Am. St. Rep. 410; *Robinson v. New York Cent. & H. R. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1; *Carlisle v. Brisbane*, 4 Cent. Rep. 503, 118 Pa. 544; *Little v. Hukett*, 116 U. S. 860, 29 L. ed. 652; *Dyer v. Erie R. Co.* 71 N. Y. 238; *McCaffrey v. Delaware & H. Canal Co.* 41 N. Y. S. R. 221; *Bennett v. New York Cent. & H. E. R. Co.* 40 N. Y. S. R. 948; 16 L. R. A.

Louisville, N. A. & O. R. Co. v. Creek (Ind.) 14 L. R. A. 733; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* (Ky.) Dec. 10, 1891; *Randolph v. O'Riordan* (Mass.) Jan. 7, 1892; *Carterville v. Cook*, 4 L. R. A. 721, 129 Ill. 152, 16 Am. St. Rep. 253, note.

Sanborn, Circuit Judge, delivered the opinion of the court:

Under the instructions of the court the jury, in arriving at their verdict, must have found that the negligence of the defendant company in failing to ring its bell, sound its whistle, or provide a flagman at this crossing was the proximate cause of the injury complained of; that the decedent was not herself guilty of any negligence that contributed to the injury; and that she neither had nor exercised any control over her brother, the driver, as he approached the crossing. The owner and driver of the team exercised entire control over it, and was traveling entirely on business of his own,—business in which the decedent had no part or interest. There is no pretense that the driver was not entirely competent to take charge of the team himself, nor that he did not possess the requisite skill to manage and control the same; so that the case sharply presents the question whether one who, while driving gratuitously in a carriage owned and driven by another, is injured by the concurrent negligence of a third person and the driver, over whom he has no control, is barred from recovering compensation for the injury from the former, by the contributory negligence of the owner and driver of the team. If he who rides in a private carriage on the invitation of the owner and driver of the team cannot recover of a third person whose careless act is the proximate cause of his injury, where the negligence of the driver contributes to that injury, it must be because the negligence of the driver is, under the law, the negligence of the guest; and, if one who rides on the invitation of the owner of a private carriage who drives his own team is so far responsible for the negligence of his host that he cannot recover of a third person for injuries caused by his negligence where the negligence of his host has contributed to the injury, it logically and necessarily follows that, if the host so negligently drives his team as to inflict injury upon a third person, the invited guest will be liable for that injury also, and an action may be maintained against him by the person injured for the damages thus sustained, since if the negligence of the host is to be imputed to the guest when he receives injury it must be imputed to him to the same extent when his host inflicts injury; but it is absurd to think that an invited guest riding in a private carriage could be held liable for the injuries inflicted on a third person by the careless driving of the owner of the carriage and team, and the absurdity of this conclusion argues with almost compelling force that the negligence of such a driver cannot be imputed to the guest so as to bar his recovery when the third person inflicts, instead of receives, the injury. That the negligence of a servant, acting under the direction and eye of the master, may be imputed to the latter, that under some circumstances the negligence of a parent may be imputed to a child,

or the negligence of a guardian to his ward, may be conceded. In cases of this class, and indeed in all cases where this doctrine of imputation of negligence may properly be applied, the relation of master and servant or principal and agent exists, and the doctrine rests on the maxim, *qui facit per alium facit per se*. The servant acts for and by the direction of his master, the parent for the child of tender years, the guardian for his ward. Hence, in the eye of the law, the act and negligence of the servant are the act and negligence of the master; the act and negligence of the parent and guardian the act and negligence of the child or ward. But, where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created; no relation of master and servant is established; the owner and driver of the team is not controlled by and is not in any sense the agent of the invited guest; and to hold him responsible for the negligence of the former, by whose permission alone he rides, is unauthorized by the law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable in the administration of justice to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who upon every consideration of justice and reason ought to make compensation for it, shall be permitted to escape because a third person, over whom the injured person had no control, and whose only relation to him was that of a guest to his host, has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury, a loss of \$1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of hers, to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realm of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it.

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It is true that it was held in 1849 in *Thorogood v. Bryan*, 8 C. B. 115, that a passenger in an omnibus, who was injured by the joint negligence of the driver of another public conveyance and the driver of the omnibus in which he was riding, was barred from recovering in an action against the proprietor of the former conveyance which collided with the omnibus in which he was riding by the contributory negligence of the driver of the omnibus, that the negligence of the driver was the negligence of the passenger, and that by selecting and entering the omnibus he became identified with the driver; and it is equally true that similar decisions founded upon this case had been rendered in England and in some of the states prior to the year 1886. In the year 1886 the reasoning found in the opinions rendered in that case was conclusively refuted, and the decision itself repudiated by the Supreme Court of the United States in an exhaustive opinion delivered by Mr. Justice Field in *Little v. Hackett*, 116 U. S. 368, 29 L. ed. 652; and the convincing logic of the distinguished jurist who delivered that opinion, and his exhaustive review of the authorities, have settled the law in this country upon this subject, and seem to have convinced the learned judges of the court of appeals in England that the rule in *Thorogood v. Bryan* was erroneous; for in 1887, in *The Bernina*, 12 Prob. Div. 58, in exhaustive opinions in which the authorities are again carefully reviewed, they expressly disapproved the reasoning and overruled the decision in that case. With the single exception of the Supreme Court of the state of Wisconsin, which had become committed to the doctrine of *Thorogood v. Bryan*, prior to 1886, the state courts have uniformly held that one who, while riding in the private carriage of another at his invitation, is injured by the negligence of a third party, may recover against the latter, notwithstanding the negligence of the owner of the carriage in driving his team may have contributed to the injury, where the person injured is without fault and has no authority over the driver. *Follman v. Mankato*, 35 Minn. 522; *Carlisle v. Brisbane*, 113 Pa. 544, 4 Cent. Rep. 508; *Robinson v. New York Cent. & H. R. Co.* 66 N. Y. 11, 28 Am. Rep. 1; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Masteron v. New York Cent. & H. R. Co.* 84 N. Y. 247; *Cuddy v. Horn*, 46 Mich. 596; *Covington Transf. Co. v. Kelly*, 86 Ohio St. 87; *Street R. Co. v. Eadie*, 43 Ohio St. 91, 1 West. Rep. 88; *Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Wabash, St. L. & P. R. Co. v. Shacklet*, 103 Ill. 364.

This rule is established by authority, commends itself to the reason, was properly and carefully given to the jury for their guidance by the learned judge below, and the judgment below is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

MORNING JOURNAL ASSO., *Piff. in Err.*,

v.

Edward C. RUTHERFORD.

(51 Fed. Rep. 518)

1. Exemplary damages may be allowed for wantonly publishing a libel without inquiry or justifiable motive.
2. The custom of a newspaper to print stories of elopements and similar gossip whenever they have appeared in the columns of another paper without any inquiry as to their truth shows such reckless unconcern as to the mental anguish that may be caused by such publication as will warrant a jury in finding the publisher guilty of wanton negligence which will justify a verdict for punitive or exemplary damages.
3. A decision upon a motion for a new trial is not the subject of review in a Federal appellate court.
4. An excessive verdict cannot be corrected in the Federal courts upon a writ of error.

(July 20, 1892.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel in which a verdict had been returned in plaintiff's favor for the sum of \$4,000. *Affirmed.*

Statement by *Lacombe, Circuit Judge:*

The plaintiff, a resident of Toronto, Canada, came to New York city on the 8th of June 1890, accompanied by the wife of a friend of his, who resided in Toronto. When the train arrived, they were met at the station by the husband. All the parties were people of high respectability, and were, apparently, intimate friends who had arranged for a visit to New York together. While they were staying at the Hotel Brunswick, and on the 14th of June, there appeared in the newspaper published by plaintiff in error a communication, under the heading "Eloped to New York; Wife of a Wealthy Toronto Merchant 'Skips Out,'"—which purported to have been sent to it by its special correspondent at Toronto, the day before. The communication stated, in substance, that the defendant in error had eloped with the lady; that for some time the intimacy between the two had excited comment in Toronto, and, when they were found to be missing, "tongues wagged freely;" that a dispatch from New York city had been received by the husband, stating that his wife and defendant in error had been seen there, and that he at once started for New York. No special correspondent in Toronto had sent any such communication to the plaintiff in error. One Cronin, a reporter for a Toronto newspaper,

with no more information on the subject than "talk which was going on about it in the office" of his paper, had, without investigating into the facts, sent the communication to a Chicago newspaper, which published it. The article, as published in the Chicago newspaper, was forwarded by a news agency to the plaintiff in error. Just prior to its receipt, a similar article was published in the New York Evening Sun. The telegraph editor of the plaintiff in error cut out the article from the Sun for publication in his own paper, and inserted it therein as an item of news, without making any inquiry as to its authenticity.

Defendant in error brought suit in the United States circuit court for the southern district of New York, laying his damages at \$10,000. The action was tried May 12, 1891, before Judge Wallace and a jury and a verdict rendered for \$4,000. A motion for a new trial was made and denied, judgment was duly entered, a bill of exceptions settled and filed, and writ of error allowed.

Argued before Lacombe and Shipman, *Circuit Judges.*

Mr. John R. Dos Passos for plaintiff in error.

Mr. James D. Fessenden for defendant in error.

Lacombe, Circuit Judge, delivered the opinion of the court:

The plaintiff in error, upon the argument in this court, criticised certain statements in the charge, to which, on the trial, he made no objection and which are covered by no exception. These portions of the charge are not, therefore, before this court for review; they would not be, even under a general exception to the whole charge, (Rule 10, U. S. Cir. Ct. App. 2d Ct.,) nor was any such general exception taken. It is elementary that a party who thinks himself aggrieved by a charge to the jury can be heard in criticism only of so much of it as he objected to at the time. The record discloses three exceptions to the charge, as follows: *First.* To a refusal to charge, as requested, that, "there being no express or actual malice on defendant's part in publishing the libel, the jury should not award exemplary or punitive damages." *Second.* To a refusal to charge, as requested, that, "where there is no actual or express malice, and no claim that the plaintiff has suffered any special damages, the jury may award the plaintiff nominal damages." *Third.* To a charge that the jury might give a verdict for punitive or exemplary damages.

The jury were charged that "they would not be justified in finding, from the evidence in the case, that there was any personal ill will towards the plaintiff which inspired the publication of the articles," and that "there

NOTE.—As to the effect of the fact that a libel is copied, see *Arnott v. Standard Assn.* 3 L. R. A. 69, and note, 57 Conn. 86; and see note to *Hayes v. Press Co.* (Pa.) 5 L. R. A. 644.

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As to effect of imputing want of chastity, see note to *Morey v. Morning Journal Assn.* (N. Y.) 3 L. R. A. 621.

was no evidence authorizing the jury to find that there was any actual or express malice on defendant's part in publishing the article," that the law implies malice from the publication of a false and defamatory article, without probable cause; that, under the circumstances, plaintiff was entitled to such damages as he had sustained in his feelings and his reputation by reason of the publication of the libelous article; that he was entitled to be indemnified for the injury to his feelings. The court further charged that, if the jury were satisfied that the article was wantonly published without inquiry, without justifiable motive or under circumstances of gross negligence, it was within their province to award, besides actual damages, such sum as they might think, upon all the facts, the case deserved for punitive or exemplary damages.

So far as the subject-matter of the second exception, *supra*, is concerned, the charge was as favorable as the plaintiff in error was entitled to. The jury was distinctly told that defendant in error was entitled to indemnification for injury to his feelings and reputation, and that, only if they were satisfied that the publication was wanton and grossly negligent, were they to give him anything more. Neither the character of the libel nor the circumstances of its publication were such as to require the court to intimate to the jury that nominal damages were a sufficient indemnity for the assault upon his reputation and the injury to his feelings, and such an intimation is manifestly what the request to charge was devised to secure.

The other two exceptions, *supra*, are unsound. The charge correctly instructed the jury as to the law of the case. In actions for libel, juries are authorized to give such exemplary damages as the circumstances require, when the evidence shows that the publication was "the result of that reckless indifference to the rights of others which is equivalent to the intentional violation of them," (*Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 28 L. ed. 874;) or, as it is elsewhere expressed, "when the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." (*Philadelphia W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 213, 16 L. ed. 76.) There was sufficient in the case to warrant the jury in finding that the action of the plaintiff in error exhibited such reckless indifference to the rights of others. For the publication of its defamatory article—a bit of spicy gossip dealing with the domestic infelicities of private persons—there was no excusable motive, and to publish it without making any effort to verify its truth was a piece of reprehensible negligence which may be fairly characterized as wanton. The story which the plaintiff in error spread broadcast throughout the community was one calculated most cruelly to outrage the feelings of any honest woman. The mental anguish which would be experienced by a loyal wife who saw herself paraded in the public press as an adulteress might well be assumed to be sufficiently acute to induce any decent person to verify before repeating such a story.

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But this plaintiff in error made no effort so to do. It published the story as if it were of its own special procurement,—the result of investigations made in its own behalf; in reality, reprinting the gossip just as it found it. "On seeing the article in the Sun, or receiving it from the United Press Association," says the editor in his testimony, "we were not supposed to make any inquiry as to the truth of it, and I did not make any." If this does not evidence a "reckless indifference to the rights of others, which is equivalent to an intentional violation of them," it is somewhat difficult to conceive what will.

It is urged, on behalf of the plaintiff in error, that it would be a physical impossibility for a newspaper to send an agent to every place where events are transpiring to ascertain by personal examination the exact facts, and that, if such a rule were insisted upon, "a paper could not give us all which we have a right to hear of the current events of the day." (*Edwards v. Kansas City Times Co.*, 82 Fed. Rep. 815.) That the public has such a right to be informed as to the private life of every individual, as to the domestic affairs of every family, as to the happiness or infelicity which may characterize every household, as will warrant the proprietors of newspapers who cater to its wants in publishing any falsehood they may think interesting to their readers, without any investigation as to its truth, is a proposition, however, to which this court is not prepared to assent. Proprietors of newspapers, no doubt, know what current events of the day the public wishes to hear, and may find it desirable to repeat such spicy personal gossip as they may find in the columns of their contemporaries, or may hear from others, but they must at least exercise reasonable care that what they publish is the narrative of a current event, and not a libelous falsehood; for it is only as the report of a current event that newspaper or public have any concern with it whatever. What proportion of the columns of a newspaper shall be devoted to reports of illicit relations is a matter between itself and its readers, to be settled by the community in which it circulates, and individuals who offend against morality and violate the laws of society may have no just cause to complain if the sin which was committed in a corner is proclaimed from the house-top; but whosoever is void of offense is entitled to insist upon the protection the law gives him, that no story of his private life, however racy may be its details, shall be published with reckless indifference to his rights. The right to a reputation unsmirched by slanderous tongue or libelous pen is one which courts hold sacred; and when the publisher of a libel urges, as his sole defense, that it is the custom of his paper to print such stories as these, whenever they have appeared in the columns of another paper, without any inquiry as to their truth, he manifests such complete indifference to another's rights—such reckless unconcern as to the mental anguish he may cause—as well warrant a jury in finding him guilty of wanton negligence.

The plaintiff in error excepted to the re-

fusal of the trial judge to set aside the verdict as excessive upon a motion for a new trial, and also contended that this court should do so on the ground that the record showed that the verdict was excessive. A decision upon a motion for a new trial, however, is not the subject of review in a Federal appellate court, (*Laber v. Cooper*, 74 U. S. 7 Wall. 565, 19 L. ed. 151; *Pittsburgh, O. & St. L. R. Co. v. Heck*, 102 U. S. 120, 26 L. ed. 58, and the cases therein cited;) nor,

when the proper rule for the computation of damages has been given to the jury, can an excessive verdict be corrected in the Federal courts upon a writ of error (*Erie R. Co. v. Winter*, 148 U. S. 60, 36 L. ed. 71; *Hogg v. Emerson*, 52 U. S. 11 How. 587, 13 L. ed. 824.) This statement of the well-settled rule of practice, however, is not to be taken as an intimation that, in the opinion of this court, there is anything in the record to show that the verdict in this case was excessive.

UTAH SUPREME COURT.

E. R. CHASE, *Appt.*,
v.

Harry JEMMETT *et al.*, Trustees of School District No. 10 in Box Elder County *et al.*,
Respts.

(.....Utah.....)

The value of a public schoolhouse built on land of an unknown owner in the expectation that he will permit such use and with the intention in case he will not to acquire it by eminent domain, is not to be included in his compensation if it becomes necessary to condemn the land.

(August 4, 1892.)

A PPEAL by plaintiff from a judgment of the District Court for Weber County de-

nying a portion of the relief asked by him in an action brought to recover the possession of certain real estate, and compensation for its use. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Evans & Rogers*, for appellant: Appellant as owner of the land was in the condemnation proceedings entitled to compensation for its value, with the improvements thereon, to wit, the stone building.

United States v. Land in Monterey County, 47 Cal. 515; *Graham v. Connersville & N. C. J. R. Co.* 86 Ind. 468, 10 Am. Rep. 56; *Seart v. Lake County School Dist. No. 2*, 133 U. S. 558, 33 L. ed. 740; *Hendry v. Trinity & S. R. Co.* (Tex.) 24 Am. & Eng. R. R. Cas. 286; *Harris v. Marblehead*, 76 Mass. 40; *Crosby v. Dracut*, 109 Mass. 206; *Meriam v. Brown*, 128 Mass. 391; *Price v. Weehawken Ferry Co.* 81 N. J. Eq. 81; *Emerson v. Western Union R. Co.* 75

NOTE.—Value of improvements made by one taking property by eminent domain as an element of damages.

When improvement is consented to by owner, mortgagor, etc.

Where entry was by consent of the landowner he is not entitled upon subsequent condemnation of the land to compensation for improvements placed thereon by the railway company. *Cohen v. St. Louis, Ft. S. & W. R. Co.* 84 Kan. 153, 55 Am. Rep. 242; *California S. R. Co. v. Southern Pac. R. Co.* 67 Cal. 56; *Emerson v. Western Union R. Co.* 75 Ill. 178.

The same rule was followed in *San Francisco & N. P. R. Co. v. Taylor*, 95 Cal. 246, where it did not appear whether the owner consented or objected to the construction of the improvements. So, too, if the entry and construction were with a view to a subsequent condemnation. *Lyon v. Green Bay & M. R. Co.* 42 Wis. 538.

When a railroad company constructs its road with the knowledge of and without objection from the landowner, and afterwards institutes condemnation proceedings, the landowner is not entitled to compensation for rails and cross-ties laid by the company on the strip of land taken. *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450.

A railroad company having constructed its road with the consent of the life tenant, the remaindermen are not entitled to compensation in a condemnation proceeding for the improvements made on the land intermediate the entry and condemnation. *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622. The court went further than this in its opinion, saying: "Even if the entry had been without license or permission of anyone authorized to grant the same, so that it was a trespass at the time, the law would not require the 16 L. R. A.

railroad company, in seeking a condemnation of the land so entered upon for a right of way, to pay the owner of the land for structures placed upon it at its own expense, with a view of subsequently acquiring the right of way."

Where a railroad company enters upon land and constructs its road with the consent of the adult tenants in common and of the infants so far as it can be given, the value of the improvements placed on the land by it is not an element of damage to be assessed in a subsequent condemnation proceeding. *Re Norwood & M. R. Co.* 47 Hun. 490.

Where a railroad company, in pursuance of a contract with one in possession of land under an apparently valid mortgage lien and other claims supposed to amount to its whole value, for a conveyance thereof when he had perfected his title, took possession of a right of way and erected improvements thereon, and it subsequently turned out that another had a superior title, the latter is entitled, in condemnation proceedings, only to what the land itself is worth and not to its value as enhanced by the improvements. *Ellis v. Rock Island & M. C. R. Co.* 14 West. Rep. 372, 126 Ill. 52.

In condemnation proceedings by a railway company which has constructed its road under an agreement with the mortgagor, the mortgagee who has come into full possession is not entitled to compensation for the improvements placed on the land by the railroad company. *St. Johnsbury & I. C. R. Co. v. Willard*, 2 L. R. A. 523, 61 Vt. 134.

A railroad, occupying land in pursuance of a contract with the mortgagor, over which its power of eminent domain did not extend, although with the knowledge of the mortgagor, has no equity to have the permanent improvements made by it reserved from sale under the mortgage. *Price v. Weehawken Ferry Co.* 81 N. J. Eq. 81.

Where a landowner assents to the occupation of

Ill. 176; *Kimball v. Adams*, 52 Wis. 554, and cases there cited.

A compliance upon the trial of this case with the provisions of Laws 1888, § 3852, vol. 2, p. 419, would have entitled appellant to have had the jury pass upon the actual value of the property taken at the date of issuing the summons or the filing and serving of respondents' cross-complaint (some years subsequent to erection of building in and upon appellant's land), and the learned trial judge ruling *contra* was error.

San José & A. R. Co. v. Mayne, 83 Cal. 566.

Messrs. Kimball & Allison, for respondents:

The use was a public use in behalf of which the right of eminent domain can be exercised—that of a school district.

2 Com. Laws 1888, § 3841, sub. 2, pp. 415, 416; Mills, Em. Dom. § 17, and cases cited.

The question is, Is the appellant the owner of the schoolhouse, and all school apparatus, fixtures, outhouses, and appurtenances placed on the land by the respondents, and is he entitled to have the value thereof included in the compensation to be paid in the condemnation proceeding? The great weight of the authorities answer this question in the negative.

Denver & R. G. W. R. Co. v. Stancliff, 4 Utah, 117; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Meig's App.* 62 Pa. 28, 1 Am. Rep. 873; *Daniels v. Chicago, I. & N. R. Co.* 41 Iowa, 52; *Morgan's App.* 89 Mich. 675; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456;

Greve v. First Div. of St. Paul & P. R. Co. 26 Minn. 66; *Kennedy v. Milwaukee & St. P. H. Co.* 22 Wis. 581; *Lyon v. Greene Bay & M. R. Co.* 42 Wis. 538; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450; *Goodin v. Cincinnati & W. W. Canal Co.* 18 Ohio St. 169; *Dove v. Congdon*, 16 How. Pr. 571; *California Pac. R. Co. v. Armstrong*, 46 Cal. 86; *Jones v. New Orleans & S. R. Co. & I. Asso.* 70 Ala. 227; *Aspinwall v. Chicago & N. W. R. Co.* 41 Wis. 474; 6 Am. & Eng. Encyclop. Law, 567.

Zane, Ch. J., delivered the opinion of the court:

The plaintiff brought this suit to recover eighty acres of land in Box Elder county, and the value of its use during defendants' possession. The defendants filed an answer denying the allegations of the complaint, and a cross complaint for the condemnation of a part of the land for school purposes. It appears from the evidence in the record that the trustees of the district erected a schoolhouse on the land in 1881; that the district has occupied it as a schoolhouse ever since, and that its use by the public is necessary; that the United States issued a patent for the land to the Central Pacific Railroad Company in 1884; that the company conveyed it to the plaintiff in 1886; that there has not at any time been any other occupation of the land or the schoolhouse; and that the trustees did not know who owned the land at the time they erected the schoolhouse upon it.

his land by a railroad company, the ties and rails affixed thereto do not become his property although the company never acquires title. *Dietrich v. Murdock*, 42 Mo. 279.

A railroad company constructing its road by agreement with the mortgagor is entitled to be relieved from the lien of the mortgage by payment of a ratable proportion of the value of the land taken irrespective of the value of the improvements placed thereon by the railroad company. *Dove v. Congdon*, 16 How. Pr. 571; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581; *Aspinwall v. Chicago & N. W. R. Co.* 41 Wis. 474 (statutory); *Hartshorn v. Milwaukee & St. P. R. Co.* 23 Wis. 602.

When construction of improvement is a trespass.

Upon the condemnation of land which a railway company is occupying as a trespasser, the owner is not entitled to compensation for the ties, rails, trestles, and other structures placed thereon by the company. *Jones v. New Orleans & S. R. Co.* 70 Ala. 227; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456; *Morgan's App.* 89 Mich. 675; *Greve v. First Div. of St. Paul & P. R. Co.* 26 Minn. 66; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380; *Jacksonville, T. & K. W. R. Co. v. Adams*, 14 L. R. A. 533, 27 Fla. 448; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622, (obiter).

In *Justice v. Nesquehoning Valley R. Co.*, *supra*, it is said: "This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use—materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by 16 L. R. A.

reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy."

A landowner has no right of property in the materials used in the construction of a railroad over his land although without the right to use his land for that purpose having in any way been acquired. *Preston v. Sabine & R. T. R. Co.* 70 Tex. 875.

The paragraphs next following show that the decisions are not harmonious where the occupation of the land is a trespass.

The value of the superstructure placed upon land by a railway company without right or authority from the owner is properly included in the award of damages to the owner upon condemnation of the land. *Re New York, W. S. & B. R. Co.* 37 Hun, 317; *Re Long Island R. Co.* 6 Thomp. & C. 298; *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 128, 55 Am. Rep. 242 (obiter).

It is said in *Re Norwood & M. R. Co.*, 47 Hun, 499: "The principle laid down in *Re Long Island R. Co.*, 6 Thomp. & C. 298, and *Re New York, W. S. & B. R. Co.*, 37 Hun, 317, ought not to be extended. It is not equitable, and, at most, should apply only to the case where the putting of the rails, etc., on the land was a trespass."

In *Hendry v. Trinity & S. R. Co. (Tex.)* 24 Am. & Eng. R. R. Cas. 236, a distinction was taken between such improvements placed by a railway company on land without the owner's consent as the landowner could use as they stood in employments connected with his freehold and those which he must detach and convert into personal property before using, and it was held that upon the condemnation of land upon which a railway company had placed

The issues were submitted to a jury, who found that the plaintiff was entitled to recover the possession of the land, and \$66.80, the value of its use. The jury also found for the plaintiff on the cross-complaint, and awarded compensation to him to the value of the land taken, and damages to that not taken, without taking into consideration the value of the schoolhouse. The court overruled a motion by the plaintiff for a new trial, and entered judgment on the verdict, to which the plaintiff excepted. The plaintiff claims that the defendants committed a trespass in erecting the house upon the ground, and that it became a part of the realty, and vested in the owner of the land, and passed with it to the railroad company by the patent, and to the plaintiff by the deed of the company to him. The only question for special consideration in this opinion is, Was the charge of the court to the jury, not to take into consideration the value of the schoolhouse in assessing damages to the plaintiff, erroneous? In making their verdict the jurors took into consideration the value of the land taken, and the damage to that not taken; also the value of the use of the land to the time of the trial. But it is claimed that the law gave the owner of the land the building because the defendant committed a trespass in building it. If the entry upon the land is a naked trespass, and from an improper motive, the general rule in a proceeding to condemn is that buildings permanently attached to it become the property of its owner.

This rule rests upon the principle that an individual committing a naked trespass can acquire no right by his tortious acts, and also upon the presumption that a person who erects a building on land that he knows to be another's, and without any color of right, or reasonable expectation of its lawful acquisition, intends it to become the property of the owner of the land. In this case the trustees were acting for the public, and we cannot infer that they intended to erect a building for the United States, who appears to have been the owner of the land; nor do we feel authorized to say that they were actuated by a fraudulent or other improper motive, or that they intended to wrong the owner of the land; in fact, they did not know who was the owner. We may assume that the trustees believed that the owner, when ascertained, would consent to such use of it, or that the title could be obtained by gift, purchase, or condemnation. While the title remained in the United States, the law furnished no process by which it could be acquired and appropriated for such a purpose; yet the trustees might reasonably believe that the government would consent to such use of it, and that its grantee, whoever he might be, would either permit such occupancy or grant the same for a reasonable consideration, or, if not, that the right might be acquired in pursuance of the law of eminent domain. To require the district to pay the plaintiff for the house it erected would, in effect, compensate him for the land taken and

a section house without authority, the owner was entitled to the value of the section house.

The Indiana Constitution provides that "no man's property shall be taken, by law, without just compensation; nor, except in the case of the state, without such compensation first assessed and tendered." Under this provision it is held that where a railway company enters without right upon land and constructs its road, upon a subsequent condemnation of the land the owner is entitled to compensation for the fixtures so erected thereon. *Graham v. Connorsville & N. C. J. R. Co.* 36 Ind. 463, 10 Am. Rep. 56. But *altiter* when the occupation is with the knowledge of and without objection from the owner. *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

It was held in *Meriam v. Brown*, 128 Mass. 391, that rails and ties laid without the consent of the landowner or any proceedings by the railroad company to acquire a right of way became a part of the realty; and their removal was enjoined.

If the owner has in no way assented to the erection of a building on his land and the condemnation proceedings relied upon by the company to acquire title are adjudged void, the building becomes the property of the landowner. *Hunt v. Missouri Pac. R. Co.* 76 Mo. 115.

Effect of good faith or mistake of trespasser.

Where a railroad company pending condemnation proceedings entered upon land by virtue of an order of the court and constructed its roadway and the proceedings were dismissed, upon a condemnation of the land in proceedings instituted the second time, the owner is not entitled to compensation for the improvements placed on the land by the railroad company. *California Pac. R. Co. v. Armstrong*, 46 Cal. 85.

In *United States v. Land in Monterey County*, 47 Cal. 515, it was held that upon the condemnation by the government of lands upon which it had

entered *manu forti* and erected a lighthouse and appurtenances, the owner was entitled to compensation for the structure so placed upon the land.

A railroad company which constructed its road upon land the ownership of which was unknown with the intention in good faith to institute condemnation proceedings is not liable in such proceedings to pay to the owner the value of improvements which it has placed on the land. *Albion River R. Co. v. Hesser*, 84 Cal. 435. In this case it is attempted to draw the distinction between *California Pac. R. Co. v. Armstrong*, 46 Cal. 85, and *United States v. Land in Monterey County*, 47 Cal. 515, that in the former the circumstances evinced the disposition in good faith to condemn and pay just compensation and in the latter an entry by the strong hand with no such intention. The court says that if this distinction cannot be maintained the latter case should be declared overruled. The value of the land only is the just compensation guaranteed by law to the owner.

A railroad company having erected improvements necessary in the operation of its road erroneously supposing them to be on its own land, in condemnation proceedings to acquire such location, the actual owner is not entitled to compensation for such structures. *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 22; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519.

Where a school district purchased a squatter title to land, being led to believe by counsel that it was superior to an outstanding patent of the same land, and relying thereon in good faith erected a schoolhouse notwithstanding notice from the holder of the patent title that it did so at its peril, in condemnation proceedings against the owner of the patent title, he is only entitled to the value of the land without the building as compensation. *Searl v. Lake County School Dist. No. 2*, 133 U. S. 553, 38 L. ed. 740, affirming 38 Fed. Rep. 18. J. G. G.

all damages to the land not taken, and in addition give him a house that cost the district \$800. This, we think, would be giving more than a just compensation, and would be inequitable. We hold that the charge of the court was not erroneous. *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 457; *Russell v. People's Sav. Bank*, 89 Mich. 675; *Meigs' App.* 62 Pa. 28, 1 Am. Rep. 872; *Daniels v. Chicago, I. & N. R. Co.* 41 Iowa, 52.

In the case of *Denver & R. G. W. R. Co. v. Stancliff*, 4 Utah, 117, it appeared that the railway company built its road across a tract of land owned by the United States. Stancliff the defendant, afterwards obtained a patent for it, and the company instituted proceedings to condemn. The court said: "The company became a trespasser, not with a view of permanently holding the land without paying for it, but to hold it temporarily, and until it could be condemned in manner provided by law. Because the company was then a trespasser, it does not follow it should lose its railroad."

Appellant relies upon *Seari v. Lake County School Dist.* No. 2, 188 U. S. 553, 88 L. ed. 740. The defendant in that case wished to obtain land to erect a schoolhouse upon. The person in possession claimed what is known as a "squatter title." Another person claimed under a placer patent. Both claims were known to the school authorities, and were submitted by them in good faith to reputable counsel for advice, who advised them that the title was in the former. Relying upon his advice, they purchased of the person in possession, and erected a costly school building upon it. The title proved to be in the owner of the patent, and the defendant proceeded to have the land condemned under the law of eminent domain. The jury, under the instructions of the court, excluded the value of the building in assessing damages. Among other things, the court said: "But if the entry upon land is a naked trespass, buildings permanently attached to the soil become the property of the latter. . . . The circuit court was not dealing with an action of ejectment or trespass, but simply with a proceeding in the exercise of the right of eminent domain. That right is the offspring of political necessity, and is inseparable from sovereignty, unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be

made to the owner, and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public, which is to pay for it. . . . The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual, nor were the circumstances such as to impart the character of willful trespass to the entry by the district, or impose liability to the forfeiture of improvements made in discharge of its public duty. . . . The sole question is whether the circuit court erred in holding that the defendant could not be allowed for the improvements. We think that in this there was no error. In our judgment, the technical rule of law invoked to sustain the defendant's contention that he owned the schoolhouse was inapplicable, and the value of the improvements could not justly be included in the compensation." This opinion sanctions the principle that, if the authorities of the state, municipality, or other corporation, having the right to acquire the use of land for the public under the law of eminent domain, enter in good faith when such use is necessary, under a reasonable belief that they have the right, and make valuable improvements necessary to such use, their value should not be taken into consideration in awarding compensation to the owner of the land in condemnation proceedings afterwards instituted. The reasoning of this opinion appears to support the further rule, sanctioned by the cases cited above, that if such authorities make such entry and improvements without objection, in the expectation that the owner will permit the use, and with the intention, in case of refusal, of acquiring the right by purchase or condemnation, just compensation will not include the value of such improvements. The facts of the case in hand bring it within the latter rule, and its application to them authorizes the conclusion reached by us in this opinion. We are aware that cases cited are at variance with this principle, but we think that the better authority, as well as reason, supports it.

The judgment of the court below is affirmed.

Anderson and Blackburn, JJ., concur.

WASHINGTON SUPREME COURT.

Marie HAWKINS *et al.*, *Repts.*,
v.
FRONT STREET CABLE R. CO., *Appt.*
(..... Wash.....)

1. Loss of the society, companionship, and solace, of one's wife is not an element of the damages which he can recover in case of her injury through another's negligence.

NOTE.—For note on presumption of negligence from occurrence of accident, see *Barnowski v. Helson* (Mich.) 15 L. R. A. 83.
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2. Damages for loss or injury to the husband may properly be recovered in an action by husband and wife for a personal injury to her in jurisdictions where property acquired by either is community property for which the one having the disposition of it must sue, since he is the only necessary plaintiff in the action and may include in his demand all damages naturally flowing from the injury complained of.

3. No presumption of negligence on the part of a street-car company arises from the mere fact of injury without his fault

See also 20 L. R. A. 698; 27 L. R. A. 279; 41 L. R. A. 836; 45 L. R. A. 108.

to a passenger on one of its cars in consequence of a collision with a wagon on the highway.

4. It is not negligence for a passenger on a cable railway to take a seat on the outside of the grip car in a place provided for passengers, although there is room in the trailer.

5. Impairment of health and suffering growing out of the death and premature birth of the child of a pregnant woman by reason of injuries negligently inflicted on her by a third person, which would not have attended its birth at the usual time either alive or dead, may be considered in estimating the damages to be awarded for such injury.

6. Mere proof that an unborn child died and was prematurely delivered because of negligent injuries to its mother is not sufficient to establish her right to recover substantial damages for the injury.

(Scott, J., dissents.)

(January 21, 1892.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. J. C. Haines, for appellant:

Although it is proper in cases of alleged tort against a wife, for the husband to join with her as plaintiff, still he cannot recover in the same cause of action for his own damage growing out of the tort to his wife. In the joint suit, no recovery can be had for special damage to the husband.

Wash. Code, § 102; *Menckirter v. Hatton*, 42 Iowa, 288, 20 Am. Rep. 618; *Tuttle v. Chicago, R. I. & P. R. Co.* 42 Iowa, 518; *Laughlin v. Eaton*, 54 Me. 154; *Eberoll v. Krug*, 8 Binn. 555; *Brown v. Hannibal & St. J. R. Co.* 28 Mo. App. 209; *Parnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Kavanaugh v. Janesville*, 24 Wis. 618; *Wheeling v. Trowbridge*, 5 W. Va. 858; *King v. Thompson*, 87 Pa. 865, 30 Am. Rep. 864; *Sheldon v. The Uncle Sam.*, 18 Cal. 526, 79 Am. Dec. 198; *Matthew v. Central Pac. R. Co.* 63 Cal. 450; *Tell v. Gibson*, 66 Cal. 247; *Scott v. Metropolitan R. Co.* 4 Mackey, 152; *Ohio & M. R. Co. v. Cosby*, 4 West. Rep. 464, 107 Ind. 32; *Whitcomb v. Barre*, 87 Vt. 148; *Lindsey v. Danville*, 46 Vt. 144.

The court erred in giving the following instruction: "It is the law that where a passenger, being carried on a train, is injured without fault of his own there is legal presumption of negligence, casting upon the carrier the burden of disproving it."

Holbrook v. Utica & S. R. Co. 12 N. Y. 236, 64 Am. Dec. 502; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534, 75 Am. Dec. 258; *Brehm v. Great Western R. Co.* 34 Barb. 256; *Mitchell v. Western & A. R. Co.* 80 Ga. 22; *Warner v. New York Cent. R. Co.* 44 N. Y. 471; 2 Shearm. & Redf. Neg. § 516.

Where the plaintiff takes a position upon the unprotected seat of a dummy, she assumes the added risk incident to such position. This is especially so when there is also furnished for her accommodation a thoroughly protected seat in the closed car.

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Indianapolis, B. & W. R. Co. v. Beaver, 41 Ind. 498.

Messrs. Ralph Simon and Allen & Powell, for appellees:

There is but one cause of action stated in the complaint. The common-law theory that the husband and wife must join in a suit to recover for the wife's injuries and the husband must sue separately for the losses and expenses incurred by him because of the injuries does not obtain in this state. The whole damage springs from the same wrongful act. Formerly the right to sue was divided; the defendant owed for one damage, but different parties. Section 7 of the Code permits the husband and wife to join in all causes of actions arising from injuries to the person or character of either or both of them. The right to sue for all causes of action arising from the injuries is thus vested in the same parties, and there is no misjoinder.

Pom. Civil Rem. & Rem. Rights, § 286. See *Messe v. Fond du Lac*, 48 Wis. 323; *Holmes v. Fond du Lac*, 42 Wis. 282.

The court did not err in instructing the jury that it is the law that where a passenger being carried on a train is injured, without fault of his own, there is a legal presumption of negligence, casting upon the carrier the burden of disproving it.

Conley, Torts, 2d ed. 794-797; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 593; *Sullivan v. Philadelphia & R. R. Co.* 80 Pa. 284, 72 Am. Dec. 698; *Louisville, N. A. & O. R. Co. v. Jones*, 7 West. Rep. 83, 108 Ind. 551; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562; *White v. Boston & A. R. Co.* 4 New Eng. Rep. 267, 144 Mass. 404; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 84 Am. Rep. 245; *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368; *Smith v. St. Paul C. R. Co.* 83 Minn. 1, 50 Am. Rep. 550; *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491; *Coudy v. St. Louis, I. M. & S. R. Co.* 85 Mo. 79; *Baltimore & F. Turnp. Co. v. Leonhardt*, 66 Md. 70; *Magoffin v. Missouri Pac. R. Co.* 102 Mo. 540; 3 Suth. Damages, 258.

The rule is still more strict in regard to street railways running through obstructed and crowded thoroughfares.

Wilson v. Cunningham, 3 Cal. 241, 58 Am. Dec. 407; *Heucke v. Milwaukee City R. Co.* 69 Wis. 401; *Wilson v. St. Paul, M. & M. R. Co.* 41 Minn. 56.

The facts constituting negligence were established by undisputed evidence; the court would have been justified in instructing the jury that there was gross negligence.

Northern Pac. R. Co. v. O'Brien (Wash.) Jan. Term, 1899.

Appellant's contention in regard to the mis-carriage, being too remote to be considered in the estimate of damages, is not tenable. The argument makes the remoteness of damages entirely a question of time. There was no proof of any intervening cause. "Proximity of cause has no necessary connection with contiguity of space or nearness in time."

Cooley, Torts, 2d ed. p. 88; *Ehrgott v. New York, 96 N. Y.* 264, 48 Am. Rep. 622; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 846, 49 Am. Rep. 168; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 842, 41 Am. Rep. 41; *Beau-*

champ v. Saginaw Min. Co. 50 Mich. 168. 45 Am. Rep. 80; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

It was a question for the jury, in the absence of proof of intervening cause.

Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100, *Lake v. Milliken*, 62 Me. 240, 18 Am. Rep. 456; *Willey v. Belfast*, 61 Me. 569; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Adams v. Young*, 3 West. Rep. 145, 44 Ohio St. 80; *Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 54 Am. Rep. 755; *Cooley, Torts*, 2d ed. p. 81, note 2.

Stiles, J., delivered the opinion of the court:

This was an action by husband and wife for damages resulting from injuries inflicted upon the wife through the negligent acts of the appellant's conductor and gripman, while she was a passenger on its street-car. She occupied an outside seat on the "dummy," at the side and near the front. At a certain place the railway track was blocked by a grocer's delivery wagon, the driver of which refused to move out of the way until the dummy came to a stop within a foot or two of the rear end of the wagon. After the gripman had called upon the wagon driver to move on, the conductor told the gripman to move the car up, and hit or push the wagon. The gripman obeyed the direction, and struck the wagon a light blow, when the driver of the wagon whipped up his horse, and drove down the street, still occupying the railway track, the dummy following closely after, and perhaps still pushing the wagon. They proceeded thus for about 300 feet, when suddenly the driver turned his horse sharply to one side, for the purpose of entering a cross-street; and the dummy, coming immediately behind, crashed into the rear end of the wagon, and upset and broke it. Some portion of the wagon, said to be part of a broken wheel, fell upon Mrs. Hawkins, and injured her. The complaint contained allegations of damage as follows: "Whereby, and by reason of which said plaintiff's [Mrs. Hawkins'] body was greatly bruised and injured, causing this plaintiff to suffer great pain of body and anguish of mind, and was by reason thereof confined to her bed under the care of a physician, and prevented from attending to her household duties, as also her business and employment, to wit, that of bath-tender, for a long space of time, to wit, ten days, and thus prevented from earning her salary of \$2 per day; and this plaintiff the said George Hawkins, the husband of said Marie Hawkins, was deprived of the society, services, companionship, and solace of his said wife, and was compelled to and did incur large expense and outlay, both of time and money, in attending to and curing his said wife as aforesaid, whereby he was damaged in a large sum, to wit, \$1,000. That at the time, to wit, the 26th day of May, 1890, when the said defendant corporation, by its carelessness and neglect as aforesaid, caused the injury aforesaid, the plaintiff Marie Hawkins was *enecinte*, and that the injury to her body as aforesaid, caused by the collision aforesaid, was of such a severe character that it caused the death of the child with which the said

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plaintiff was then and there *enecinte* as aforesaid; and that since the filing of the second amended complaint, and the answer thereto herein, to wit, on October 5, 1890, the plaintiff Marie Hawkins lost the said child, and by reason whereof the said Marie Hawkins suffered great pain in body and distress of mind in giving birth to the said child dead, and in the loss of the said child, and these plaintiffs were compelled to and did expend large sums of money in curing the said Marie Hawkins, and suffered other damages therein." The case was commenced within a few days after the injury occurred, and originally charged no damage accruing later than ten days from May 26, but subsequent to October 5 the last paragraph was added as a supplemental complaint.

The first error complained of relates to the husband's alleged damage. The defendant requested the court to charge that the fact that the husband was joined as a plaintiff in the action gave him no right to recover any damages on his own account, for loss or injury sustained by him. This request was refused, and the court charged instead: "If the jury find for the plaintiffs, and if they find that by reason of the injuries of the wife, Marie Hawkins, the husband, George Hawkins, was deprived of the ordinary benefit of his wife's services, then the jury may in computing the damages take into consideration a fair compensation of such loss caused by the wife's injuries." At common law, when a wife was injured through the tort of a third person, the injury and the right of action were hers; but she could not sue unless her husband, if living, joined her as plaintiff. The recovery in that case was the pecuniary measure of her own injury and suffering in body and mind. But there was another element of damage which could be recovered only by her husband suing alone in a separate action, viz., his loss of her services, and his outlay in restoring her to health. In this case the complaint seems to have been based upon the idea that he could also recover for the society, companionship, and solace of his wife, but we do not understand these to be recoverable injuries. As matter of fact, unless death ensues the husband is not deprived of either, although his enjoyment of them may be lessened by the knowledge of his wife's suffering. They are of those sentimental, intangible injuries which the law cannot measure. Even in case of death, they are not elements of damage. 2 Thomp. Neg. p. 1289; *Howard County Comrs. v. Legg*, 98 Ind. 528.

The departure from the common law has, in the most of the states, been in the direction of securing to the wife the right to sue alone for injuries to her, and giving her the fruits of her action as her separate property. In others, as Wisconsin (Rev. Stat. § 2630,) husband and wife may recover in the same action for all the injuries to both, in case of a tort committed against her. The instruction requested by the appellant was based upon the common-law rule, and would have been a proper instruction were the common law in this particular in force here. But inasmuch as the right to sue for a tort which one has suffered is a chose in action, and therefore property, in those states where, as here, all property acquired by

either spouse, otherwise than by gift, bequest, demise, or descent, is common or community property, this chose in action is suable by that member of the community who has the disposition of the community personally. So in Texas it is held that the wife is not either a necessary or a proper party to an action for an assault committed upon her. *Ezell v. Dodson*, 60 Tex. 331; *Gallagher v. Bowie*, 66 Tex. 265. And in California the husband is held to be a necessary party, since he has the management and power of disposition of the right to damages as part of the common property. *McFadden v. Santa Ana, O. & T. St. R. Co.* 87 Cal. 464, 11 L. R. A. 262.

Our statutes are substantially the same in this respect as those of Texas and California, and we see no reason why we should not follow the decisions of those states. In this case, therefore, the husband was the only necessary party, though the wife, by section 7 (Code 1881), is a proper party, and in this action all of the damages naturally flowing from the injury complained of are recoverable. The first element of these to be considered is that directly connected with the person of the wife, the injury, and its subsequent consequences, whether permanent or temporary, and her pain, suffering, wounded feelings, etc., next, the cost of her nursing, medical attendance, and medicines, which, although they could, at common law, be recovered by the husband alone, are with us presumptively expenses incurred and paid by the community; and, lastly, the loss of the wife's services in the household. Under this ruling it is apparent that the instruction asked by the defendant was properly refused, and that given by the court, as above, was substantially correct.

The second point made by appellant is that the court erred in instructing the jury thus: "It is the law that where a passenger, being carried on a train, is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it." Such is not the law as laid down by very numerous authorities. The language of the charge in question was apparently taken from Cooley on Torts, (2d ed.) p. 796, where it is quoted with approval, as being well said in a Pennsylvania case. There follow several lines in the text, however, which qualify the quotation, and make it clearly the law when applied to the cases intended to be covered by it. These additional lines are also taken from the Pennsylvania case, but without credit by quotation. The case was *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 8 Am. Rep. 681, where the exact language is: "Prima facie, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it. . . . This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive." No case cited to us, or that we have been able to find, goes further than this. See *Patterson, Railway Accident Law*, chap. 6, p. 433, *et seq.* 16 L. R. A.

In *Federal St. & P. V. R. Co. v. Gibson*, 96 Pa. 83, a passenger on the street-car of a railway company was struck and injured by a passing load of hay. The charge of the trial court was that if plaintiff was without fault he was entitled to recover, unless the defendant satisfied the jury by the weight of evidence that the injury arose from an accident which could not be prevented by the utmost skill, foresight, and diligence on the part of the driver. Held error; and the court said: "It is true in many cases the mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective tracks, cars, machinery, or motive power. Here there was no privity between the company and the driver of the wagon. . . . We see nothing in the case which relieved the defendant in error from proving negligence, or that threw on the company the burden of disproving it."

Applying the just rule thus laid down to the case at bar, we do not see how the charge given by the court, even had it been modified as quoted from *Meier v. Pennsylvania R. Co.*, *supra*, could have been pertinent. The nature of the accident was not such as to warrant saying anything about the machinery; and the question whether the servants of the appellant violated any duty to Mrs. Hawkins in allowing the dummy to run so close behind the wagon as to touch or push it, so that when the wagon was turned into the side street by the driver it was upset, was the very question which the jury was to decide upon the proofs. They were to say whether, under all the circumstances, there was negligence in so running the car at the rate of speed at which it traveled, or in not stopping the car when the wagon slackened its pace in turning out. But if the fact of injury was to determine the negligence *prima facie*, the jury would naturally stop its consideration of the other questions, and look to the defendant's evidence to see whether there was anything to negative the presumption declared by the court. For this error the case must be reversed.

But there are some other matters which it is necessary to advert to in view of another trial. The appellant claims contributory negligence on the part of Mrs. Hawkins in taking a seat on the outside of the dummy when she could have sat safely on the inside of the trail car. This we cannot support. The seats on the dummy were for passengers, and any one sitting there had the same right to be protected against the negligence of the company's servants as though he had sat inside. The original claim in this case was for special damage to a dress worn by Mrs. Hawkins, in the sum of \$25, \$20 for loss of her earnings as a bath-tender, and \$3,000 general damages. But by the third amended and supplemental complaint, filed after the delivery of her child, the demand was raised to \$25,000. We can see no reason for this very great increase in the alleged damage, unless it was upon the theory that, if the death of the child could be shown to have been caused by the injury to its mother, that fact would be ground for an enhancement of the damage. Nor can we upon any other theory account for the vast amount of medi-

cal testimony adduced to show that the death of the child, some three weeks before its delivery, was attributable to the blows and fright inflicted upon Mrs. Hawkins four months and nine days before its delivery. Had this testimony been coupled with any attempt to show that in giving birth to the child the mother had suffered any unusual pain or illness, or that by the death of the child and her subsequent carriage of it for several weeks in that condition she had been subjected to extraordinary distress of body or mind, we might discern some purpose in it. But it is admitted that the mere loss of the child by its death *en ventre sa mere* is not a recoverable damage, and, for aught that appears, there was no perceptible difference in the amount of pain and illness attending the delivery of the child dead from what there would have been had it been alive. It may have been imagined that there would be, but there was no testimony that there was. It appeared that the child on May 26 must have been at least four months advanced. On that day the accident occurred, after which Mrs. Hawkins went home without assistance. She was immediately attended by a physician, who found symptoms of a miscarriage. But after about ten days of quiet and treatment the danger apparently passed away, and she resumed her accustomed household duties, using great care and caution, however, against any imprudence which might bring on the dreaded miscarriage. She continued somewhat nervous and anxious, and suffered some pain and had some faint spells; but the child was alive, and remained so until a certain time some four weeks before October 5, after which no signs of life were observed. No physician was summoned until the day of her delivery, and the confinement lasted some fourteen hours. It was about two months later before she could resume her household duties. Previous to the accident she was a healthy woman, and had none of the symptoms described. Upon these summarized facts, the jury was to find what pecuniary injury the plaintiffs suffered from the tort committed against Mrs. Hawkins, not in any sense against the child. Cases are cited to show that damages have been recovered for a miscarriage. *Shartle v. Minneapolis*, 17 Minn. 808, (Gil. 284.); *Barbes v. Reese*, 60 Miss. 906; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342. But in all such cases it will be found that the recovery was for the ill-health and suffering attendant and consequent upon the miscarriage, and not in any sense for the loss of the child.

In this case, however, respondent's own medical experts say there was no miscarriage, but a premature birth, caused by the death of the child from insufficient nourishment, referable probably to the injury and fright occurring to the mother in May previously. Now, time is not considered in establishing liability for injuries, except that when what are claimed to be effects of an injury appear at a period remote from the injury the proximate cause of the cause is more difficult to prove. And so we have no doubt that if Mrs. Hawkins shows impairment of health and suffering growing out of the death and premature birth of her child, which would not have attended its birth at the usual time, either alive or dead, and also that

the child's death is attributable to a negligent injury which she received, respondents can recover for her suffering and impaired health. But she must show the injury by appropriate evidence, and the mere proof that the child died, and was prematurely delivered, as a result of the accident, would not be sufficient to presume substantial damage therefrom. We are led to say this much from a belief that, from the way the case went to the jury, the death of the child probably occupied a large place in its calculations, and tended to cause the return of a somewhat excessive verdict, upon the showing of actual damage, though we do not wish it understood that, if the size of the verdict were the only ground of objection, we should on that account reverse the case. It is matter of common knowledge that every woman who is *en ventre*, and particularly one who is so for the first time, is more or less prone to nervousness and anxiety, as well as that the travail of childbirth is a time of suffering, illness and danger; so that it is not just to impose upon the merely careless tortfeasor, without previous knowledge of her condition, liability for more of her trouble than he has actually caused.

Judgment reversed, and cause remanded for a new trial.

Anders, Ch. J., and Dunbar, J., concur:
Hoyt, J., did not sit at the hearing, he being disqualified.

Scott, J., dissenting:

I cannot agree with the conclusion reached by the majority in this case, as to the ground upon which the judgment is reversed, that the right to a recovery was not limited to cases where the injury was due to some act or omission of the company in the instruction which was given as to the presumption of negligence arising in case of injury. In this case the instruction could only have been injurious as bearing upon the fact that the injury might have been caused solely by the negligence of the driver of the express wagon in not getting out of the way, or in turning off so abruptly. There was no question as to the respondent having been hurt in this collision, and I think this general charge complained of was remedied, explained, and limited in a subsequent instruction, wherein the court charged the jury that "it is claimed in this case by the plaintiffs that the injuries received by Marie Hawkins were suffered from the consequences of a collision which took place between the cable car of the defendant and a wagon driven by one Keller, who is a witness in this cause. In order to enable the plaintiffs to recover, it is not sufficient to show merely that the collision occurred and that the plaintiff Marie Hawkins was injured in consequence of it. In order to make the defendant liable for such injuries, it must further appear by a preponderance of the evidence that the collision resulted from the negligence of the defendant or its employés. And I instruct you, further, that if you should find from the evidence that the collision was caused by the negligence or carelessness of the man who was driving the wagon, and not by the negligence or carelessness of the defendant, then the per-

son driving or owning the wagon would be liable for such injuries, and it would be your duty in such case to find for the defendant in this case." Here the jury were specifically told that the plaintiffs could only recover in case the defendant was negligent, and that mere proof of the injury was not sufficient, and it seems to me that the jury could only have understood that the right to a recovery was so limited. I do not understand that any

question was raised over the testimony relating to the death of the child, except that its death was claimed to have been too remote to warrant any recovery of damages for anything resulting from it, nor do I understand that the judgment is reversed upon any such ground; so I do not desire to examine or comment upon the evidence in this respect. I think the judgment should have been affirmed.

ALABAMA SUPREME COURT.

Emma L. LINDSAY, *Appt.*,

v.

Mary K. COOPER *et al.*

(.....Ala.....)

1. The silence of an administrator in respect to any individual title or claim to property sold by him in person as that of his intestate, under order of the court, estops him and those who claim under him from afterwards setting up a legal title which he had at the time of the sale.
2. Purchasers at a judicial sale, although for value and in good faith, are affected to the same extent as the person whose title they buy, by an estoppel *in pais* which prevented him from asserting the title.
3. A right of action to establish an interest in property purchased at a judicial sale under an invalid title, for which purchase money notes are given on receiving a bond for title, does not accrue until the notes are paid.
4. An estoppel may be the basis of a claim to establish a trust in land of which the defendants have both the legal title and possession.
5. An estoppel in *pais* alone is not sufficient to cause equity to compel a transfer of the title to real estate to the one in whose favor it runs when the value of the land has materially increased since the estoppel ac-

crued, so that payment of its former value with interest will involve less injury to those in possession.

(January 6, 1891.)

APPEAL by complainant from a decree of the Chancery Court for Colbert County in favor of defendants in a suit brought to enforce an alleged trust in certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. J. B. Moore, for appellant:

Price as administrator of Walker's estate filed a petition in the probate court for an order to sell the land in controversy in which under oath he alleged that Walker, his intestate, died "seised and possessed" of said land. He procured the order and sold the land to Winston. If now living he would be estopped from claiming this land and his petition would be conclusive evidence against him that the land belonged to Walker.

Steele v. Adams, 21 Ala. 584; *Doe v. Walters*, 16 Ala. 714; *Hendricks v. Kelly*, 64 Ala. 388; *Powers v. Harris*, 68 Ala. 409; *Prickett v. Siebert*, 75 Ala. 315; *Alabama G. S. R. Co. v. South & North Ala. R. Co.* 84 Ala. 570, 5 Am. St. Rep. 401; 1 Perry, Tr. § 483; 2 Perry, Tr. §§ 468, 464; *Putnam v. Tyler*, 10 Cent. Rep. 752, 117 Pa. 570; *Miles v. Left*, 60 Iowa, 108; *Mason v. Williams*, 66 N. C. 564; *Vilas v. Mason*, 25 Wis. 810.

"Seised and possessed" means a holding by the rightful owner.

NOTE.—*Estoppel in pais upon defendant as basis for action to recover real estate.*

A simple estoppel does not have the effect of conveying the legal title. *Miller v. Cook*, 10 L. R. A. 232, 185 Ill. 190, in which case an estoppel upon the mortgagor of property from questioning the validity of a tax deed thereof was held not to have the effect of conveying to the holder of the tax deed either the title or rights of the mortgagor.

The action of ejectment is confined to cases where the claimant has the possessory title. See *note* to *Murphy v. Bolger* (Ill.), 1 L. R. A. 309.

And plaintiff must recover upon the strength of his own title, and cannot rely upon the weakness of defendant's claim. See *note* to *Greene v. Couse* (N. Y.), 12 L. R. A. 206.

In accordance with the general principle upon which the action of ejectment is founded, and in view of the character of the rights created by an estoppel *in pais*, it seems to be generally held that the existence of such estoppel in favor of one out of possession of real estate will not enable him to maintain ejectment against the one bound by the estoppel who has the legal title and is in possession of the property. *De Mill v. Moffat*, 49 Mich. 126; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533; 16 L. R. A.

Winslow v. Cooper, 104 Ill. 238; *Nims v. Sherman*, 43 Mich. 51; *White v. Hapeman*, Id. 297.

So in ejectment a plaintiff cannot rely on estoppel to prevent defendant from disputing his alleged title. To recover he must show a clear legal title. *Nix v. Collins*, 65 Ga. 219.

So an estoppel *in pais* cannot be made the basis of a writ of possession after a judgment foreclosing a mortgage. *Thompson v. Campbell*, 57 Ala. 188.

So estoppel by admission of the seisin of plaintiff's husband is not sufficient to sustain an action for dower. *Hamlin v. Hamlin*, 19 Me. 141.

On the other hand, equity seems never to have hesitated to compel a transfer of the title whenever it has been called upon to do so if the complainant was clearly entitled to such relief, although the cases in which the jurisdiction has been invoked seem to be rare; and it also seems that the estoppel has usually been used as a defense by the one in possession, either in the ejectment suit where such procedure is permitted, or by an application to equity to enjoin the ejectment suit, or to afford such other relief as was appropriate in the premises.

Where one having in his possession a deed of entail running in his own favor engrossed the jointure deed of the wife of his elder brother in

McKenzie v. Baldridge, 49 Ala. 566; 1 Washb. Real Prop. 84; 4 Kent, Com. 2; *Anderson v. Knox*, 20 Ala. 161; 2 Devlin, Deeds, § 885.

Appellees claim title under and through Price who is estopped, and, being privies in estate to Price, are also estopped.

2 Herman, Estoppel, §§ 583, 587; *Colburn v. Broughton*, 9 Ala. 357; 1 Herman, Estoppel, §§ 20, 145, citing *Beniley v. Cleveland*, 22 Ala. 814; *Edmondson v. Montague*, 14 Ala. 870; *Montgomery v. Gordon*, 51 Ala. 877; *Catterlin v. Hardy*, 10 Ala. 511; *Thomason v. Odum*, 81 Ala. 108, 68 Am. Dec. 159; *Carey v. McDougald*, 25 Ala. 120; *Dotson v. State*, 62 Ala. 143, 84 Am. Rep. 2; *Masteron v. Beniley*, 60 Ala. 521; 2 Pom. Eq. § 415, note 1, §§ 683, 813; *McCracey v. Remson*, 19 Ala. 437, 54 Am. Dec. 194; *Kennedy v. Brown*, 61 Ala. 296; *Hendricks v. Kelly*, 64 Ala. 388; *Taylor v. Agricultural & M. Assn.* 68 Ala. 229; *Rorer, Jud. Sales*, §§ 444, 445.

Appellees claim title through one Barton, who purchased the property at a judicial sale. He purchased it at a sale made by Jones as administrator of Price and who obtained an order and sold it as belonging to said Price's estate. Appellees claiming as they do under a judicial sale cannot as against appellant claim and defend as innocent purchasers for value without notice.

The maxim " *caveat emptor*" strictly applies to judicial sales in which there is no warranty of title. The purchaser and those who claim under him have no cause of complaint if the title should prove valueless.

Wilson v. Wall, 84 Ala. 288; *Witter v. Dudley*, 42 Ala. 616; *Thames v. Rembert*, 63 Ala. 561; *Wallace v. Nichols*, 56 Ala. 321; *Fore v. McKenzie*, 58 Ala. 115; *Bland v. Bowie*, 53 Ala. 152; *Hickson v. Lingold*, 47 Ala. 449; *Boykin v. Cook*, 61 Ala. 472; *Lovell v. Webb*, 62 Ala. 271; *Counts v. Harlan*, 78 Ala. 554; *Derrick v. Brown*, 66 Ala. 162.

There could have been no adverse possession between Steele, the verbal vendee of Winston, and his vendor, because Steele paid no part of the purchase money.

Sellers v. Hayes, 17 Ala. 749; *McQueen v. Ivy*, 36 Ala. 303.

possession of the property, concealing the fact of the entail, the court, after the death of the brother, established the wife's jointure rights against the one holding the deed and all claiming by or under him. *Raw v. Pote*, 2 Vern. 239.

In *Saunderson v. Ballance*, 55 N. C. 322, 47 Am. Dec. 218, the court compelled one who stood by and saw lands in which he had an interest purchased as the land of another at public auction without disclosing his title, to convey his interest to the purchaser upon receiving what he paid for the land, which in that case was merely a nominal sum.

In equity an estoppel resting in parol may form the basis of an affirmative action to pass the title to lands. *Taylor v. Agricultural & M. Assn.* 68 Ala. 229.

Where the heirs-at-law induced plaintiff to purchase testator's land at an administrator's sale under an order of court which afterwards proved to be invalid, the court held that plaintiff had a remedy in equity to compel them to convey their interest in the premises to him. *Favill v. Roberts*, 8 Lana. 23, 50 N. Y. 223.

But the damages to support an estoppel and convert the owner into a trustee must be something

Mr. R. C. Brickell also for appellant.
Mr. Roulhac & Nathan for appellees.

McClellan, J., delivered the opinion of the court:

It is sought by the bill in this case to declare and enforce a trust against the respondents in respect of a one-third undivided interest in a certain quarter section of land to which they have the legal title, and which they have been in possession of actually or by privity, since 1870. Complainant's theory is that she has a perfect equity in and to that interest; that the respondents hold the legal title in trust for her, and should be decreed to execute that trust by vesting title in her, and held to account for rents and profits accruing pending the existence of the trust. The facts are complicated, but the evidence which goes to establish them is substantially free from conflict. We encounter no difficulty in finding them to be as follows, so far as material: William H. Price became seised and possessed of the land in fee simple absolute about the year 1853, and continued in its occupancy for four or five years. In 1857 or 1858 he sold the land by executory contract to Isaac H. Walker, and put the purchaser in possession. Early in 1860 Walker died, without having paid the purchase money to Price, and without having received a conveyance of it. Price became Walker's administrator, and in that capacity took possession of the tract in controversy, together with other lands held by the intestate, and applied to the probate court for an order to sell all these lands for the payment of decedent's debts. An order of sale was made, and, acting under it, Price sold, on December 17, 1860, all of said lands as the property of the intestate. At this sale Thomas E. Winston became the purchaser of the quarter section in question. In accordance with the terms of the sale the purchaser executed his several notes, with sureties, for the purchase money, and Price executed to him a bond for title, binding himself, as such administrator, to convey all the right, title, and interest of the intestate upon payment of the purchase-money notes. Winston was let into possession immediately, and rented the land for the year

more substantial than what would technically amount to a consideration for a contract. It must be of such character that the person sustaining it cannot be put back into his former position and cannot be adequately compensated by pecuniary damages. *East v. Dolhite*, 72 N. C. 562.

So where the former owner of land which had been sold for taxes represented to a third person that the tax title was good and persuaded him to purchase it, although enjoined upon learning that the tax title was void from setting up his legal title as against the claimant of the tax title, he was not compelled to make a transfer of his title rather than compensate the holder of a tax title for the amount claimed, nor was an agreement between the parties enforced which provided that in case the tax claimed was not paid within a certain time the tax title of the holder should become absolute. *Nelson v. Kelly*, 91 Ala. 568.

There is little doubt that other cases exist where similar equitable relief has been granted. But if such cases do exist, the fact of the granting of such relief seems to have remained unindexed since a careful search has failed to reveal them.

H. F. F.

1861 to John A. Steele. Steele was a surety on the notes given by Winston to Price as Walker's administrator. At the close of 1861, Steele and Winston had a parol understanding and agreement by the terms of which the former was to take the land off Winston's hands, and assume and pay the purchase-money notes as they matured. Under this agreement, Steele continued in possession and cultivation of the land as the owner of it until 1870, but paid nothing on the notes. Meantime Price died in 1865, without asserting any individual claim or title to the land, and without taking any steps as Walker's administrator to collect the notes of Winston. On December 18, 1865, Theophilus A. Jones qualified as administrator of Price's estate, and soon afterwards reported and had the estate declared insolvent; but it does not appear that he advanced any claim to this land prior to 1870. Winston died in 1869; and in 1870, Steele delivered the possession of the land to Jones, as Price's administrator, by whom it was sold as assets of Price's estate under probate order on April 24, 1872, to Clark T. Barton, the sale being regularly reported and confirmed, and conveyance executed to the purchaser as ordered by the court. The respondents, Mary K. Cooper, Minerva Winston, and Calvin G. Jackson, held by mesne conveyances from said Barton. After Price's death one Weatherford became the administrator *de bonis non* of the estate of Isaac Walker. Weatherford having died this administration was committed to Abner W. Ligon, general administrator for the county of Franklin on January 25, 1869. It does not appear that either Weatherford or Ligon ever made any efforts to realize on the Winston notes by proceedings against the makers thereof personally, or against the land, until 1872. Then Ligon, as administrator of Walker, filed a statement of the notes as a claim against the estate of Thomas E. Winston. Lewis B. Thornton, having qualified as administrator *de bonis non* of Winston's estate, reported the same insolvent, and a decree passed so declaring. The claim by Ligon was filed while the estate of Winston was being administered under this decree as insolvent, and, pending this state of things, Ligon obtained an order to sell the Winston notes, along with other claims belonging to Walker's estate. At a sale under this order John E. Moore bought these notes at the price of \$50, which was distributed to the creditors of Walker's estate, and was let in to the representation of the claim based upon them against Winston's estate. This claim was contested by Winston's administrator, but whether meritoriously or not we are not advised, as the objection was held not to have been seasonably made, and the estate was upon that ground adjudged to be liable for it, (see *Thornton v. Moore*, 61 Ala. 847); and the administrator compromised it with Moore by paying \$1,100 therefor. It appears, further, that no cognizance was had of this land, or the interest of Winston in it, in the administration of his estate. It was not administered. The estate, though declared insolvent, was not so in fact, or, rather, by compromises and the like, effected by Thornton with creditors, their demands were satisfied, and a considerable sum remained, which was distributed to the

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intestate's children. The present complainant is one of these children. There are two others who do not join in this bill. The complainant was born in March, 1864, and filed this bill September 10, 1887, within three years after attaining her majority.

Whether or not Price and his privies are estopped to assert his legal title against Winston and those claiming under him, and, among the rest, the present complainant, is a prominent, if not, indeed, a vital, question in the case. The facts specially bearing upon this inquiry, which have not before been adverted to, are the following: In his petition to the probate court for an order to sell this along with other land as the administrator of Walker, Price alleged that his intestate died "seised and possessed" of all the land sought to be sold; and this averment is not in any manner qualified by the statement of any other fact or circumstance in limitation of Walker's ownership. There is no intimation that Price himself and in individual capacity held the legal title, naked or otherwise, or any beneficial interest in the land, or any lien for the unpaid purchase money. The order of sale which passed in response to this petition is likewise without intimation that any less estate than an unincumbered fee in the land was to be sold. The sale under this order was made by Price in person. It is not pretended for respondents that at the time and place of the sale, or at any other time and place, Price, advanced, asserted, or made known in any manner to those present at the sale, or to Thomas E. Winston, who then purchased the land, that he, Price, had the legal title to the land, and a lien upon it for the purchase money due from Walker to him, or either, or that any other or less estate than the unincumbered fee was in the estate of his intestate or intended to be passed by the sale he was then making. To the contrary, this record cannot be read without enforcing the conclusion that he gave no notice whatever of his personal title or interest or claim in and to the property. Persons present at the sale testify that the land was sold by Price as the property of Walker's estate. The bond for title which he executed in his representative capacity to Winston recites that the land was sold as Walker's, and evidences an undertaking to convey the title thereto as fully as it was vested in the obligor as Walker's administrator; and all this may be looked to, not, indeed, as importing an estoppel by the bond, but as admissions of Price against interest going to negative any reservation or notice of his personal interest at the sale to Winston. And, beyond all this, the uncontroverted evidence is that Winston purchased the land at its full market value, bidding therefor \$15.02 per acre, amounting to \$2,408, for the 160 acres, and executed his note for that sum. Moreover, the report of the sale imports no intimation that any less than an unincumbered fee in the land was sold. On these facts,—that Price alleged the seisin and possession of his intestate of the land, he asked for an order to sell, thereby importing a purpose to sell an estate in fee, (*McKensie v. Baldrige*, 49 Ala. 564); that there is nothing in the petition, or the order of sale, or report of sale, or bond for title, or the notes accepted by Price, in

any degree indicating that less than the fee was intended to be or was in fact sold; that, on the contrary, the manifest implication, from each and all of these papers, is that Walker's estate was in the unincumbered ownership of the land; that those present at the sale and who testify in this case in no wise suggest that any notice was given by Price of any individual interest or claim on his part, and that the land fetched its full market value (more, indeed, per acre than the other lands of the estate lying adjacent to it), as appears from the report of sale,—we cannot, without the greatest violence to the probative force of evidence, reach any other conclusion than that Price, selling the land in person, as Walker's administrator, gave no notice or intimation whatever of his individual rights in respect of it, but, conscious, as he must have been, that the purchaser was acting upon the assumption and in the belief that he was getting the land free from all incumbrance and claim of adverse title, allowed him to proceed upon that assumption and in that belief to a change of his position, to his detriment, in taking upon himself a pecuniary liability evidenced by the notes, which doubtless could have been enforced at the time, and which were subsequently enforced against his estate. These facts involve every element of an estoppel *in pais* upon Price, conceding that he had the legal title or a lien for unpaid purchase money, or both, to and on the land when he sold it as Walker's administrator, to subsequently assert that title, or enforce his lien against the purchaser at that sale. If he had the title and lien, or either, he must have known it. He must be held to have known that Winston bought in the belief of the non-existence of any such adverse claim or right in him or in anybody else. It cannot be supposed that any sane man would pay the full value of property, not for the property, but for the privilege of paying its full value over again to its real owner, and thus acquiring it from the latter. Price not only stood by, in a sense, and saw Winston buy his land from another, believing that other to be its owner, and said nothing, but he represented that other in the transaction, and as his agent, in legal contemplation, participated in the sale of his own property to Winston, knowing that Winston's purchase was influenced by the belief, which Price knew to be ill-founded, that the property belonged to the principal, Walker's estate, and not to the agent, Price; and he said never a word of warning to the purchaser, but consciously, and hence intentionally and willfully, as the law looks upon his conduct, permitted Winston to buy and pay for, in the sense of becoming legally liable for the purchase money, that which he professed to sell as administrator, but which he knew he did not own as administrator and could not sell. In all reason and by all the authorities it was Price's moral and legal duty to speak, and to give notice of his claim and rights in the premises. And "his silence, when in good conscience he ought to speak, shall close his mouth when he would speak." Having been silent when every consideration of moral and legal obligation was upon him to apprise the purchaser, acting on the assumption, known to

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Price, of the nonexistence of the facts which Price could and should have disclosed to him, having changed his legal status to his detriment in consequence of Price's failure to discharge this duty, the law holds the latter estopped now to say that the real facts were other than he wrongfully allowed the purchaser to believe them to be at the time of the sale, on the familiar doctrine "that where one knowing suffers another, in his presence, to purchase property, to which he has a claim or title, which he willfully conceals, he will be deemed, under such circumstances, to have waived his claim, and will not afterwards be permitted to assert it against the purchaser." *Herman, Estoppel*, p. 1054 *et seq.*; *Bigelow, Estoppel*, p. 476 *et seq.*; *Devey v. Field*, 4 Met. 381, 38 Am. Dec. 876; *Stephens v. Baird*, 9 Cow. 274; *Fuvill v. Roberts*, 50 N. Y. 222; *Greene v. Smith*, 57 Vt. 263; *Fielding v. Du Bose*, 63 Tex. 631; *Wells v. Pierce*, 27 N. H. 503; *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200; *Money v. Ricketts*, 62 Miss. 209; *Copeland v. Copeland*, 28 Me. 525; *Raley v. Williams*, 78 Mo. 210; *Bullis v. Noble*, 36 Iowa, 618; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 1 L. ed. 165; *Heard v. Hall*, 16 Pick. 457; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Pickard v. Sears*, 6 Ad. & El. 469; *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; *Drake v. Glover*, 30 Ala. 382; *Burns v. Taylor*, 23 Ala. 255; *Williamson v. Ross*, 33 Ala. 509; *David v. Shepard*, 40 Ala. 587; *Leinkauff v. Munter*, 76 Ala. 194.

The estoppel thus on Price is equally efficacious in its operation upon all who claim under or through him. They, too, will not be heard to say as against Winston or his privies that Price at the time of his sale as Walker's administrator had any claim or title to the land, in his individual capacity. *Wood v. Seely*, 33 N. Y. 105; *Parker v. Crittenden*, 37 Conn. 143; *International Bank v. Bowen*, 80 Ill. 541; *Kinnear v. Mackay*, 85 Ill. 96; *Drake v. Glover*, 30 Ala. 383; *Kennedy v. Brown*, 61 Ala. 206; *Hendricks v. Kelly*, 64 Ala. 388; *Taylor v. Agricultural & M. Asso.* 63 Ala. 229; *Wortham v. Gurley*, 75 Ala. 358. And this principle has been carried in the decisions of this court to the extent of giving effect to the estoppel even upon bona fide purchasers for value and without notice of the facts operating the estoppel upon their grantor. The one fact that they are privies of him who is estopped, and in respect of the estate upon which the estoppel operates, is, according to these cases, quite sufficient to estop them also, notwithstanding their good faith, want of notice, and payment of a valuable consideration. *McCravey v. Remson*, 18 Ala. 430, 54 Am. Dec. 194; *Adler v. Pin*, 80 Ala. 354. This doctrine, however, does not appear to be fully supported by the weight of authority, and, its soundness being questioned by some members of the court as now constituted, our conclusion that the respondents are bound by the estoppel which rested on Price will be rested upon another consideration. They are purchasers, it is true, in good faith, without actual notice, and for value. They are also, however, purchasers at a judicial sale,—the sale made by Price's administrator to Barton in 1872, under an order of the probate court. To such sales the rule

of *caveat emptor* applies in its utmost rigor and strictness. The court orders the sale in such cases only of such interest and estate and rights in the premises as he had and could have asserted; no more, no less. The purchaser succeeds to his rights and attitude in respect of the property sold, "takes his shoes," stands in his place, acquires his interest as the same existed in his hands, subject to all infirmities of title then attaching to the estate, and to all equities, known or secret, which operated a limitation upon the nominal or apparent estate of the intestate in his lifetime. The purchaser buys at his peril. He takes upon himself the risks of any outstanding rights that could have been asserted against the decedent; and if, by reason of the existence of such rights, whether known or not, or discoverable or not, he takes nothing by his purchase, he cannot complain. *Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 38 Ala. 210; *Bland v. Bowie*, 58 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Lovelace v. Webb*, 62 Ala. 371. There are some expressions to be found in opinions handed down here indicative of a doubt in the minds of the writers as to "whether the rule of *caveat emptor*, which applies to judicial sales, will go further than to cover those defects which may be disclosed by an examination of the chain of title; or, at least, whether it would cover such secret equities as no ordinary diligence could discover." *Wilson v. Holt*, 33 Ala. 539. We do not share in this doubt. To give that limitation to the doctrine of *caveat emptor* would be to emasculate it altogether. To hold that the purchaser at an administrator's sale made under an order of the court of probate need only look out for defects disclosed by the proceeding in which the order is entered, and by the muniments of the intestate's chain of title, would be to put such purchaser upon the footing of a vendee from an individual, and to strip the fact that he buys at a judicial sale of all significance whatever; thus destroying the doctrine that he buys at his peril, and takes, not the estate the record and paper muniments indicate the intestate held, as would a vendee at a private sale, but the interest only which was so held in point of extraneous fact. We cannot subscribe to the limitation suggested, but, on the contrary, adhere to the broad doctrine announced in the authorities cited, that the purchaser at such sale gets only such right, interest, or estate as resided in the intestate, the apparent title being qualified and limited by every fact or circumstance, whether *in pais* or of record, which would have constituted an outstanding equity against the decedent in his lifetime; and, applying this principle to the case at bar, we hold that Barton and those holding under him are estopped in like manner, and to the same extent, that Price would now be were he yet living.

We have not been inattentive to the argument for appellees against an estoppel upon Price and his privies which proceeds on the theory that the estoppel is sought to be based on the acts of Price as Walker's administrator. The theory is at fault in that it is Price's conduct as an individual that is relied on to estop him. His averment that Walker was "seised and possessed" of the land, his report of the sale, the title bond executed by him as

administrator, and his acceptance, as such administrator, of Winston's notes,—all representative acts,—have been referred to in the course of this opinion, not as going to raise up an estoppel upon him in that capacity or upon Walker's estate, but as evidence going to prove that in that capacity he sold the land as belonging absolutely to Walker's estate, without giving notice of any individual claim of his own to it,—to show his silence when the duty of speech as an individual was upon him, as a predicate for the application of that principle of law which closes his mouth, and the mouths of those claiming under him, when they would now speak, and to hold them to the aspect of things which he then wrongfully allowed to be presented to Winston, inducing prejudicial action on the part of the latter. It may be conceded that the sale to Winston was originally inoperative to pass the interest of Walker's estate because of the absence of jurisdictional allegations from the petition for the order to sell, and hence that neither Price, as Walker's administrator, nor any successor to him in that office, nor the heirs of Walker, would be estopped to question its validity, or to deny the claims of Winston and his privies under it. All that may be conceded without in any degree affecting the rights of the present complainant as against those of the respondents who claim under Price. They assert no right under Walker's administrator or heirs, and their position is essentially in denial and repudiation of all rights in Walker's estate. Their position is that they have succeeded to the right and title which Price had, as they claim, as well after as before the administrator's sale, and which were not affected by that sale, because, they say, it was Walker's interest alone, and not Price's at all, which was sold, and the only interest Walker had, they contend, was the naked privilege of paying for the land, and by payment acquiring title to it. They have no right to attack the sale by Walker's administrator, because no interest they now assert or have ever asserted was involved in that sale, or passed by it. Whether the sale was valid or invalid cannot concern them. Price originally could have attacked it, but only as the representative of Walker. Price's successor in that administration could, at one time, have drawn it in question, but only in the interest of Walker's estate. Walker's heirs, had the estate been administered as a solvent one, might likewise have had its invalidity declared. So, too, it may be that Winston could have repudiated it. But no assault has ever been made upon it from any of these sources. On the contrary, it has all along been treated by every party having the right to avoid it as a valid sale. So far as strangers are concerned, it has been a valid sale from the first, and parties to it have been, and are now, forever estopped to question its validity,—the representatives of Walker by the sale of Winston's notes and distribution of the proceeds to creditors of Walker's estate, and Winston's estate and his privies by the payment of those notes. And, moreover, no representative of or person interested in Walker's estate has ever contested, or is now contesting, the right sought to be effectuated by this bill. The sale must now be considered as valid, and

as having been so all the time. By it and its consummation in the payment and receipt of the purchase money and its distribution to and retention for years by Walker's creditors, all the parties thereto are cut off from now objecting to its validity. By the conduct of Price as an individual at this sale made by him as Walker's administrator, he and his privies are estopped to set up any individual right or claim he then had as against the present complainant.

The case is not like that of *Owen v. Slatter*, 26 Ala. 547. The interest which the administratrix in that case had as an individual in the land which she sold in her representative capacity was an interest conferred by law,—the right of dower,—and attaching to all the lands of an intestate. The presumption is that all men have knowledge of this interest, as all men are presumed to know the law. The opinion proceeds on this theory, and can be supported upon no other. The court, among things, said: "If the purchaser blindly bids off the land without inquiring whether the widow had relinquished her dower, or consented to a sale of it, electing to take a share of the proceeds in lieu thereof, it is his folly, and he has no one to blame but himself."

Our conclusion that Price incurred an estoppel on the assertion of his individual rights in the land, and our views as to the effect of this estoppel upon the present holders of his title, dispose of the defense advanced on the idea that the respondents who are now in possession, claiming under Price, are entitled to protection as bona fide purchasers for value, adversely to them, and leaves for consideration the defense of laches on the part of complainant, and consequent staleness of the demand now asserted by the bill. This defense is to be considered from two points of view,—as respects the representatives and heirs of Walker's estate, and with reference to the purchasers from Price's estate. It may be conceded that, had twenty years elapsed from the last recognition on the part of Walker's representatives and heirs of the sale to Winston, the latter's heirs, though infants during the whole of that period, could not demand a specific enforcement of the contract of sale. But, even passing over the fact that possession under that sale was held on the part of or in behalf of Winston down to the year 1870, or to within seventeen years of the filing of the bill, the sale was recognized in the most unequivocal manner by Walker's administrator as late as the year 1872, by filing the purchase-money notes as a claim against Winston's estate, by subsequently selling those notes as assets of Walker's estate, and by the enforcement of that claim through the purchaser at said sale against Winston's estate. Upon these uncontroverted facts, there can be no room to say that the doctrine of prescription may be invoked by Walker's estate to defeat the right now asserted by the complainant. The fact is that that right did not accrue to the complainant until the payment of these notes, which was less than ten years before the institution of this suit; and during the greater part of this period she was an infant. It is true that Winston in his lifetime, and his privies at any time after his death, might have paid off the notes, and demanded a conveyance from

Walker's estate, or that, had a tender been declined, a bill might have been filed offering to pay the notes, and praying a specific performance of the contract made with Price as Walker's administrator, as evidenced by the latter's bond for title; but no laches can be imputed to Winston, or those claiming under him, in failing so to do, so long as the contract was treated by Walker's representatives as a subsisting one even to the extent of its actual enforcement against Winston's estate. Mrs. Lindsay cannot, therefore, be said to have lost any right against Walker's estate by negligent delay in asserting it. Has she been guilty of laches which will defeat her claim against those now holding under Price individually? On considerations already adverted to, the rights of these parties cannot be helped out by any reference to the title or interest of Price in the land prior to the sale to Winston. Whatever rights they have are such only as have accrued to them by their own dealings with and attitude towards the land since Price's death. What are these? The first transaction on their part, or which can be said to have taken place in their behalf, respecting the land, was in 1870. Till then they bear the relation of strangers to the subject-matter of the controversy. At that time Steele surrendered the possession of the land to Jones as Price's administrator. It cannot be successfully contended that this act of Steele had any other effect than to put Price's estate in the actual possession of the premises. There is no ground for any insistence that under his parol agreement with Winston, assuming its validity and binding efficacy upon Winston and his heirs, Steele had any authority to surrender the land to Walker's estate even, without saving Winston harmless on the purchase-money notes; and manifestly that arrangement never contemplated or authorized Steele to deliver possession to Price's administrator, or any other stranger, leaving the purchase-money notes to be paid by Winston's to Walker's estate. This surrender by Steele therefore stands for no more in this case than had Price's administrator casually and without license of any body, taken possession of the land in 1870. In the aspect of the case most favorable to these respondents in this connection, the utmost that can be affirmed in this behalf is that since 1870 they have had actual adverse possession, claiming in good faith against all the world. And it is admitted that, had complainant been *sui juris* during the period of this adverse possession, her rights would be foreclosed by the ripening of the adverse holding into a perfect title. But, on the other hand, it needs no argument or authority to demonstrate that, as she was an infant at the inception of this possession, and afterwards, until within three years of bill filed, no title accrued to the respondents from it as against her, (Code, §§ 2618, 2624;) and that, as the whole period of such possession up to the filing of the bill was less than twenty years, the doctrine of prescription has no application.

The complainant is, of course, entitled to the relief prayed against Walker's heirs. The purchase money having been in the manner detailed paid to the administrator of his estate, and distributed to his creditors, Mrs. Lindsay

has a right to demand a conveyance to her of whatever interest his estate had in the undivided third part of the land which has descended to her, regardless of the original invalidity of the sale to her ancestor. The effect of the estoppel on Price individually was not to pass the title out of him into Winston; and the title having passed into the respondents now in possession, the operation of the estoppel upon them has not been to divest the legal title out of them and to vest it in Winston's heirs, but only to prevent an assertion of it by them against the complainant, who is entitled, moreover, to whatever rights would have been hers had Price in fact had no title to or claim upon the land, as he led her ancestor to believe. *Bigelow, Estoppel*, 561; *Grisler v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475; *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498. And upon this principle primarily she has a right to claim the conveyance of the legal title to a one third undivided interest by those respondents in whom it is now vested, since, had the truth as to Price's want of title been as he led her ancestor to believe it to be, she would now be entitled to investiture of it by Walker's heirs.

There is, however, another principle which the chancellor may be justified in applying on the final disposition of the cause, but which,

in the present state of the evidence as to the value of the land, and its yearly rental since it came to the possession of Barton, we are unable to apply intelligently. That principle is that estoppels are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the person in whose favor they arise, and they should not in any case be made the instruments of gain or profit. This doctrine has been given lodgment in our own adjudications, though it appears not to be generally accepted in other courts. *Nelson v. Kelly*, 91 Ala. 569; *Adler v. Pin*, 80 Ala. 851. It may be found, if the parties elect to go into that inquiry, that full equity can be done the complainant by charging the land with one third of the sum paid by Thorton in settlement of the Winston notes, with interest from the time of the payment, and that that course would involve less injury to those now in possession than to pass the title to one third of the land into the complainant, and hold respondents accountable for rents.

The decree of the chancellor is reversed, and, that this aspect of the case may be further considered, if the respondents desire, the cause is remanded.

Petition for a rehearing denied July 27, 1892.

NEW MEXICO SUPREME COURT.

Ella LUTZ (Formerly Sykes) *et al.*, *Plffs.* in
Err.,
v.

ATLANTIC & PACIFIC R. CO.

(.....N. M.....)

1. A statute giving a right of action for the death of "any person" through the

carelessness or criminal action of an agent, officer, or other employé of a railroad company does not apply to a person killed by the negligence of a fellow servant.

2. When evidence is of such a character that it would be the duty of the court to set aside a verdict for one party it will in the first instance direct a verdict for the other party.

NOTE.—*The relation of the proximate cause doctrine to the rule of liability of a master for injuries to his servant caused by combined negligence of himself and a fellow servant.*

Few rules have received more general acceptance than the one holding a master liable for injuries to a servant which are caused by the combined negligence of himself and a fellow servant of the injured person. See note to *Hunn v. Michigan Cent. R. Co.* (Mich.) 7 L. R. A. 500.

The relative share which the master's negligence must bear in the production of the injury in order to render him liable has seldom if ever been directly considered. In the application of the doctrine to the decision of cases the negligence required to hold the master liable has varied from the slightest absence of care combined with great negligence of the fellow servant to negligence sufficient alone to produce the injury combined with slight negligence of the fellow servant.

The following are illustrations of expressions found in opinions dealing with the question:

The proximate cause is the object of inquiry, and when discovered is to be regarded and relied on. *Hayes v. Western R. Corp.* 3 Cush. 270.

The master, to be exempt from liability, must have himself been free from negligence. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71.

The rule which excuses the master from liability for injuries caused by a fellow servant presupposes that he has performed the obligations which the 16 L. R. A.

law imposes upon him and that the injury occurs solely through the negligence of the co-employé. *Stringham v. Stewart*, 1 Cent. Rep. 779, 100 N. Y. 518; *Donohue v. Brooklyn City R. Co.* 38 N. Y. S. R. 485.

If the negligence of the master combines with the negligence of a fellow servant and the two contribute to the injury, the servant injured may recover damages from the master. *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 156; *Flak v. Central Pac. R. Co.* 72 Cal. 42.

Where the injured person was knocked from a defective platform by a negligent act of a fellow servant the court held that the servant may recover for an injury caused by the combined negligence of the master and a fellow servant. *Young v. Shickle H. & H. Iron Co.* 108 Mo. 324.

Concurring negligence of a fellow servant with the negligence of the master will not relieve the master of liability. *Kaiser v. Flaccus*, 138 Pa. 332; *Rogers v. Leyden*, 127 Ind. 50.

If the negligence of the principal and that of a fellow servant together produced the injury, the principal is still liable therefor. *Cowan v. Chicago, M. & St. P. R. Co.* 80 Wis. 284.

In *Anderson v. The Ashbrooke*, 44 Fed. Rep. 124, the court held that the promoting cause of the injury was defective appliances furnished by the master.

Unless the negligence of the master co-operated with that of the co-employé, the master is not re-

3. **The proximate cause of the death of a railroad employee who is killed while in a caboose** which is weak and unsubstantial, being merely a common box car, and which is struck and splintered by a locomotive of another train, is the negligence of the fellow servant in charge of the colliding train and the weakness and unsubstantial character of the caboose cannot be regarded as constituting any part of such cause.
4. **A master is liable for an injury to a servant**, the proximate cause of which is the result of the combined negligence of the master himself and of a fellow servant.

(Freeman, J., and O'Brien, Ch. J., dissent from proposition 3; Seeds, J., dissents from proposition 4.)

(August 15, 1892.)

ERROR to the District Court for Bernalillo County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed*.*

The facts are stated in the opinions.

Mr. Bernard S. Rodey, for plaintiffs in error:

Under the New Mexico Statute, Compiled

*Five judges compose the court, one of whom tries the case at *not prius*. It will be seen from the above opinions that on the main question as to the proximate cause of the death, two judges of the court in bank agree in affirming the opinion of the justice (Lee) who tried the case. Therefore the court stands three to two on that question.

Laws 1884, §§ 2308-2310, a servant can recover against the master for an injury resulting from the negligence of a fellow servant,—if not, then the words "any person" in the opening sentence of the Act are superfluous, in fact the Damage Act would be just as complete were section 2308 entirely left out.

Schultz v. Pacific R. Co. 36 Mo. 18, and cases cited: *Connor v. Chicago, R. I. & P. R. Co.* 59 Mo. 308; *Gillennwater v. Madison & I. R. Co.* 5 Ind. 340, 61 Am. Dec. 101; *Fitzpatrick v. New Albany & S. R. Co.* 7 Ind. 436; *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 250; *Little Miami R. Co. v. Stevens*, 20 Ohio, 416.

To prevent courts from holding to the non-liability rule of master to servant for negligence of fellow servants, many states have passed laws expressly declaring the liability.

See McKinney, Fellow Servants, chap. 7, p. 215 et seq. See also Whittaker's Smith, Neg. pp. 443-467.

The court should not have instructed the jury at the trial on the issue raised on the second count to find for the defendant because it was the sole province of the jury to say whether or not McCarty had been negligent. And specific acts of negligence were competent proof to be considered by the jury.

McKinney, Fellow Servants, §§ 88-85, and cases cited in notes. *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 81 L. ed. 296; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 218; *Fox v. Sanford*, 4 Sneed, 36, 67 Am. Dec. 588; *O'Donnell v. Allegheny R. Co.* 59 Pa. 239, 98 Am. Dec. 336; *Northern*

spensible. *Abel v. Delaware & H. Canal Co.* 128 N. Y. 662.

In *Paulmier v. Erie R. Co.* 84 N. J. L. 156, the court said the injury was the result of two con-joint causes, one of which was the negligence of the master. For an injury so caused the master is liable.

A recovery may be had where the master contributes to the negligence of the fellow servant or to the injury. *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 323.

If the master's negligence directly contributes to the injury he must be held liable, though it also appears that the negligence of a fellow servant contributed to the injury. *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 510.

The master is liable for injuries resulting from defective machinery although the negligence of a fellow servant contributes to the accident. *Boyce v. Fitzpatrick*, 80 Ind. 530.

If the master failed to exercise reasonable care in providing suitable machinery for the work he is responsible for an accident although the negligence of a fellow servant contributed thereto. *Griffin v. Boston & A. R. Co.* 1 L. R. A. 686, 148 Mass. 143; *Houston & T. C. R. Co. v. Lowe* (Tex.) May 21, 1890.

So if the negligence was in not providing sufficient help. *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97.

Proximate cause.

It would seem that if an injury was produced by the combined negligence of two, such combined negligence would be the proximate cause of the injury and that the negligence of each would be only one of the elements which together make up the proximate cause, but it is a common occurrence for the courts to look through and beyond 16 L. R. A.

the combined cause to the element and make the question of liability depend on whether or not such element is of itself the efficient proximate cause of the injury. This course in many instances completely nullifies the rule as to combined negligence.

Where the chain connecting the lever with the coupling apparatus upon a passenger coach was broken and the brakeman was compelled to go under the car to pry the couplings apart in order to separate the cars, and while he was in that position the conductor signaled the train to go ahead whereby the brakeman was injured, the court said that the negligence in giving the signal, not the failure to repair the train, was the direct proximate cause of the injury. *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163.

Where a brakeman was injured while attempting to make a coupling between a freight car and an engine, which was supplied with a gooseneck coupling iron, and his hand was crushed, the court held that the gooseneck was not the proximate cause of the injury, it was only the instrument which inflicted it, but that the injury was caused by the negligence of the engineer in running the engine back in the manner he did without notice or signal. *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159.

Where an injury occurred from the derailment of a train caused by the separating of the rails in the track and the company was negligent in not furnishing a safe road-bed, the court held this would be the proximate cause of injuries received in the accident, and that the negligence of fellow servants in not giving notice of the danger in time to avert it would not excuse the negligence of the company. *Gulf, C. & S. F. R. Co. v. Pettis*, 60 Tex. 689.

Where the chain which held a valve under an engine was broken and tied up and the valve had

Pac. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, and cases cited.

It was the duty of the railroad company to have furnished a fit and proper caboose to the deceased, and he accepted no additional risk by continuing in defendant's employ after he had given it notice, and it had promised to furnish him within a reasonable time with a proper caboose, and the defendant was liable for the death of plaintiff's husband resulting therefrom.

McKinney, Fellow Servants, §§ 16, 82-85 et seq. and all cases cited; *Tennessee O. I. & R. Co. v. Kyle*, 12 L. R. A. 103, 93 Ala. 1; *Flike v. Boston & A. R. Co.* 58 N. Y. 549; *Fuller v. Jewett*, 80 N. Y. 46, 86 Am. Rep. 575, and all cases there cited; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 868, and cases cited; *Bessess v. Chicago & N. W. R. Co.* 45 Wis. 477; *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560, and cases cited; *Richmond & D. R. Co. v. Norment*, 84 Va. 167, and cases cited; *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85; *Mater v. Missouri Pac. R. Co.* (Mo.) March 23, 1891; *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 889; *Davidson v. Southern Pac. Co.* 44 Fed. Rep. 476; *Rogers v. Leyden*, 127 Ind. 50; *Goodrich v. New York Cent. & H. R. Co.* 5 L. R. A. 750, 116 N. Y. 898; *Arnold v. Delaware & H. Canal Co.* 125 N. Y. 15; *Lytle v. Chicago & W. M. R. Co.* 84 Mich. 289; *Grand Trunk R. Co. of Canada v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605; *Washington & G. R. Co. v. McDade*, 185 U. S. 554, 34 L. ed. 285;

Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152; *Atchison, T. & S. F. R. Co. v. Sadler*, 88 Kan. 128; *Counsell v. Hall*, 5 New Eng. Rep. 462, 145 Mass. 468; *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371, 8 Am. St. Rep. 608; *Louisville, N. A. & O. R. Co. v. Wright*, 18 West. Rep. 798, 115 Ind. 378; *Regan v. St. Louis, K. & N. W. R. Co.* 12 West. Rep. 387, 98 Mo. 848; *Parsons v. Missouri Pac. R. Co.* 12 West. Rep. 615, 94 Mo. 286; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Greene v. Minneapolis & St. L. R. Co.* 31 Minn. 248, 47 Am. Rep. 785, and cases cited; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 193, 30 L. ed. 1116.

Messrs. W. C. Hasledine & H. L. Waldo for defendant in error.

Seeds, J., delivered the following opinion:

This is an action of trespass on the case, brought by the plaintiffs in error against the defendant corporation, for the statutory damages for the negligent killing of the plaintiff's (Ella Sykes') former husband by the defendant. The declaration contains three counts. The first count declares upon the negligence of the fellow servants of the deceased, he being a conductor upon a freight train of the defendant. The second count declares upon the negligent, careless, and improper selection of the deceased's fellow servants by the defendant, and the retention of said fellow servants in its employ after full knowledge of their incompetency, and alleges that the killing was caused by reason

to be removed to oil the engine, to do which the chain was untied and the valve then dropped upon the ground under the engine and the injured person reached under to pick up the valve when the engineer negligently started the engine forward, the court held that the fact that the chain which held the valve was broken was not the proximate cause of the injury. *Spencer v. Ohio & M. R. Co.* (Ind.) Jan. 26, 1892.

Where a train broke in two and there was a defective coupling apparatus which a brakeman was endeavoring to remedy when the engineer negligently backed the forward part of the train upon him and killed him, the court ruled that the injury was not to be attributed to the company, that the injury did not result from the defective appliance but that the blame was to be solely attributed to the engineer who backed his part of the train upon the brakeman without due care. *Course v. New York, L. E. & W. R. Co.* 17 N. Y. S. R. 715.

Where a brakeman's leg was crushed while descending the ladder upon a car upon which there was no bumper, and it was shown that the accident would not have happened had the bumper been present, the court held that the defective condition of the car, and not the negligence of the engineer in backing the engine when he did, was the proximate cause of the injury. *Richmond & D. R. Co. v. George* (Va.) 48 Am. & Eng. R. R. Cas. 331.

Bansier v. Minneapolis & St. L. R. Co., 32 Minn. 331, in which the injury was caused by the breaking in two of a train, was decided on the ground that the defective apparatus which caused the train to break in two was the proximate cause of the injury.

Where an edger was so out of repair that it was liable to become clogged by the planks passing through it, in which condition it was very dangerous

to attempt to remove the plank to relieve the clogging, and an employé was injured while such an attempt was being made, the court held that the accident was the direct result of the defective working of the machine and that he was not relieved from liability from the fact that a fellow servant of the injured person was also negligent in his method of attempting to relieve the clogging. *Sherman v. Menomonee River Lumber Co.* 1 L. R. A. 173, 72 Wis. 122.

Where a mine owner allows fire damp to accumulate in the mine, which is exploded by a servant going into it with an open lamp, the negligence of the servant is the direct and immediate cause of the injuries to other servants and the master will not be responsible. *Berns v. Gaston Gas Coal Co.* 27 W. Va. 305.

If the proximate cause doctrine is applied to determine the master's liability it is evident that in most cases of purely combined negligence he will escape since the test of proximate cause given by *Parsons* (8 Cont. 7th ed. 180), and which is emphatically approved in *Jacksonville etc. R. Co. v. Peninsular Land Co.* 17 L. R. A. 83, is, "Did the cause alleged produce its effect without another cause intervening or was it made operative only through and by means of this intervening cause?" In cases of purely combined negligence the negligence of the master never becomes operative of itself but requires the co-operation of the fellow servant's negligence to produce the injury. See *note* to *Jacksonville etc. R. Co. v. Peninsular Land Co.* *supra*. Hence if Mr. *Parsons'* test was applied to such cases no liability could be established.

Many cases make use of the term "proximate cause" to describe the negligence of the master when the case is decided on the ground of combined negligence.

Where the caboose in which the injured person

of said incompetency. The third count declares upon the negligent conduct of the defendant in furnishing the deceased with an improper, unsafe, and defective caboose, knowing at the time that it was unsafe and defective, but which the deceased used under protest, and only under and by reason of the promise made by the defendant to the deceased that he should be provided with a safe one in a very short time; and because of the negligence and carelessness of the deceased's fellow servants upon another train of the defendant, running into and destroying the caboose in which the deceased was, by reason of which he was killed. To the declaration, and each count thereof, the defendant filed a demurrer. The court sustained the demurrer to the first and third counts, and overruled it as to the second; whereupon the defendant answered as to the second count. A jury was called, and after the plaintiffs' evidence was in and they had rested, the court, upon motion of the defendant, instructed it to find for the defendant. The plaintiffs sued out a writ of error, and allege error in sustaining the defendant's demurrer to the first and third counts, and in instructing the jury to find for the defendant upon the trial, under the second count.

1. The first count declared upon the negligence of the deceased's fellow servants, whereby he lost his life. Unless changed by statute, it is now the unquestioned law that damages cannot be recovered for injuries sustained by reason of the negligence of fellow servants. Negligence of such servants, of a common employer, is part of the risk which public policy requires that an employé take in entering upon a service in which there are fellow servants. *Priestly v. Fowler*, 8 Mees. & W. 1; *Murray v. South Carolina R. Co.* 1 McMull. L. 885; *Farwell v. Boston & W. R. Corp.* 4 Met. 49; *Pierce, Railroads*, 858; 2

Rorer, Railroads, 1188; 1 *Lawson, Rights, Rem. & Pr.* § 801; *Beach, Contrib. Neg.* § 102; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008.

Beach in his work objects strenuously to the reasoning upon which this rule of law is based, but admits that it is now universal, unless when changed by statute, as it has been in some jurisdictions. We are content to adopt the rule as the law for this jurisdiction, whatever may be the theoretical objections to it, based upon what may be thought to be purely logical grounds, until such time as the Legislature sees fit to change it.

But the plaintiffs contend that the rule as above enunciated has been changed. The question for decision then is, Has it been changed? Sections 2308-2810, Comp. Laws N. M.* provide, in substance, that, when

*The material portion of the statute referred to is as follows: Section 2808. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employé whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any stage coach or other public conveyance, while in the charge of the same as driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employé, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of \$5,000, which may be sued and recovered. First, by the husband or wife of the deceased. . . . In suits instituted under this section, it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not a negligent defect or insufficiency.

was driven forward by a rear-end collision, and by reason of the absence of proper bumper: the car ahead of it was thrown upward and fell upon and against it causing the injury, the court held that the absence of the bumpers was the proximate cause of the injury although it was enough to render the company liable if its negligence merely contributed to produce the injury. *Ellis v. New York, L. E. & W. R. Co.* 96 N. Y. 546.

In *Pullituro v. Delaware, L. & W. R. Co.*, 37 N. Y. S. R. 63, in which an employé on a gravel train was injured while attempting to get upon the train after it had started by being caught between two cars which were not furnished with bumpers, the court said that it was a question for the jury to consider whether the failure to provide the bumpers was the proximate cause of the injury, and if it was, the master was liable, although the fellow servants of the injured person were negligent in running the train; since if the negligence of the master concurs with that of a fellow servant in producing the injury the master is not thereby excused.

The master is not relieved from liability if his negligence was the proximate cause of the injury although a concurring cause was the negligence of a fellow servant. *Hunn v. Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 618.

"A" proximate cause as distinguished from "the" proximate cause.

In some cases the inquiry has been made whether 16 L. R. A.

or not the negligence of the master was "a" proximate cause of the accident, and they have not insisted that it must be "the" proximate cause.

If the master's negligence proximately contributes to the injuries, he will be liable. *Franklin v. Winona & St. P. R. Co.* 37 Minn. 411.

In *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, an instruction was approved which stated that if one of the proximate causes of the accident without which it would not have occurred was the unsafe condition of the wheel or brake, or both, and that the company was guilty of negligence in furnishing them, then it would be liable for the injury, notwithstanding the negligence of the engineer or brakeman may have contributed to the accident.

Where an injury was caused by the misplacing of an unlighted switch, the company contended that the absence of the lights was not the proximate cause of the accident but that it was caused by the negligence of fellow servants of the injured person: the court held that the absence of the lights was just as much the proximate cause of the injury as the turning of the switch rails. The injury, in any event, was occasioned partly through the negligence of the company as to the lights, and partly by the condition of the switch rails, in which case the company would be liable. *Town v. Michigan Cent. R. Co.* 84 Mich. 222.

Where an injury resulted from a defective brake and from the negligent running of the train at a

"any person" comes to his or her death by reason of the negligence or carelessness or criminal action of an agent, officer, or other employé of a railroad company, that his or her representative may recover of the company \$5,000. The contention is that "any person" in this statute has reference to any one whomsoever who may be killed, and hence includes one who may be a fellow servant. By further reading the statute it will be found that the words "any person or passenger" are used, which would seem, however, to throw doubt upon the real meaning of the words "any person," rather than to more definitely explain them. This statute is almost *verbatim* a copy of the Missouri Damage Statute. In that state it has received a decisive construction after a somewhat lengthy period of uncertainty. In *Schultz v. Pacific R. Co.*, 36 Mo. 13, it was held that the general meaning of the words "any person" was the meaning which the Legislature intended to attach to them, and that, therefore, the common-law rule of fellow servants taking the risk of each other's negligence, when not notorious and known to the employer, was abrogated. But this was not satisfactory, and in the case of *Connor v. Chicago, R. I. & P. R. Co.*, 59 Mo. 808, two of the five judges vigorously dissented; Judge Hough in his dissent satisfactorily showing, to the writer's mind, that, whatever may be the sounder and more humane rule, the Legislature never intended to change the rule as to the liability for negligence of a fellow servant by that statute, but only to give a cause of action to the representatives of a deceased person where none existed before, and to limit the extent of that liability. Finally, in the case of *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, the supreme court of that state took the view of the case so ably expounded by Judge

Hough, and it has remained the law of that state ever since. Upon a similar statute, the same words have received the same construction in Iowa, (*Sullivan v. Mississippi & M. R. Co.* 11 Iowa, 422;) in Maine, (*Carle v. Bangor & P. O. R. Co.* 48 Me. 271;) and in Colorado, (*Atchison, T. & S. P. R. Co. v. Farrow*, 6 Colo. 498.) The statute of this territory (sections 2308-2310) was adopted after the final decision in the *Connor Case* in Missouri, and it was urged that it is the law that, when one jurisdiction adopts without change the statute of another jurisdiction, it also adopts the judicial construction placed upon it by that jurisdiction. While this is so, yet we do not think it necessary in this case to rest our decision upon that principle, but rather upon the broader principle that there is nothing in the statute itself, nor in the history of its adoption, which goes to show that it was the intention of our Legislature to overthrow a rule thoroughly ingrained in the judicial holdings of the courts of the land, and in view of which it must now be held that all contracts for hire to corporations, in the absence of express stipulations, are made. The action of the trial court in sustaining the demurrer to the first count was correct.

2. The second count was predicated upon the assumed fact that the defendant company was negligent in its selection of the fellow servants of the deceased, Sykes, or in the keeping of them in its employ after knowledge of their incompetency had been brought home to it, and that it was through such incompetency that the deceased was killed. After the plaintiffs' evidence was all in, the jury was instructed by the court to find for the defendant, which it did. Of this action the plaintiffs complain. They insist that there was something to go to the jury, and that in instructing it to find for the defend-

greater speed than the rules of the company require, the court held that both causes were proximate, the defect in the brake as much as the speed, and that the company was liable. *Young v. New Jersey & N. Y. R. Co.* 46 Fed. Rep. 160.

Right to consider relative negligence.

Where the injury was caused by the starting forward of a locomotive, owing to its defective condition, the court held that the jury could not be permitted to inquire whether the exercise of extra diligence or skill on the part of the engineer would have neutralized the company's own negligence. This would require them to determine the comparative negligence of master and servant and strike a balance of negligence, which could not be permitted. The negligence of the servant does not excuse the principal from liability for an injury which could not have happened had the machinery been suitable for the use to which it was applied. *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 208, 37 Am. Rep. 491.

Where the fall of a defective staging was caused by negligently dropping a stone on it, the court held that if the jury found that the defect caused it to fall, and that the accidental strain was a contributing cause, the force and violence of the strain were immaterial; it could do no more than contribute to the injury, and the degree of contribution could not be apportioned. *Drommie v. Hogan*, 158 Mass. 20.

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If the negligence of the master had a share in causing the injuries of plaintiff, the master is liable notwithstanding the contributory negligence of a fellow servant. *Faren v. Sellers*, 39 La. Ann. 1019.

Liability exists when master's negligence was an essential element.

In accordance with the doctrine that an inquiry into the comparative negligence of master and servant could not be permitted, the cases in which the question has been most directly before the courts have held that if the injury would not have happened but for the negligence of the master, contributory negligence on the part of a fellow servant is no defense to the master. *Cone v. Delaware, L. & W. R. Co.* 15 Hun, 177.

Negligence of a servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppins v. New York Cent. & H. R. Co.* 122 N. Y. 557, aff'd 48 Hun, 288; *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723.

Where an injury resulted from the fall of an elevator the court said the difficult and close question in this case is as to the proximate cause of the injury,—whether the absence of safety appliances, or the act of the engineer and the fellow brakeman of the injured person, or whether it resulted from both causes. The court then applied the following test: "Where several proximate causes contribute to an accident, and each is an efficient cause

ant the court usurped the province of the jury, which was error. However, it is now the settled law of the supreme court of the United States, and of this court, that when evidence is of such a character that, should the jury find for one side rather than the other, it would be the duty of the court to set aside such verdict, it will in the first instance direct a verdict for the party thus entitled to it. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Candelaria v. Atchison, T. & S. F. R. Co.* (N. M.) 27 Pac. Rep. 497; *Gildersleeve v. Atkinson* (N. M.) 27 Pac. Rep. 477. We have thoroughly read the evidence produced by the plaintiffs to sustain the allegations of their second count, but we are unable to see where there is anything which tends to support those allegations. The action of the court, therefore, was correct.

3. The real difficulty in this case grows out of the sustaining the demurrer to the third count. It will be necessary, therefore, in order that a complete understanding of the count may be had, to set out *in extenso* the material portions of the same. After the allegations of incorporation, the place of doing business on the part of the defendant, its employment of the deceased, and its duty to furnish proper, safe, and reliable cars, cabooses, and other machinery, the count continues as follows: "Yet, not regarding its duty and promises in the premises, the said defendant did not so furnish the said Sykes with all safe, properly constructed, and reliable cars, locomotives, machinery, and tools for the proper conduct of his con-

ducting of trains as aforesaid, in this: That after his engagement and entering the employment as aforesaid, and some short time previous to the happening of the event hereinafter mentioned, the said defendant failed to furnish said Sykes with a proper caboose or way car, such as is usually and ordinarily used upon said same railroad, and upon all other like railroads, but instead wrongfully, negligently, and carelessly gave and furnished him, for use upon his said trains, against his consent and over his protest, (but which he was induced to take and use, under faithful promises of the defendant, by its agents and their servants, then and there to him made, that he would be furnished with a proper caboose in a very short time,) a weakly-built, common, unsubstantial box car, without any platforms, bottom beams, springs, bracing, or proper trucks, and without any doors in the ends or windows in the ends, or cupola or lookout station in the top, through either of which approaching danger might be seen and prevented, as is usually upon cabooses and way cars upon other parts of said line and other like roads. And said box car, used as a caboose or way car as aforesaid, was so flimsily and improperly constructed it would, and did, during its use by said Sykes, aforesaid, easily become derailed and jump the track aforesaid, all of which was then and there known to said defendant but the said George W. Sykes, so relying upon the promises of the defendant so made to him as aforesaid, that it would in a very short time furnish him with a good, safe, and proper caboose, did, relying upon

without which the accident would not have happened, it may be attributed to all or any of them, but it cannot be attributed to a cause unless without its operation the accident would not have happened;" and concluded that "from the evidence the jury could find both causes to be proximate," and that "If they did so, the master was liable." *Kern v. De Castro & D. Sugar Ref. Co.* 24 N. Y. S. R. 748.

If the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable even though the negligence of a fellow servant of the servant injured was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 286.

Where an engine was caused to explode by its defective condition, and it appeared that the engineer might have prevented its doing so by using extra care, the court held that the refusal to instruct the jury that if the accident would not have happened without negligence on the part of the engineer the railroad company was not liable was properly refused. To say that the master should not be responsible for an injury which would not have happened had a proper safeguard been used, because the engineer was negligent, would be to say in substance and effect that he should not be liable at all for an injury resulting from the failure to use such safeguard. *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317.

Where a locomotive without a headlight was left after dark standing on the track, over which a train came and collided with it, the court held that the jury should have been instructed that the com-

pany was not liable unless they find the accident would not have happened but for the absence of the headlight, and that it was error to charge that it was liable if its negligence contributed to the injury, though a fellow servant was also negligent. *Whittaker v. Delaware & H. Canal Co.* 49 Hun. 400.

But the company would be liable if the absence of the headlight was an efficient cause without the operation of which the accident would not have happened. *Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 544.

The above cases furnish a test which would be at the same time uniform and logical. According to it, to determine the master's liability, withdraw entirely the element of his negligence as a possible cause of the injury. If with it withdrawn the injury would have been inflicted just the same, the master is not liable, but if without it the injury would not have happened, the master is liable. Under this test the result in many of the cases would have been the reverse of what it is, and in the principal case the question of liability would depend on whether or not the force of the collision was sufficient to crush the platform ordinarily used in a caboose. If not, the injury would probably not have happened, and the master's negligence was an essential element. It is evident that by directing the attention to the effect of an absence of the fellow servant's negligence rather than to an absence of that of the master, erroneous results will be attained, since the servant's negligence is an essential element of the combination, and if from the premise that the injury would not have occurred in the absence of the servant's negligence the result is reached that therefore the master is not liable, relief may be denied when it should be granted.

said promise, continue in said employment until the 80th day of March, A. D. 1898, at which said date, at to wit, the county of Bernalillo, in the territory of New Mexico, said George W. Sykes was, pursuant to the order of the defendant, proceeding with one of its trains with the aforementioned box car, being used as a way car, with all due and proper care and diligence, eastward in said county, towards said Albuquerque, and when he had so proceeded to a point upon said railroad, about four miles east of the small station of San José, and while still, as aforesaid, exercising all due and proper care and diligence in the premises, the defendant then and there being possessed, as aforesaid, of a certain other locomotive engine and train of cars attached thereto, which said latter locomotive engine and train of cars were then and there, under the care and management of drivers, then servants of the defendant, who were then and there driving the same upon and along said railroad, near and towards the point aforesaid, also in an easterly direction, and the said defendant then and there, by its servants last aforesaid, so carelessly, improperly, negligently, and unskillfully drove and managed the said locomotive engine and train of cars that, by and through the carelessness, negligence, unskillfulness, and improper conduct of the defendant, by its said servants in that behalf, and also by and through the negligence, carelessness, default, and improper conduct and wrongful act of the defendant in defaulting, refusing, and neglecting to

furnish a proper caboose and way car to Sykes, as was its duty to do, the said locomotive engine then and there ran and struck, with comparative force and violence, upon and against the rear of the train and box car, being used as a caboose as aforesaid, and being conducted with all due and proper care and diligence by the said George W. Sykes, and, by reason of the poor and improper construction of the same, broke the same into splinters, and said George W. Sykes was then and there, with great force and violence, struck by said locomotive and by splinters of said box car being used as aforesaid, and thrown with great violence from out of said car," from the effects of which he afterwards died.

To this count the defendant demurred, and assigned several reasons therefor, among them that the said Sykes voluntarily used the said caboose; that it did not appear that there were any latent or hidden defects in or about the way car; that the negligence, if any, was the negligence of Sykes' fellow servants; and that the count is in many other respects uncertain, informal, and insufficient. The court sustained the demurrer. While this demurrer specifically sets out the grounds of objection, yet it is in substance a general demurrer, and under it any objections to the substance of the count may be urged, whether assigned or not. 1 Chitty, Pl. 633; Gould, Pl. p. 435, § 19. It is elementary that upon demurrer all facts which are well pleaded are admitted to be true. Therefore it must be considered that the facts in this count

Cases where the negligence of the master is the efficient cause.

A master is liable for the consequences of his own negligence, although the negligence of a co-servant also contributed to bring about the injury. McMahon v. Henning, 1 McCrary, 517.

Cases holding that the master is not liable for injuries resulting from the negligence of a fellow servant are applicable only where the injury complained of happened without any actual fault or misconduct of the principal. If the injury resulted directly from the negligence or misconduct of the master himself, he is liable. Keegan v. Western R. Co. 8 N. Y. 175.

Where the master makes an unreasonable order in the execution of which a servant is injured it will be no defense to an action for the master to say that the immediate cause of the injury was the negligence of a fellow servant in the execution of the order. Pittsburgh, C. & St. L. R. Co. v. Henderson, 37 Ohio St. 553.

It does not exonerate the master from the consequences of a failure to perform his duty, if such failure contributed to the injury, to show that if others for whom he was not responsible had performed their duty the injury would not have occurred, or that it might have been avoided by care and vigilance on the part of those who were clearly fellow servants of the injured person. Elmer v. Locke, 135 Mass. 576.

Cases where the servant's negligence was the cause.

If the master failed to use due care he might be held responsible although the negligence of a fellow servant contributed to the accident; but if the court can see that the accident was caused solely by the neglect of a fellow servant no recovery 16 L. R. A.

from the master can be had. Myers v. Hudson Iron Co. 150 Mass. 125.

Where a switchman negligently left a switch open while he engaged in conversation with a third person and a train ran into the open switch causing the injury, the court said there is no evidence which warranted the jury in finding that any act of neglect on the part of the defendant contributed in any manner to produce the injury complained of. Harvey v. New York Cent. & H. R. R. Co. 88 N. Y. 481.

The mere existence of a defective coupling link in a train will not render the company liable if the reason of its being there was the negligence of a fellow servant in using that link instead of perfect ones which were provided. Sweeney v. New York, N. H. & H. R. Co. 32 N. Y. S. R. 416.

Where a car with a defective brake was left standing on a side track without being blocked and started to move thereby colliding with a passing train and causing an injury, the court said the main question is whether the defective condition of the brake was the cause or one of the producing causes of the accident, and held that the injury was occasioned solely by the fault of the employes in failing to secure the car, and that the defective brake had nothing to do with it. Harvey v. New York Cent. & H. R. Co. 32 N. Y. S. R. 517.

Where defects in a hand-car cause it to jolt and an employé using it placed a water cask on the front of it in such a manner that it was jolted off and caused a wreck of the car and an injury to a coemployé, the court held the injuries resulted from the cask rolling off the car and that the negligence as to the condition of the car had no connection with the wreck and that therefore the master was not liable. Rose v. Gulf, C. & S. F. R. Co. (Tex.) Oct. 27, 1891.

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pleaded, which are well pleaded, are before us with the same effect as though found by a jury.

At the argument counsel for both parties rested their contention solely upon the alleged negligence of the company in failing to provide the deceased, Sykes, with a safe and proper caboose, within a reasonable time after having promised him to do so. The position of the plaintiffs was that, as the defendant knew of the unsafe condition of the way car or caboose, and had promised to provide another in its stead, it assumed all risks and dangers to the deceased during a "reasonable time" which he might use it while waiting for a new car; and that such use was not, upon the part of the deceased, contributory negligence. The defendant contends, upon the other hand, that it is shown that the defects, if any, in the caboose, were patent and evident as immediately dangerous, and therefore that the rule contended for by the plaintiffs did not apply, but that the use of such car, under the circumstances alleged in the count, notwithstanding the promise of the defendant, was contributory negligence on the part of the deceased, and that his representatives cannot recover. "If the servant complain of the defect to the master, and the latter promises to remedy or repair it, the servant, by remaining on this assurance for a reasonable time in the service, will not be considered to have waived it, and the question of a reasonable time will be for the jury." 1 Lawson, Rights, Rem. & Pr. § 312, and cases cited; *Gulf, O. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 28 Am. St. Rep. 377, and annotated note; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612. In this last case the court holds that it is not contributory negligence, as a matter of law, to remain in a dangerous employment for a reasonable time after a promise by the employer to remedy the defect complained of, but that it was a question for the jury to say whether it was contributory negligence to so remain. This is unquestionably the general rule of law where an employé gives notice to his employer of defects in the machinery that he is using, and the employer promises to remedy the defects in a short time, unless such defects are so evidently dangerous as that it would be reckless and foolish for the employé to use the defective machinery, even under a promise that it should be immediately remedied. The defendant contends in this case that the allegations of this count, admitted by it to be true show—*First*, that the deceased used the defective car for a longer period than by any possibility could be considered a reasonable time; and, *second*, that the defects set out in the count are so evidently dangerous that only a reckless person, one utterly careless of his safety, would have used the caboose without its being, at least, remedied. That, therefore, as a matter of law, he did contribute to his death, and that the action cannot be sustained. In the case of *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. ed. 948, the court carefully limits the ruling in the *Hough Case*, *supra*. That was a case wherein McElligott was

working in a gravel pit for the defendant. There was an overhanging bank, under which he with others was working, which threatened to break off and fall upon them. It was alleged that the supervisor of the work was notified of this danger, and promised to have it remedied immediately. Under that promise the plaintiff continued to work for but a short time, and while so working was injured. The court, in discussing the question of his contributory negligence, said: "If liability might come upon the district for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." 117 U. S. 633, 29 L. ed. 949.

If, then, the dangers were as great by reason of the alleged imperfections of the way car as are admitted by this demurrer, it would seem as though the case last cited went very far towards sustaining the defendant's contention that the deceased, Sykes, contributed by his own negligence to his death; and, if so, then clearly, under the law, his representatives cannot recover in this action. But whether they can or not, under this view of the law, yet we think that the action of the trial judge was correct upon another view of this count. The real question presented by this count, and the demurrer thereto, is, What was the proximate cause of the injury to the deceased? Was it the negligence of the fellow servants upon the second train, or was it the negligence of the company in failing, within a reasonable time, to provide the deceased with a suitable and proper way car, or was it the combined result of both negligences? If it was the first negligence, then clearly the action cannot be sustained, for in the first part of this decision we have seen that the law is that no recovery can be had for the negligence of a fellow servant. If the proximate cause was the resultant of the two negligences, and one of those negligences is not actionable, then there is no cause of action upon which the suit can be predicated, for the proof must correspond with the allegation, and there would be no proof of the negligence of the fellow servant allowed. It is admitted by the demurrer that the facts are as alleged, if properly pleaded. But, if the plaintiffs cannot recover for the negligence of a fellow servant, then that negligence, as an alleged cause of action, may not be so pleaded, and the demurrer in this case does not admit it as an actionable fact. Therefore the count is not good, upon the theory that the injury was the result of the joint negligences of the fellow servants of Sykes, and the failure upon the part of the company to furnish a safe caboose. It would seem that the fair interpretation of this count

was that it does charge the injury to be the result of the joint negligence of the fellow servants and the company, and hence that it was not a legal statement of a wrong upon which a suit might be predicated. But, conceding that the negligent action of the fellow servants upon the second train is alleged by the plaintiffs simply as a mere condition of the injury, and that they insist that the proximate cause of such injury was the negligence of the company in failing to furnish a proper and suitable way car within a reasonable time, as it had promised to do, we have to inquire, Was such negligence the proximate cause of the death of Sykes? What is a "proximate cause?" Definitions have been given by text-writers and in adjudicated cases which will aid us materially in answering this question, though, as a matter of fact, each case will have, in a great measure, to depend upon its own particular facts in arriving at what is the proximate cause of an alleged injury. "A 'proximate cause' may be defined as that cause which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of and without which that result would not have occurred." 16 Am. & Eng. Encyclop. Law, 416. This is the general rule "where no intervening efficient cause is found between the original wrongful act and the injurious consequence complained of." Another definition found in the same authority, and more particularly applicable here, is, "in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." This rule is sustained by the highest authority. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 298; 2 Thomp. Neg. 1085, § 2; 16 Am. & Eng. Encyclop. Law, 486, and cases cited under note 4.

It must be remembered in this case that the negligence complained of is the failure upon the part of the company to furnish a proper caboose, which from its construction would not jump the track; that should be strongly built; that should have platforms, bottom beams, springs, bracings, proper trucks, doors, end windows, and cupola. Now, under these definitions, and the law as laid down in the cited cases, the question is, Could this defendant have foreseen, by any ordinary or any extraordinary foresight, that, because of its negligence to furnish such a caboose, another train upon its tracks would negligently run into this caboose, rather than into one properly built and fitted up? If the second train is eliminated from the consideration of the case, was the negligence of the company to furnish a proper caboose in any manner whatever the cause of the death of Sykes? How, then, can that negligence be said to be the proximate cause of the injury? Supposing that the deceased had been furnished with a proper way car,

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and that a second train had run into it with comparative force and violence, is there any presumption from the fact that it was a proper way car that an accident would not have happened? Would not the way car have been thrown from the track, and the deceased with it, and would not the result of the force and violence of the collision and of the splinters from the way car have been, in all probability, the same as in this case? If it would, then the proximate cause of the injury was not the negligence in failing to furnish the proper way car, but the collision with the second train. In other words, if you take away this bad caboose, and place a good one in its stead, leaving all the other facts as alleged in the count, you will have the accident and the injury; but, if you take away the negligence of the fellow servants in the second train,—it makes no difference whether there is an imperfect caboose or not,—there will be no accident, and the negligence in not furnishing a proper caboose would not be the natural or probable cause of the injury, and, under the ruling of the courts, would not be the proximate cause of Sykes' death.

If because of the weakness or lack of support, or of the platform, or of bottom beams, the car had broken down, or jumped the track, and the injury had been caused, a far different case would have been presented; or if because of the lack of windows, and without any other alleged negligence, the way car had been run down, and the deceased injured because he could not see the approaching danger, which he was looking for, the case would be different; but there is no allegation in this count which can be construed into meaning that Sykes came to his death by reason of the absence of the windows. We are not to be understood as holding that, if there had been proper allegations of the defects in the way car being the primary cause of injury to the deceased,—the fact that the force which caused those defects to operate disastrously was brought into action by the negligence of the fellow servants of the deceased in the second train,—there would have been no cause of action. If the allegation had been, for instance, that, by reason of the negligence of the defendant in failing to furnish a way car with windows in the end, and with a cupola, the deceased was unable to see approaching danger, for which he was on the lookout, and therefore he was injured, he probably would have alleged a good cause of action. It is true that the plaintiffs alleged generally in this count that the way car had no doors or windows in the ends by "which approaching danger might be seen and prevented," but that is all. The allegation as to his injuries is that, "by reason of the poor and improper construction of the same, (referring to the way car,) broke the same into splinters," and that Sykes was then and there struck by said locomotive, and by the splinters of said box car. This was the cause of his death, and we are unable to see how the failure to furnish a way car with proper end doors and windows, upon these allegations, can by any construction be considered the proximate

cause of his death. The following cases fully sustain, in our judgment, the above holding: *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163; *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159; *Hayes v. Western R. Corp.* 3 Cush. 271; *Whittaker v. Delaware & H. Canal Co.* 49 Hun. 400; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Gilman v. Eastern R. Corp.* 10 Allen, 283; *King v. Boston & W. R. Corp.* 9 Cush. 112; *Handelum v. Burlington C. R. & N. R. Co.* 72 Iowa, 709; *Campbell v. Stillwater*, 82 Minn. 308; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293; *West Mahanoy Twp. v. Watson*, 116 Pa. 344, 8 Cent. Rep. 543.

As, then, the deceased, under the facts as pleaded in this count, met his death by reason of the negligence of the fellow servants on the second train, which was, in our view of the case, the proximate cause, we find no error in the rulings of the court below, and they are therefore affirmed.

McFie, J., concurring:

I agree with the conclusions of the court, that the court below did not err in sustaining the demurrer to the first count of plaintiffs' declaration, and that the court below properly instructed the jury to find for the defendant on the trial had, upon issue joined under the second count of plaintiffs' declaration, as the proof clearly failed to sustain the allegations of the declaration. I agree with the conclusions of *Mr. Justice Seeds* that the court below properly sustained the demurrer of the defendant to the third count of plaintiffs' declaration. The first count declared upon the negligence of fellow servants of the deceased; the second count charged the negligence of the defendant in the selection and retention of incompetent fellow servants, after full knowledge of their incompetency, and that decedent was killed by reason of such incompetency; and the third count, that the decedent was killed by reason of the combined negligence of the defendant and fellow servants. I do not question the right of recovery in a proper case, for the combined negligence of master and fellow servant, where the negligence of each contributed to the injury, but the third count of plaintiffs' declaration is subject to the demurrer because it fails to point out with certainty wherein the negligence complained of on the part of the defendant contributed to the injury. It is not sufficient to allege negligence on the part of the defendant. It must also be shown that the injury complained of resulted from the specific negligence complained of. It will not do, in actions of this nature, to leave it a matter of conjecture as to whether the injury resulted from the negligence complained of or not. The declaration must state a cause of action, and if it fails to do so, either by insufficient allegations, or by alleging matter that destroys the right of action, it must yield to a demurrer. The negligence of the defendant is alleged to be that it furnished deceased with an improper, unsafe, and defective caboose, knowing that it was unsafe and defective; and, although defendant promised to do so, it failed to furnish the deceased

with a proper caboose or way car, such as is usually and ordinarily used upon said same railroad, and upon all other like railroads, but instead wrongfully, negligently, and carelessly furnished him with a weakly-built, common, unsubstantial box car, without any platforms, beams, springs, bracing, and proper trucks, and without doors and windows in the ends or cupola, or lookout station on the top. These concluding allegations are simply descriptive of a box-car caboose, as distinguished from the usual caboose or way car used by that and other roads; not that the box car was particularly defective, by being broken and unfit for use, but because it was a box car, whereas the company had promised to give plaintiff a regular caboose, and had failed and neglected to do so. But, suppose the defendant was negligent in this respect, we fail to see how such negligence caused or contributed to the injury complained of, much less became the proximate or promotive cause, as defined by law. "That, in determining what is proximity of cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." *West Mahanoy Twp. v. Watson*, 116 Pa. 344, 8 Cent. Rep. 543. In the case of *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653, *Mr. Justice Trunkey*, then president of the common pleas of Venango county, in his charge to the jury on the trial of the above-named case, said: "The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. . . . The question is, Did the cause alleged produce its effects without another cause intervening, or was it to operate through or by means of this intervening cause?" "The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." And in the same opinion he says: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect

and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self operating, which produced the injury." *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 489, 24 L. ed. 256. To the same effect, in Massachusetts, it is held "that the proximate cause is the object of inquiry, and when discovered is to be regarded and relied upon. We cannot reason as to chances or probabilities. They are held to be too remote to form the basis of judicial decision." *Hayes v. Western R. Corp.* 8 Cush. 271.

A case involving the same questions as the one under consideration is found in 61 Wis. 159, (*Fowler v. Chicago & N. W. R. Co.*) In it a switchman was injured, while making a coupling, by an engine being backed down upon him. The engine was not a regular switch engine, but it was a regular road engine, being used for switching purposes, and had been so used for 16 days. The regular switch engine would not have had the goose-neck projection by which he was injured, and would have been so constructed as not to obstruct the view backward. It was held that the negligence of coservants, and not any insufficiency or unfitness in the engine itself, was the proximate cause of the injury, and that the company was not liable. About the same time that court held, where the chain coupling was broken, and the brakeman had to go under the platform to make the coupling, and while he was under it the conductor, not knowing his position, gave the signal to the engineer to move up, and thereby the brakeman was killed, that it was the negligence of the conductor, and not the imperfect coupling, that was the proximate cause of the injury, and therefore the company was not liable. *Pease v. Chicago & N. W. R. Co.*, 61 Wis. 163. In *Henry v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 288, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and while upon the ground stepped upon a track, where he was run upon and injured by a train. Hough, J., speaking for the court, said: "It is, perhaps, probable that, if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home, he certainly would not have been injured as he was, but his leaving home could not, therefore, be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural, nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation in the absence of any regulation to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same as it would have been if no such expulsion had taken place."

Where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded the proximate cause of the injury, if the injury be

one which might reasonably be anticipated from the act or omission, and which would not have occurred without it. *Campbell v. Stillwater*, 32 Minn. 808.

From these decisions, the proximate cause of the injury in this case was not the negligence of the defendant in failing to furnish the usual way car or caboose, because the car used by the deceased, although a box car, was making its run regularly, and, so far as the declaration shows, was rendering as safe and complete service as if another car had been furnished, until it was dashed into by another train. What injury would have been done the deceased, if the second train had not run into the first? Clearly, none whatever. It is pure speculation to say that any injury would have resulted, and the law abhors speculation. The plaintiff alleges that this box car was liable to jump the track, as it had done before; but a complete answer to that is that it did not do so but, on the contrary, was making its regular run. If the declaration had alleged that the car had jumped the track, and by reason thereof the deceased was killed, a cause of action not demurrable would be stated, because it would be apparent that the injury resulted from the negligence of the company in furnishing a car that was liable to run off the track, and in failing to furnish one that was not. The negligence would appear to be the immediate and proximate cause of the injury, there being no intervening, independent cause between the negligence and the injury.

The third count of this declaration, however, presents a very different case. Here we have the intervention of an independent cause, which actually caused the death of the deceased,—a rear-end collision by another locomotive and train, managed by coservants of the deceased. The averment is as follows: "The said locomotive engine then and there ran and struck, with comparative force and violence, upon and against the rear of the train and box car, being used as a caboose aforesaid, and being conducted with all proper care and diligence by the said George W. Sykes, and, by reason of the poor and improper construction of the same, broke the same into splinters, the said George W. Sykes was then and there, with great force and violence, struck by the said locomotive, and by splinters of the said box car being used as aforesaid." In view of this averment that the car was broken to splinters by the force of the collision, it seems idle to contend that, if the defendant company had furnished the deceased the kind of a car he desired, he would not have been killed. The collision, and the injury resulting in the death of the deceased, were almost simultaneous occurrences. There can be no reasonable doubt as to the cause of the death of Sykes. He was killed by the second train dashing into the first, and this was the proximate cause of the injury. Having discovered the proximate cause, the inquiry stops there, because to go back of it would be both endless and useless. *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790.

It is true the plaintiff avers, in general terms, that the defendant's failure to furnish another car was also the cause of the injury; but, in my opinion, she wholly fails to point out in what way it caused or contributed to the injury. The averment seems to me to be destitute of foundation, and in the nature of a predicate for the introduction of uncertain and improper evidence. In the case of *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 811, where the plaintiff alleged negligence in keeping a crossing in repair, where he received an injury by a collision of a train with plaintiff's wagon, there was no averment that the condition of the crossing contributed to the injury, but the gravamen of the action was the failure to give the statutory signal, and failure to slack the speed, held, that evidence could not be given to show the condition of the crossing, nor can its condition be shown as a make-weight to sustain an entirely different charge, in which the condition of the crossing is not an element. In this case the wrong complained of against the company is that they failed to furnish a certain kind of car for the use of said employé, but it is not averred that their failure in this respect was the cause of the locomotive running into the car. But it is charged that the collision was caused by the wrong, negligence, and incompetency of the defendant, by and through its servants. An employer is not liable for the negligent acts of coservants to each other. *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 30 L. ed. 1114. Therefore, so far as it attempts to charge the defendant with the negligent acts of coservants, the count is bad. It is an immaterial inquiry which of these fellow servants were at fault, but it is very clear that both of these trains did not have a right to the same part of the track at the same time. One or the other was in the wrong, and, to create a liability against the defendant, the declaration must aver the particular act or omission of the defendant that caused the collision, and this it does not attempt to do. An omission that was not the proximate cause would not be sufficient. In this respect the count does not state a cause of action against the defendant, for it avers the proximate cause of the injury to have been the intervention of an independent locomotive, which ran into the car, as in *West Mahanoy Twp. v. Watson*, above cited. Eliminate this second train from consideration, and there is nothing left upon which to found an action for damages against the defendant. There is no averment in this count that the company knowingly selected incompetent servants. That was the subject of the second count, upon which the plaintiff secured a trial, and therefore such cannot be considered as an element of damages under this count. The demurrer being interposed, the facts well pleaded were admitted. The demurrer challenges the sufficiency of the facts stated to constitute a cause of action in law. The trial is by the court, as the matter at issue is one of law, and not of fact. The court below found, upon the facts stated, that the negligence of coservants of the deceased was the proximate cause of the injury complained of, and not the com-

bined negligence of defendant and coservants, as alleged in the count, and hence sustained the demurrer. The plaintiff stood on his demurrer, refused to amend, and judgment was properly given for the defendant.

Freeman, J., delivered the following opinion:

I am unable to agree with the majority of the court in the conclusions reached in this case. I agree that the doctrine of the non-liability of the master to the servant for the negligence of a fellow servant seems to be now well settled. I shall not undertake to review the numerous authorities, nor to discuss the many hotly-contested cases through which this questionable doctrine has passed. It has come up "through great tribulation," and is possibly entitled to a rest. But the decision of a majority of the court in this case proceeds a step further, and that, too, in the wrong direction, to exempt the master, not only from the consequences of his servant's negligence, but from that of his own, if it appear that a coservant contributed to the result. This proposition is to my mind too dangerous in its tendency, and too far reaching in its consequences, to be allowed to pass without dissent. That the grounds of my dissent may not be misunderstood, I will state what I understand to be the precise issue. The plaintiff alleges, in substance, that the injury for which redress is sought was the combined result of the conduct of the injured party's fellow servant and the use of defective machinery (a way car) in the hands of the injured employé, which he was induced to use by the promises of the employer to repair. To this count a demurrer was interposed and sustained. The opinion of a majority of this court affirms the action of the court below. I shall endeavor to sustain the proposition that, while the master is not liable to one servant for the wrongful act of a fellow servant, he is nevertheless liable for his own wrong; and that he cannot escape responsibility by showing that the negligence or wrong of the injured party's fellow servant contributed to the result; and that while an employé assumes the ordinary risks incident to his employment, among others, breakage of machinery, and injury from defects in machinery, yet if the servant discover defects in such machinery, and point them out, and the master promise to repair within a reasonable time, and the servant is induced thereby to continue in the use of such defective machinery, the danger to such use not being so imminent or impending as to deter a man of ordinary prudence, and while thus employed he is injured by such machinery, he has a right of action against the master. *Eastern Counties R. Co. v. Marriage*, 6 Hurlst. & N. 937; *Patterson v. Pittsburg & O. R. Co.* 76 Pa. 389, 18 Am. Rep. 412; *Le Clair v. St Paul & P. R. Co.* *First Iron Works*, 62 Mo. 35; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 615.

Before, however, inviting attention to the discussion of the main question involved, I desire to suggest, with great respect, that it

seems to me the reasoning employed by the majority of the court to sustain the demurrer is at fault, in that the conclusion is reached from two absolutely contradictory premises. It is held that the count is defective, in that it shows that the dangerous character of the machine (way car) was so apparent that it was contributory negligence to use the car. This for the purpose of bringing the case within the rule laid down by the Supreme Court of the United States in the case of *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. ed. 946. This position, however, is not only abandoned, but entirely overturned, in the effort to establish the contrary proposition, that the defective machinery, so far from being so palpably dangerous as to prevent its use by an ordinarily prudent man, was not in fact at all dangerous, and did not in fact even contribute to, much less cause, the accident.

The rule as to the effect to be given to the negligence of a fellow servant, when combined with the negligence of the master, is thus stated in *note 10*, p. 981, *Thomp. Neg.*: "It is but another expression of rules already announced, to say that, if the negligence of the master combines with the negligence of a fellow servant, and the two contribute to the injury, the servant may recover damages of the master." The learned author cites, in support of this proposition, *Orutshfield v. Richmond & D. R. Co.*, 76 N. C. 820, wherein the doctrine is laid down in this language by Reade, J.: "The decisions, both English and American, go very far towards the conclusion that one servant cannot recover of the employer for any injury which results from the negligence of a fellow servant, in a business common to both. There may be exceptions, but, grant that to be so, for the sake of argument, yet it is not so where the employer contributes to the negligence of a fellow servant, or to the injury; as if he employs an unfit servant, or, as in the case of a bad engine, knows that it is bad, and fails to repair it. So in this case, if the defendant answers that the plaintiff cannot recover because the injury resulted from the negligence of his fellow servant, the engineer, the plaintiff may reply that the defendant contributed to the negligence of the engineer, and to the injury, by having a bad engine."

The same doctrine was laid down in the case of *Booth v. Boston & A. R. Co.*, 78 N. Y. 88, 29 Am. Rep. 97. The facts in that case were substantially as follows: The plaintiff was engineer in the defendant's employ, and, as such, went with a freight train from Greenbush on the morning of February 8. This train was preceded by one under an engineer named Hughes, with seventeen cars, two brakemen, and a conductor. Plaintiff's evidence tended to show that three brakemen were necessary to such a train, and were usually sent. One or two other trains had preceded it the same morning. There was a head conductor, Rockefeller, who gave the conductors directions as to what cars were to go in the different trains. He also assigned the brakemen to go with the several trains. After receiving instructions, trains were started by, and were each under the control

of, each conductor. Three brakemen had been assigned by Rockefeller, and were ready to go with Hughes' train of 17 cars on the morning in question, but one overslept himself, and failed to go, and the conductor of the train started without him, and without giving any notice to the head conductor, Rockefeller, of the absence of the third brakeman. Hughes' train, upon arriving at Chatham, was stopped to take coal upon the engine, as was customary. A train ahead of it still stood at the coal pile taking coal, and Hughes' train stopped and stood behind it for some ten minutes. The conductor and one brakeman got off and went forward to be ready to put on coal. When the forward train had gone, Hughes started his train up to get to the coal pile. The train broke in two, and eleven cars ran back. Upon them was the other brakeman, named Losty, who tried in vain to stop them. They collided with plaintiff's train, and he was injured. In this case it was held that the company were liable. Says the court, Andrews, J., delivering the opinion: "The rule that the master is not liable for the negligence of a coservant does not, however, go to the extent of exempting him from liability in every case when it appears that he did not himself do or direct the doing of the negligent act, or even when the immediate negligence is that of a person who in some sense was the coservant of the person injured. There are certain duties which concern the safety of the servant, which belong to the master to perform, and he cannot rid himself of responsibility to his servant for not performing them, by showing that he delegated the performance to another servant, who neglected to follow his instructions, or omitted to do the duty intrusted to him. The duty of the master to select competent servants, and to provide safe implements and machinery for the use of his servants, belongs to this class. The rule that the servant takes the risks of the service 'supposes,' says Lord Cranworth, 'that the master has secured proper servants and proper machinery for the conduct of the work.'" —citing *Bartons Hill Coal Co. v. Reid*, 4 Jur. N. S. 767, 8 Macq. 275. It is there held that the duty to provide competent servants and proper machinery is a duty at all times resting upon the company, which it was bound to discharge for the protection of all persons, its servants as well as others, and which, if neglected and injury to a servant resulted from the neglect, gave a right of action, notwithstanding the fact that the immediate negligence was that of coservants intrusted with such performance. The rule is thus stated in the case of *Paulmier v. Erie R. Co.*, 84 N. J. L. 155: "The rule already referred to is that the master is not responsible to one servant for the ill consequences of the negligence of a fellow servant in the course of common employment. The reason for this rule is that, as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable. But the servant does not agree to take the chance of any negligence on the part of his employer; and

no case has gone so far as to hold that, where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servants. Contributory negligence, to defeat a right of action, must be that of the party injured."

In the case of *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317, the cause of action was stated substantially as follows: The defendant negligently managed his engine, and did not provide a competent and suitable engineer and boiler and engine and pump and gauge and appendages and machinery and precautions for safety used therewith, but knowingly and carelessly provided such as were not competent and suitable and sufficiently safe, and knowingly and carelessly continued the same in use, and improperly used them while out of order and unsafe, either solely or in connection with his servants. There was a verdict for the plaintiff, and, on appeal to the supreme court, it was said by Thomas, J., delivering the opinion: "It is now well-settled law that one entering into the service of another takes upon himself the ordinary risks of the employment in which he is engaged, including the negligent acts of his fellow workmen, in such employment, [citing *Farnell v. Boston & W. R. R. Corp.* 4 Met. 49; *King v. Boston & W. R. R. Corp.* 9 Cush. 112; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228.] It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant, or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be responsible for the injuries resulting from an act of carelessness or negligence of such an engineer; but we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented injury. The very object and purpose of a safeguard, like the fusible plug, are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance, to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened, had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it. . . . The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and among others, the negligence of his fellow servants, for the protection of the master. The principle should not be so extended as to impair in the least degree the obligation

resting upon the master in the prosecution of a business, involving unusual risks of health, or life or limb, to employ well-guarded instruments, with competent engineers." Continuing the quotation from the note already cited from Thompson on Negligence, it is said: "This [the liability of the master for injuries to servants] happens where the negligence of the master in furnishing defective machinery or appliances, or an insufficient force of collaborators, combines with the negligence of the servants whose duty it is to oversee and use the particular machinery, whereby another servant is injured; or where the negligence of the master in selecting an incompetent servant combines with the negligence of such servant; or where the negligence of a railroad company in not furnishing a sufficient number of workmen for the management of a train combines with the negligence of a particular servant in starting a train while insufficiently manned.

Perhaps a better expression of the rule is that given in the headnote of *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317, 'that the master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow servant contributes to the accident.' The doctrine is thus stated by Mr. Wood, at page 685 of his work on Master and Servant: "The servant, although he may know that the instrumentalities of the business are not in good repair or condition, is not therefore necessarily chargeable with negligence in remaining in the master's employ, and using them, unless real danger therefrom is apparent. In all cases where there is any doubt, the question is for the jury." "The master," says the same author, at page 687, "is bound to exercise reasonable care to prevent accidents to his workmen. He is bound to furnish suitable machinery, and see that it is properly protected and kept in proper repair."

The case of *Snow v. Housatonic R. Co.*, 8 Allen, 441, 85 Am. Dec. 720, was an action against the railroad company to recover damages incurred by the plaintiff, who was injured while endeavoring to uncouple the train. The proof showed that the accident was the result of a defect in the road, of which defect the plaintiff had knowledge. Bigelow, Ch. J., in a very able opinion, wherein he reviewed the questions relating to the relations existing between master and servant, held that the continuance in the service of the company by the plaintiff after knowledge of the defect was not of itself evidence of such negligence as to defeat the action, and that in all such cases the question of negligence on the servant's part is a question for the jury. The rule that the master is liable for an accident growing out of the use of defective machinery by the servant is thus laid down in Wood, Mast. & Serv. §378: "But if there is any evidence that tends to excuse the plaintiff from the imputation of negligence on his part, as that he had called the attention of the master to the defect, and he had promised to repair it, or if the danger was not obvious, or if he incurred the risk by the express direction and com-

mand of the master or his agent, and the danger was not inevitable or a necessary result of performing the service, then it is a question for the jury whether or not the performance of the service or his acts at the time of the happening of the injury, were negligent in fact. Where the servant, being aware of the danger of the service, complains to the master, and he promises to remedy the defect, the master is liable for injuries resulting to him therefrom, and he is not chargeable with contributory negligence by remaining in the service, unless the danger is so great that a man of ordinary prudence would not remain." In support of this proposition a long line of authorities are cited. Mr. Wharton, in his work on Negligence, supports the same proposition, and speaks of it as a doctrine peculiar to this country. This, however, is not altogether correct, the leading English case on the subject being that of *Clarke v. Holmes*, 7 Hurlst. & N. 942. The same doctrine is supported by the following decisions: *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 523; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 889, 18 Am. Rep. 412; *Lanning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

The doctrine of the master's liability to the servant for accidents resulting from the use of defective machinery is thus laid down by Mr. Justice Harlan in the case of *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. ed. 612: "If the servant of such a company, who has knowledge of the defects in the machinery, gives notice thereof to the proper officer, and is promised that they shall remedy it, his subsequent use of it, on the well-grounded belief that it would be put in proper condition within a reasonable time, does not necessarily or as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective and insufficient condition, he was in the exercise of due care. The burden of proof in such case is upon the company to show contributory negligence." Nor can the master shield himself from responsibility for injury growing out of the use of defective machinery by showing that the negligence of a fellow servant contributed to it. Where the injury is the result in part of the negligence of a fellow servant, and in part the negligence of the master, the latter is liable. In the case of *Tennessee C. I. & R. Co. v. Kyle* (Ala.) 12 L. R. A. 103, the accident resulted from a collision between an engine (running without a cowcatcher or pilot) and a cow, and the company was held to be liable. In the case of *Town v. Michigan Cent. R. Co.*, 84 Mich. 214, the plaintiff, an engineer, was injured by running into an open switch. The switch had some months before been abandoned, and the lights taken down. Shortly previous to the accident, however, the switch had been reopened, but the lights had not been replaced. The company contended that the absence of the light was not the proximate cause of the accident; 16 L. R. A.

that if the switch had been locked the engine would have passed over safely; and that the opening or unlocking of the switch was caused either by the intermeddling of a stranger, or by the negligence of a fellow servant of the plaintiff, and that in either event he could not recover. But the court held that, if the lights would have prevented the accident by giving timely warning of the condition of the switch, their absence was just as much the proximate cause of the accident as the unlocking or turning of the switch, "and if they were concurrent causes the defendant would be liable." In *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206, 37 Am. Rep. 491, the company was held liable for an accident resulting from the sudden starting of a locomotive, caused by its being out of repair. In that case, as in this, the doctrine of the negligence of a fellow servant (the engineer in charge) was invoked. If he had been careful, it was alleged, he might have prevented the accident. But the court held otherwise, saying: "If this doctrine is accepted, it will loosen the rule of responsibility, which now bears none too closely upon corporate conduct." In *Elmer v. Locke*, 135 Mass. 575, the injury was the combined result of the defective construction of trestlework and the negligence of a fellow servant. The defendant was held liable, the court holding that "it does not exonerate him from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that, if others for whom he is not responsible had performed their duty the injury would not have occurred,"—citing *Cayser v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Baton v. Boston & L. R. Co.* 11 Allen, 500; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 861; *Lane v. Atlantic Works*, 111 Mass. 186. To the same effect is the case of *Franklin v. Winona & St. P. R. Co.* 87 Minn. 409. The same defense as in this case was attempted to be set up in the case of *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 548, but the court said: "This rule, [the fellow-servant rule,] however, has no application if the company has at the same time disregarded its obligation to provide either a suitable roadbed or engine or cars." The following authorities also support the same proposition: *Hunn v. Michigan Cent. R. Co.* 78 Mich. 513, 7 L. R. A. 500; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Cayser v. Taylor*, 10 Gray, 281, 69 Am. Dec. 317; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *McMahon v. Henning*, 1 McCrary, 516, 3 Fed. Rep. 353; *Crutchfield v. Richmond & D. R. Co.* 76 N. C. 320; *Stringham v. Stewart*, 100 N. Y. 516, 1 Cent. Rep. 779. Indeed, the doctrine of the master's liability, where his negligence contributes to the accident, is settled by such an unbroken chain of authorities as to lead the learned author of the notes to English and American Railroad Cases to declare: "The cases affirming this proposition are numerous, and the doctrine is supported with a unanimity not to be found among the authorities on any

other branch of the law of fellow servants." *Coppins v. New York Cent. & H. R. R. Co.*, 122 N. Y. 557, 44 Am. & Eng. R. R. Cas. 623. This doctrine "has been so often asserted by the courts of the highest character as to be no longer an open question." *Richmond & D. R. Co. v. George* (Va.) 48 Am. & Eng. R. R. Cas. 335. "It is a cruel and inhuman doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment, puts them in constant hazard of injury, is not to be held accountable to those employés who, serving under him, under such circumstances, are injured by his neglect and omissions." *Richmond & D. R. Co. v. Norment*, 84 Va. 167, cited in *Richmond & D. R. Co. v. George*, *supra*.

The fatal error which, in my opinion, lurks in the doctrine propounded by the majority of the court, consists—*First*, in the application of the doctrine of fellow servants, in a qualified sense, at least, to the relation of master and servant; and, *second*, in the application of the doctrine of proximate and remote, mediate and immediate, cause, to cases wherein the injury is the result in part of the negligence of the master and in part of that of the servant. I affirm without hesitation that, wherever the facts of the case demonstrate that the negligence of the master contributed to the accident, negligence is to be regarded, as a matter of law, as direct and proximate. This doctrine is laid down without qualification by the Supreme Court of the United States in the case of *Grand Trunk R. Co. of Canada v. Cummings*, 106

U. S. 702, 27 L. ed. 267, where the court says: "In the instruction which was given we find no error. It was, in effect, that, if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." The only possible escape from this unbroken line of authorities is to say that, notwithstanding the declaration of plaintiff in error that her late husband came to his death "also by and through the negligence, carelessness, default, and improper conduct and wrongful act of the defendant, in defaulting, refusing, and neglecting to furnish a proper caboose and way car," yet this court will determine, as a matter of fact, that the alleged defect in the way car contributed nothing whatever to the accident; that, even if the deceased had been provided with a proper way car, the result would have been the same. I insist that this and like questions are matters for the jury. "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of all the circumstances of facts attending it." *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 474, 24 L. ed. 258.

O'Brien, Ch. J., concur.

NORTH CAROLINA SUPREME COURT.

L. M. WATERS

v.

RICHMOND & DANVILLE R. CO., *Appel.*

(.....N. C.)

1. No excuse for the breach by a carrier of its contract to furnish a car and transport cattle to a certain place by a certain day is furnished by the fact that the shipper's object in naming that day was to enable him to offer the cattle for sale on Sunday contrary to law, unless that object entered into the contract as part of the inducement or consideration.
2. Damages for breach by the carrier of a written contract under which cattle were shipped, cannot be recovered in an action for breach of a prior oral contract to transport them at a certain time.

(April 5, 1892.)

APPEAL by defendant from a judgment of the Superior Court for Ashe County in favor of plaintiff in an action brought to recover damages for alleged breach of contract to transport cattle. *Reversed.*

Statement by Davis, J.:

A former appeal in this action was decided at February term, 1891, (108 N. C. 849), when a new trial was granted, after which plaintiff filed an amended complaint, in which it is alleged in substance that the defendant is a corporation duly created by law, owning and operating a line of railroad between the town of Taylorsville, in North Carolina, and the city of Charleston, S. C. That on or about the 10th of May, 1888, he was the owner of a lot of cattle, which he desired to ship from Taylorsville to the city of Charleston; and, in order to reach said city on the Saturday morning following, he contracted with the defendant for and in consideration of the sum of \$58.50, to furnish on the Wednesday night one safe and substantial R. & D. stock-car, capable of holding and transporting the said cattle, 32 in number; and that the said car should be transported with diligence and dispatch from Taylorsville to Charleston, and reach the latter place on Saturday morning. That the defendant at the time of making the said contract was distinctly and plainly in-

NOTE.—As to the validity of contracts remotely connected with illegal purpose or transaction, see *notes to Anheuser-Busch Brewing Assn. v. Mason* (Minn.) 9 L. R. A. 306; *Jackson v. City Nat. Bank* 16 L. R. A.

(Ind.) 9 L. R. A. 637; *Graves v. Johnson* (Mass.) 15 L. R. A. 384, and the case of *Gray v. Western Union Tele. Co.* (Ga.) 14 L. R. A. 95.

formed that the plaintiff desired to reach Charleston on Saturday, to be ready for the Monday market. That the defendant neglected and failed to perform and comply with said contract, and by reason of said neglect and failure the plaintiff sustained \$350 damage, and he demands judgment for the same and for costs, etc. The defendant answered, admitting that it was a corporation as alleged, but denying all the other allegations *seriatim*, and for a further defense alleged: "(1) That, as it is informed and believes, a cattle car of a kind in constant use on its road was tendered to the plaintiff on his arrival at the town of Taylorsville, and refused by him. (2) That, as it is informed and believes, it was Sunday market in Charleston which plaintiff desired to reach, and this information is obtained partly from the sworn statement of plaintiff in his original complaint; and, as it is advised and believes, the law of South Carolina prohibits the sale or offering for sale of any property in said state on Sunday. (3) That plaintiff's cattle were shipped by defendant from Taylorsville within a reasonable time from their delivery at its depot." This answer was duly sworn to. Upon the trial the plaintiff offered in evidence the verified answer of the defendant in the original action, and afterwards the defendant put in evidence the original verified complaint of the plaintiff, which are set out in full in the record. Much other evidence was offered, to which there were many exceptions. At the close of the evidence the defendant asked in writing twenty-one special instructions, eight of which were refused, and exceptions entered by defendant; but only two (the second and twenty-first) seemed to be insisted upon by counsel in his brief for defendant. The second prayer for instructions was as follows: "If the jury believe the evidence of the plaintiff himself, he had in his mind at the time of making the contract the purpose to expose his cattle to sale on Sunday, and communicated this purpose to the defendant, and the contract, if made, was void, and the plaintiff is not entitled to recover." Instruction refused, and defendant excepted.

Mr. George F. Bason for appellant.

Messrs. George W. Bower and Strong & Stronach for appellee.

Davis, J., delivered the opinion of the court:

When this case was before us on the former appeal (108 N. C. 349), the court said that the judge below very properly declined to give the instruction that the "contract was based upon an illegal consideration, and was void, . . . as there is not the slightest illegality either in the consideration or promise. The consideration was the sum of \$53.50, and the promise was to transport the cattle so as to reach the city of Charleston on Saturday. We presume that the defendant intended to present the question as to the effect of the alleged illegal purpose of the plaintiff, but, as the point is not presented in the prayer for instruction, we do not feel at liberty to pass upon it in this appeal." The question which the court declined to pass upon because not presented by the prayer for instruction is now directly presented

by the prayer, but there is no issue to which the prayer for instructions is applicable. There was no objection to the issues framed, and none was tendered as to the purpose of the plaintiff with regard to the sale of cattle on Sunday, or of the knowledge of the defendant of his purpose; but there was evidence tending to show the plaintiff's illegal purpose to sell on Sunday, and that that purpose was communicated to the defendant. The jury were instructed at the request of the defendant that, "If the plaintiff had in his mind, at the time of making the alleged contract, the purpose to sell his cattle or expose them for sale in Charleston on Sunday, and communicated his purpose to the defendant, and the contract was made with this understanding, then it is void, and the plaintiff is not entitled to recover;" and we think this instruction was fully as liberal as the defendant was entitled to, bearing upon the illegality of the contract; and, though the question was not presented by any issue, we deem it proper to say that railroad companies are public carriers of passengers and freight, and they cannot exempt themselves from liability for damages by reason of the fact that freight is to be used for some illegal purpose at the point of destination or that the object of the passenger is to do some illegal act at the point of destination, even if the railroad company had knowledge of the illegal purpose, unless that illegal purpose was the consideration and inducement of the contract. The railroad company has no right to say to the passenger or to the shipper, "I will not transport you or your freight, for it is your purpose to do some unlawful act;" but, if it makes some special contract, not in the regular order of transportation,—as, for instance, to furnish a special train to passengers to go to a particular point to engage in a prize-fight,—the contract will be illegal and void, and no action could grow out of it. An illegal contract furnishes no ground, in law, of action; but the railroad is not exempt from liability for negligence, even though the purpose of the shipper or passenger be illegal, unless the illegal purpose enter into the consideration of the contract of transportation. The twenty-first prayer for instruction, which the court refused to give, was: "Plaintiff can recover nothing for the drift at Columbia, nor for his expenses there, and nothing for the drift at Taylorsville, except for such as would have occurred notwithstanding good care and attention." It is in evidence that the cattle were shipped, not under the contract for the breach of which this action is brought. The plaintiff himself testified, "I shipped my cattle on a written contract, different from the one first made." There is no allegation in the complaint of any breach of the written contract under which the plaintiff shipped his cattle, nor of any damage by reason of detention in Columbia. The written contract under which the cattle were shipped was made, according to the evidence, after the plaintiff reached Taylorsville, and after the breach of the parol contract, for the breach of which this action is brought, and his honor erred in refusing the last instruction.

Error.

NEW YORK COURT OF APPEALS.

First Case.

PEOPLE of the State of New York, *ex rel.*
George C. CARTER, *Appl.*,

v.

Frank RICE, *Respt.*

Second Case.

PEOPLE of the State of New York, *ex rel.*
Charles F. POND, *Appl.*,

v.

BOARD OF SUPERVISORS OF MONROE
COUNTY, *Respt.*

Third Case.

Hartley V. D. HORN, *Appl.*,

v.

BOARD OF SUPERVISORS OF ONEIDA
COUNTY, *Respt.*

(.....N. Y.....)

1. An extraordinary session of the Legislature called by the governor for that purpose is a session within the meaning of a constitutional provision requiring the alteration of the districts from which members of the Legislature are elected at the "first session after the return of every enumeration."
2. Judicial notice may be taken of the length of time ordinarily required to complete an enumeration of the inhabitants of a state.
3. Upon the omission of the Legislature to make an enumeration of the inhabitants and apportion the districts for electing members of the Legislature in the year fixed by the Constitution for that purpose, the duty rests upon each succeeding Legislature until it is performed; and an apportionment cannot be set aside as unauthorized although it was made seven years after the constitutional time.
4. The provision of the New York Constitution requiring the omission of colored persons not taxed from the number of inhabitants in apportioning senate districts, became inoperative when the Constitution was amended by striking out the provision limiting the liability of colored persons for taxes to those assessed upon real estate, and making the payment of taxes necessary to entitle them to vote; the plain intention of the people being to blot out all distinctions of a political nature between white and colored citizens.
5. Courts will not spend time in attempting to remedy errors in an apportionment of members of the Legislature among the inhabitants of the state which injure

no one and which raise nothing but abstract questions for adjudication.

6. The court will not, in the absence of evidence on the question, presume the existence in one election district of more persons of a certain class which has been unlawfully included in the enumeration upon which an apportionment of members of the Legislature was founded, than exist in other districts for the purpose of establishing injury to the inhabitants of such district as a basis for setting aside the apportionment.
7. Discretion as to the apportionment is vested in the Legislature by a constitutional provision that members of Assembly shall be apportioned by it among the several counties of the state "as nearly as may be, according to the number of their respective inhabitants," which the courts have no power to review unless it has been so abused as to clearly show an open and intended violation of the letter and spirit of the Constitution.
8. No abuse of the discretion vested in the Legislature as to the apportionment of members of Assembly is shown where each county has been given a member for every full ratio of representation which it contains and the only inequalities alleged are in the distribution of the remaining members to counties having a smaller surplus over the ratio than other counties have; at least where the reason for such action was not partizan and the fair inference is that it was absolutely necessary to secure the passage of the bill.
9. A Legislature cannot be charged with unfairness in distributing the remaining members of Assembly among the counties after all full ratios are provided for because it takes into account the losses sustained by the most populous counties by reason of the adoption of a certain ratio of representation rather than of some other more favorable to them, nor because it regards increases of population shown by the census.
10. The result which may follow from one construction or another of a statute or constitution is always a potent factor and is sometimes in and of itself conclusive as to the correct solution of the question.
11. That the effect of setting aside an apportionment Act would be to cause every subsequent Act to be brought before the courts for review which might happen at a critical time; to originate the greatest confusion as to an impending election with a possible total suppression of it; and at all events to continue in force an Act containing greater inequalities than the one attacked—is of itself sufficient to induce the court to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should it exercise such power.

NOTE.—For the recent decisions upon the subject of legislative gerrymanders, see *State, Adams County, v. Cunningham* (Wis.) 15 L. R. A. 561; *Giddings v. Blacker* (Mich.) *ante*, 402; *Houghton Co. Supra. v. Blacker* (Mich.) *ante*, 432; *McPherson v. Blacker* (Mich.) *ante*, 475.

In considering the various decisions it will be noticed that the Wisconsin Constitution does not contain the clause "as nearly as may be" (see *State*, 16 L. R. A.

Lamb, v. Cunningham (Wis.) 17 L. R. A. 145), which clause found in the New York Constitution is in the above case relied upon to some extent to establish the existence of discretion in the Legislature. On the other hand, the Michigan Constitution does contain such clause, (see *Houghton Co. Supra. v. Blacker, ante*, 432), but no importance seems to have been attached to that fact.

12. Former apportionment Acts may be examined by the court when it is asked to set aside such an Act, for the purpose of finding a valid one which may be declared in force.

(*Andrews and Finch, JJ., dissent from propositions 7-12.*)

(October 12, 1892.)

A PPEAL by relator from an order of the General Term of the Supreme Court, Third Department, denying a motion for a peremptory writ of mandamus to require the secretary of state to issue election notices for the election of members of Assembly pursuant to the Act of 1879, disregarding the Act of 1892. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry M. Love, with Messrs. Risley & Robinson, for appellant:

Any citizen has the right to apply for the relief asked.

When the action or non-action of a public officer or board is in violation of any provision of the Constitution or of the law, every citizen's rights are violated.

People v. Collins, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 844; *People v. Rice*, 129 N. Y. 461; *People v. Sullivan County Supra*. 56 N. Y. 249; *People v. Rice*, 14 L. R. A. 643, 129 N. Y. 448; *People v. Halsey*, 37 N. Y. 844; *Pond v. Monroe County Supra*. opinion of Rumsey, J.

The Apportionment Act was not passed at the "first session after the return" of the enumeration, and is invalid and unconstitutional.

The Constitution of 1846, art. 10, § 6, says that the political year and legislative term shall begin on the first day of January, and those words are still in use.

A definite limit of life for each and every Legislature is clearly fixed, and it cannot be lengthened or shortened by the exercise of any power, save that of the people.

The Constitution has granted the power of adjournment, which means that the single session, or life, may be suspended, but is not destroyed.

People v. Fancher, 50 N. Y. 288.

This period of existence can be termed nothing else than a session, of which all sittings within the year are mere parts.

Ever since 1777, the Acts of each Legislature have been known as the "Session Laws" of the particular year, from which it must be plain that the life of each Legislature is a "session," nothing more or less.

By the established rules of interpretation, the meaning of the words is to be fixed by their general use and meaning, which has been shown very plainly.

1 Story, Const. § 406; *People v. Wemple*, 125 N. Y. 485.

It certainly is logical, and is in strict line with the established principles of American Constitutions, that the people shall appoint their own agents, and that the body which enacts a law cannot secure for itself any advantages which may arise from its execution.

To protect the people against any such abuse of power is the intention of the Constitution.

Lanning v. Carpenter, 20 N. Y. 448.

Any enactment, contrary to the purpose, ex-16 L. R. A.

pressed or necessarily implied, is as clearly void as if in express terms forbidden.

People v. Albertson, 55 N. Y. 50, and *nota*, 55.

It is by no means a correct rule of interpretation, to construe the same word in the same sense, wherever it occurs in the same instrument.

1 Story, Const. § 454.

There can be no comparison made between the clause in question in this case and that providing for constitutional amendments, and the phrase in question must be read only as it stands, according to the plain rules of construction, and in view of the sense and intention in which they were adopted.

Newell v. People, 7 N. Y. 9.

The enumeration and the apportionment based upon it are unconstitutional and void because "persons of color not taxed" are included.

N. Y. Const. art. 3, § 4.

Under the law the plain sense was, and is, that persons of color not taxed upon \$250 worth of freehold estate are to be excluded.

Nothing can be found in the laws of this state which changes this meaning, or prescribes different rules of interpretation. If the law has not this meaning, it is meaningless.

1 Story, Const. § 407; *People v. Potter*, 47 N. Y. 875; *People v. Wemple*, 125 N. Y. 485.

No arguments based upon supposed inadvertence, possible contrary intention, or subsequent change of mind, as claimed in opposition, have any place here, nor have they any right of consideration.

1 Story, Const. §§ 426, 427; *People v. Wemple, supra*.

The business of the courts is with the "text of the fundamental law as they find it."

Rumsey v. People, 19 N. Y. 41; *People v. Draper*, 15 N. Y. 546.

The court cannot dispense with a constitutional or statutory rule because it appears that the policy upon which it was established has ceased.

Brown v. Clark, 77 N. Y. 869.

If any Act of the Legislature violates the Constitution, it is a nullity, and as if it had never been. No rights can be acquired by it and no duty imposed.

Pond v. Monroe County Supra. supra; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274.

The Constitution plainly directs (art. 3, § 4), that the senate districts shall be altered according to inhabitants, excluding "persons of color not taxed."

But the enumeration of 1892 contains no such exception, nor does it show the number of such inhabitants, but it states merely "inhabitants," "citizens," or "aliens."

The court may take judicial notice of the fact there are numbers of such persons of color not taxed.

Kernits v. Long Island City, 50 Hun, 428; *Howard v. Moot*, 64 N. Y. 262; *New York v. Sands*, 7 Cent. Rep. 268, 105 N. Y. 210; *Pond v. Monroe County Supra. supra*.

Quite plainly, then, the Legislature passed a law which goes beyond the limits set by the people in the Constitution.

The question simply is, Which is supreme? a question which has many times been answered to the effect that no Legislature can amend the Constitution; which would be the effect here, if the Acts in question, or either of them, be held constitutional.

1 Story, Const. §§ 409, 418, 448, 451, 458; *Taylor v. Porter*, *supra*; *People v. Draper*, 15 N. Y. 532; *Cooley*, Const. Lim. 168 *et seq.*; *Rumsey v. People*, 19 N. Y. 41; *Kinney v. Syracuse*, 80 Barb. 849, affirmed 8 Keyes, 110; *People v. Albertson*, 55 N. Y. 50, *note*, 55; *People v. Wemple*, 125 N. Y. 485.

The provisions of the 14th and 15th Amendments to the Federal Constitution are not in point, and our laws are not subversive of any of their enactments.

The law does not deny to that class the right of citizens to vote, but merely excludes them from the count which fixes the quantity of representation.

All powers not delegated to the Federal government are reserved to the states, and no provisions of national law forbid any such action by our own state.

U. S. Const. § 8, Amend. arts. 10, 14, 15; *Slaughter House Cases*, 88 U. S. 16 Wall. 36, 21 L. ed. 394; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615.

The Constitution ordains in art. 8, § 4, that the senate districts shall be so altered that "each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, and persons of color not taxed."

In art. 8, § 5, it is ordained that "the members of Assembly shall be apportioned, as nearly as may be, according to the number of inhabitants."

The apportionment as made is not "as nearly as may be" in accord with the number of citizens.

The language means that when the enumeration shall have been taken—the apportionment shall be made as nearly equal as can be done, under those facts.

Newell v. People, 7 N. Y. 9.

The highest power and law of the state has fixed the rule for increasing representation according to increased population, to be the law forever.

1 Story, Const. § 505a; *People v. Potter*, 47 N. Y. 375; *People v. Wemple*, 125 N. Y. 485; *People v. Fancher*, 50 N. Y. 288.

The principle that representation in a government by the people shall be equal, or as exactly so as possible, has been so often established and recognized that it has become almost axiomatic.

Kinney v. Syracuse, 80 Barb. 849, affirmed, 8 Keyes, 110.

In formulating the Constitution, the people laid down the rule that representation should be as nearly equal as possible.

No provision, or hint of authority, was made for any elaborate system of computation, which, to an indefinite extent, changes the fraction of individual authority.

To change the ratio overthrows the entire system of popular representation, and is a flagrant violation of the highest law.

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1 Story, Const. §§ 684, 678 *et seq.*

But no one can be so bold as to claim that the Legislature is left free to follow fancy or partisan motives; without regard to any standard of propriety.

Matter of discretion is but another name for matter of judgment.

People v. Collins, 19 Wend. 56.

Discretion does not mean license, and the facts in this case prove that the Legislature departed widely from the rule of action laid down in the Constitution.

State v. Cunningham (Wis.) 15 L. R. A. 561; *Giddings v. Blacker* (Mich.) *ante*, 402. See also *Houghton County Supra. v. Blacker* (Mich.) *ante*, 432.

Courts have no political maxims and no line of policy to further or advance. Their only duty is the humble one of construing the Constitution by the language it contains.

People v. Draper, 15 N. Y. 546; *Rumsey v. People*, 19 N. Y. 41.

The peculiar duty of the judiciary is to exercise the power here invoked.

1 Story, Const. 3d ed. §§ 376, 398.

It is not necessary to show an express prohibition upon the Legislature from acting as it did.

People v. Albertson, 55 N. Y. 50; *Newell v. People*, 9 N. Y. 119.

Mr. Simon W. Rosendale, Atty-Gen., for respondent:

The enumeration of the inhabitants of the state on which the apportionment was founded, was constitutional and legal, notwithstanding the fact that it was taken in the year 1892, and not in a year the number of which ended with the figure "5."

Where a statute or written constitution provides that an act shall be done and specifies a time for its performance, such specification is merely directory and not mandatory, and the act may be performed at any other time.

Smith v. Jones, 1 Barn. & Ad. 828; *Ex parte Heath*, 8 Hill, 49; *People v. Chenango County Supra.* 8 N. Y. 380. See also *Rumsey v. People*, 19 N. Y. 41; *People v. Allen*, 6 Wend. 486, and cases cited; *People v. Tompkins*, 64 N. Y. 57; *Metcalf v. New York*, 17 N. Y. 8. R. 97; *State v. Smith*, 67 Me. 328; *State v. Camden*, 39 N. J. L. 620; *Re Census Superintendent*, 1 New Eng. Rep. 156, 15 R. I. 614; *People v. Jones*, 8 Cent. Rep. 763, 106 N. Y. 380; *People v. New York Board of Police*, 46 Hun, 296, affirmed, 107 N. Y. 285.

The same general rules which govern the construction and interpretation of statutes and written instruments generally apply to, and control in, the interpretation of written constitutions.

People v. Fancher, 50 N. Y. 288, citing *Story*, Const. § 400; *McCluskey v. Cromwell*, 11 N. Y. 601; *People v. Potter*, 47 N. Y. 375; *People v. Angle*, 12 Cent. Rep. 759, 109 N. Y. 564; *People v. Wemple*, 125 N. Y. 485.

The duty to pass such an Act is a continuing one from the time it is constitutionally devolved upon the Legislature until performed.

State v. Cunningham (Wis.) 15 L. R. A. 561.

The Apportionment Law being Laws of 1892, chap. 397, is not rendered invalid, because passed at an extraordinary session of the Legislature, held in 1892, subsequent to the return of the enumeration.

1. The provision as to time is merely directory.

Rumsey v. People, *supra*. See *State v. Cunningham*, *supra*.

2. The law was passed at the first session of the Legislature after the return of the enumeration.

An extra session of the Legislature is as much a "session" of that body as a regular session. It is denominated in the Constitution as a session.

N. Y. Const. art. 4, § 4.

It has been treated as a "session" by this court.

People v. Fancher, 50 N. Y. 288.

Separate and several sessions are distinctly contemplated by the Constitution. It speaks of final adjournment of the Legislature—thus referring to the close of the session.

N. Y. Const. art. 4, § 9.

A final adjournment marks the end of a session, and limits the time for action by the executive on bills.

Ibid.; *Hequembourg v. Dunkirk*, 49 Hun. 550.

In Wisconsin, where the provisions of the Constitution as to apportionment are in substance the same as our own, its court of last resort said: "The plain intent of this provision is to enable a new apportionment to be made at the earliest practicable period after the enumeration, to the end that the change in representation thereby required shall readily become effective, and not be unreasonably delayed."

State v. Cunningham (Wis.) 15 L. R. A. 561.

If it had been intended to prohibit action during the legislative term of the year in which the enumeration was made, the Constitution would have so stated.

As to proposed amendments to the Constitution, they are to be "referred to the Legislature to be chosen at the next election of senators."

N. Y. Const. art. 18, § 1.

If the Constitution had intended that this Act could be passed only at the next "regular" or "annual" session, or by the next Legislature, it would have said so.

III. Const. 1870, art. 4, § 18; *People v. Lipincott*, 64 Ill. 256.

The objection that the senate apportionment is unconstitutional because, in estimating the number of inhabitants in the senate districts, the Legislature did not, and were not furnished with any information whereby it could, exclude from representation "persons of color not taxed," is not well taken.

1. The objection is unavailing to the appellant, as the law is unquestionably valid as to assembly districts, so far as this point is concerned.

The parts of the Act relating to the Senate and Assembly are separable.

Where part of the law is in conflict with the Constitution, and that part is entirely separate from the residue so that other portions of the law can be enforced without reference to it, then only the unconstitutional part will be condemned.

Wynehamer v. People, 18 N. Y. 442; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Penniman's Case*, 108 U. S. 714, 16 L. R. A.

26 L. ed. 602; *Unity v. Burrage*, 108 U. S. 459, 26 L. ed. 409; *Trademark Cases*, 100 U. S. 92, 25 L. ed. 551; *Baldwin v. Franks*, 120 U. S. 679, 30 L. ed. 757.

2. There is no such classification of inhabitants now recognized in the Constitution of this state as "persons of color not taxed."

By the amendment of the Constitution of the state of New York in 1874 that classification was expunged.

The words in section 4 were, in effect, repealed and rendered nugatory by the adoption of the amended section 1 of article 2.

Any provision will be regarded as revoked and repealed by subsequent repugnant enactment. It was repealed by implication.

Murdock v. Memphis, 87 U. S. 20 Wall. 590, 22 L. ed. 429; *Lyddy v. Long Island City*, 5 Cent. Rep. 927, 104 N. Y. 218.

The provisions as to "persons of color not taxed" has been rendered nugatory by the Amendments to the Constitution of the United States.

Slaughter House Cases, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Presser v. Illinois*, *supra*; *Strauder v. West Virginia*, 100 U. S. 305, 25 L. ed. 664; *People v. King*, 1 L. R. A. 298, 110 N. Y. 416; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

The practical construction of the provision as to "persons of color not taxed" and the acquiescence therein for a long period, by all the public authorities, ought to control the court.

Rumsey v. People, 19 N. Y. 42; *People v. Dayton*, 55 N. Y. 367.

The words "as nearly as may be" are words conferring discretion; they are not limitations on the power of the Legislature.

See *Indianapolis & St. L. R. Co. v. Horst*, 98 U. S. 300, 23 L. ed. 901; *Emma Silver Min. Co. v. Park*, 14 Blatchf. 414; *Beardsley v. Little*, 14 Blatchf. 105; *Reedy v. Smith*, 42 Cal. 251; *Opinion of Justices*, 18 Me. 460; *Prouty v. Stover*, 11 Kan. 261.

An inquiry into the comparative population of the districts would involve an investigation of facts, outside of any document or record, of which judicial notice can be taken, and such an investigation the courts will not tolerate.

People v. Durston, 7 L. R. A. 715, 119 N. Y. 569; *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 345; *Rumsey v. People*, 19 N. Y. 42; *People v. Albertson*, 55 N. Y. 50; *Re New York Elev. R. Co.* 70 N. Y. 827; *Amy v. Watertown*, 130 U. S. 819, 32 L. ed. 952.

Whatever the motive of the Legislature the legal presumption is that it was a proper one.

People v. Draper, 15 N. Y. 532; *People v. Durston*, *supra*.

The act of altering the senate districts and the apportioning members of the Assembly by the Legislature is not within the power of the judiciary to review.

The legislative power of the state is vested in a Senate and Assembly.

N. Y. Const. art. 3, § 1.

The separation of the legislative, executive, and judicial departments is enjoined just as imperatively as though by express mandate.

Article by William Hamilton Cowles, 81 Am. L. Rev. 436.

All legislative power is vested in the Legislature, and all judicial power in the courts, except as otherwise expressly provided in the several Constitutions.

Hayburn's Case, 2 U. S. 2 Dall. 410, 1 L. ed. 496, note; *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Cooley*, Const. Lim. 6th ed. 192; *People v. Flagg*, 46 N. Y. 401.

The power of dividing the state into senate districts and apportioning members of the Assembly is essentially a political one.

The courts have no power in political questions.

Luther v. Barden, 48 U. S. 7 How. 1, 12 L. ed. 581; *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; *Montague v. Hayes*, 10 Gray, 611.

The Legislature having acted upon the facts, the courts will not review.

Rumery v. People, 19 N. Y. 42; *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 845, citing *People v. Albertson*, 55 N. Y. 50; *Re New York Elev. R. Co.* 70 N. Y. 327; *People v. Durston*, 7 L. R. A. 715, 119 N. Y. 569; *Amy v. Watertown*, 180 U. S. 819, 32 L. ed. 952; *De Camp v. Eteland*, 19 Barb. 81; *Steenerson v. Colgan*, 14 L. R. A. 459, 91 Cal. 649, 25 Am. St. Rep. 280.

To declare the apportionment void because not equitably made would be, in effect, to declare that the apportionments should be made by the courts.

The question may be safely dismissed by the judiciary, for unlike most instances where its power is invoked, because there is no other relief, there is here a remedy.

The remedy which the Constitution provides by the apportionment for frequent renewals of legislative bodies, is far more efficacious than any which can be afforded by the judiciary.

People v. Draper, 15 N. Y. 532, cited in *Waterloo Woolen Mfg. Co. v. Shanahan*, *supra*.

The court ought not to declare the Act unconstitutional.

Before the court will deem it their duty to declare an Act of the Legislature void, a case must be presented in which there can be no rational doubt.

Ex parte McColium, 1 Cow. 550.

If the Act can be upheld upon any views of necessity or public expediency which the Legislature may have entertained, the law cannot be challenged in the courts.

People v. Draper, 15 N. Y. 532.

Improper motives cannot be attributed to the Legislature in any law for the government of the state.

Amy v. Watertown, 180 U. S. 819, 32 L. ed. 952; *People v. Orange County Supra*, 17 N. Y. 235; *Com. v. McWilliams*, 11 Pa. 61; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Metropolitan Board of Excise v. Barrie*, 84 N. Y. 657; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1, quoted with approval in *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 845.

SECOND CASE.

APPREAL by relator from an order of the General Term of the Supreme Court, Fifth 16 L. R. A.

Department, affirming an order of a Special Term for Monroe County denying a motion for mandamus to compel the Board of Supervisors of Monroe County to proceed to apportion the Members of Assembly among the inhabitants of the County according to the directions of the Law of 1892. *Reversed*.

The facts sufficiently appear in the opinion.

Mr. C. D. Kiehel, for appellant:

The writ of mandamus is the proper remedy in this case sued out at the relation of a citizen and elector of the city of Rochester.

It is not necessary to show that the relator has any private or peculiar interest in the matter.

People v. Sullivan County Supra, 56 N. Y. 249; *People v. Halsey*, 87 N. Y. 344; *People v. Rice*, 14 L. R. A. 643, 129 N. Y. 449, 129 N. Y. 461.

The court has the power to compel the board of supervisors to perform the duties required of them in section 3 of the Apportionment Act, chap. 397 of the Laws of 1892.

People v. Chenango County Supra, 8 N. Y. 330; *People v. Ulster County Supra*, 34 N. Y. 268; *People v. Schiellain*, 95 N. Y. 184.

The enumeration taken pursuant to Laws of 1892, chap. 9, was constitutional.

The state Constitution, art. 3, § 4, provides: "An enumeration of the inhabitants of the state shall be taken under the direction of the Legislature in the year 1855 and at the end of every ten years thereafter."

If the Constitution requires that this shall be done at the time and in the manner specified without expressly declaring what shall be a consequence of noncompliance, the provision becomes merely directory.

Endlich, Interpretation of Statutes, § 481; *People v. Chenango County Supra supra*; *McPherson v. Leonard*, 29 Md. 377; *Hill v. Boyland*, 40 Miss. 618; *Miller v. State*, 3 Ohio St. 475.

The Apportionment Act was not passed at the same session during which said enumeration was returned, but at the first session after the return thereof.

People v. Fancher, 50 N. Y. 288; *State v. Cunningham* (Wis.) 15 L. R. A. 561.

The exercise of the discretion reposed in the governor to call an extraordinary session was legal and constitutional, and his decision in this respect is final and cannot be reviewed by the courts.

Cooley, Const. Lim. 54; *Opinion of the Court*, 49 Mo. 216.

The Apportionment Act is not unconstitutional upon the ground that it is based upon an enumeration prepared and reported by the secretary of state to the Legislature in which "persons of color not taxed" are included.

The 15th Amendment removed this restriction and prevented the states from giving preference to one citizen of the United States over another, on account of race, color, or previous condition of servitude.

United States v. Reese, 92 U. S. 214, 23 L. ed. 568; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

A state is not an independent, separate, political organization, and does not possess in itself inherent and absolute powers of legislation, but the functions of its rulers are not only lim-

ited by its local Constitution, but by that of the United States.

Pom. Const. Law, § 40; *People v. Snyder*, 41 N. Y. 408.

The apparent inequalities in the apportionment of members of Assembly and senators is a question of fact within the discretion of the Legislature and cannot be reviewed by this court.

N. Y. Const. art. 3, § 4; *Arnold v. Rees*, 18 N. Y. 57; *Rumsey v. People*, 19 N. Y. 48; *Niagara County Suprs. v. People*, 7 Hill, 505; *People v. Draper*, 15 N. Y. 533; *Prouty v. Stover*, 11 Kan. 261.

Mr. W. A. Sutherland, for respondent:

Monroe County was defrauded in the apportionment of 1892, and has the right to insist that the old apportionment shall stand until a new one shall do her justice.

Houghton County Suprs. v. Blacker (Mich.) ante, 432.

The court will not by mandamus compel the supervisors to comply with a direction of the Legislature which leads to any violation of the Constitution.

People v. State Canvassers, 14 L. R. A. 646, 129 N. Y. 860.

Under the census of 1892, Monroe County is absolutely entitled to four assemblymen.

The Constitution says (art. 3, § 5): "The members of Assembly shall be apportioned among the several counties of the state . . . as nearly as may be, according to the number of their respective inhabitants."

There is no room here for an elastic discretion.

Webster pointed out in his great argument in the case of *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 327, 4 L. ed. 582, that "the question of constitutional power can hardly be made to depend on a question of more or less."

The Constitution has not given discretion to the Legislature, nor has it empowered the courts to inquire into the wisdom of any other basis of representation than that of equality.

To give, as the apportionment of 1892 does, four to the smaller county and three to the larger, is just as clear a violation of the Constitution as if the disproportion were greater.

Kinney v. Syracuse, 80 Barb. 849, affirmed, 8 Keyes, 110; *Giddings v. Blacker* (Mich.) ante, 402; *Houghton County Suprs. v. Blacker* (Mich.) ante, 432; *State v. Cunningham* (Wis.) 15 L. R. A. 561.

The court of last resort in the state of North Carolina held in 1875 that even in the revision of the charter of a city, the arrangement of ward lines must be had with reference to equality of representation in the board of aldermen.

People v. Canady, 73 N. C. 198; *Darby v. Wilmington*, 76 N. C. 183.

The apportionment is void because it was had at the same session which provided for, and which received, the returns from the enumeration, and hence, before the "first session after the returns of" the enumeration.

N. Y. Const. art. 3, §§ 4, 5.

After the Legislature had adjourned, its members could not convene again in a lawful body without command of the governor, "under the power conferred upon him to convene the Legislature on extraordinary occasions, and 16 L. R. A.

if in session, they could not be convened by the governor in another session."

People v. Fancher, 50 N. Y. 290.

The word "session" as here used means the entire period covered by the life of one Legislature, to wit, one calendar year.

N. Y. Const. art. 10, § 6, art. 3, § 11.

Beginning with the adoption of the first Constitution, 1777, all of the doings of any Legislature in any year have been described as the acts of one session, and are known as the "Session Laws" of that particular year.

Counting the sittings of the Legislature for each legislative year as making one session, the recent session would be the 115th session.

So it was declared to be by the presiding officers of the Senate and Assembly when those bodies respectively adjourned *sine die*, April 21.

The Legislature met more than once in several legislative years. The laws passed in each of these legislative years, as in every other legislative year from 1777 to the present time, were published under the direction of the Legislature itself, and the entire legislation of each legislative year was designated in each instance as the legislation of a single session.

Prior to 1821 the same Legislature which directed the census could have rearranged the districts.

The Constitution of 1777 as amended in 1801, said at art. 4, "that upon the return of every such census, the Legislature shall apportion," etc.

But by 1821 the people had evidently concluded that an election should intervene between the return of the census and the Act of redistricting, so that the people could speak directly on the subject.

The Constitution of 1821 therefore says, as does that of 1846: "An apportionment of members of Assembly shall be made by the Legislature, at its first session after the return," etc.

The Legislature of 1892 attempted to cheat the people out of their reserved prerogatives, that of electing assemblymen, reflecting the wishes of the people after a study of the census returns.

The governor was not able to create a new Legislature by reconvening the old one.

The Legislature which adjourned *sine die* April 21 was the same Legislature when it assembled April 25, and its doings on both dates were the Acts of the Legislature at its 115th session.

Suppose that the governor should be opposed to any reapportionment. He could recall the Legislature in a message, making no mention of reapportionment, and under art. 4, § 4, the Legislature would be prohibited from doing that which art. 3, §§ 4, 5, command to be done at that very time.

Article 4, § 4, provides that the governor "shall communicate by message to the Legislature at every session the condition of the state."

It has never been held obligatory upon the governor to transmit a formal state paper to the Legislature when sitting on "an extraordinary occasion;" and no such message greeted the 115th session when it reconvened April 25, 1892.

See *Lanning v. Carpenter*, 20 N. Y. 453;

Smith v. People, 47 N. Y. 341; *Kinney v. Syracuse*, 30 Barb. 867, 8 Keyes, 110.

By naming the time when the Legislature shall apportion, the Constitution by implication forbids the Legislature from making an apportionment until that date arrives.

An apportionment of representatives is a mere ministerial act, which does not inhere in a legislative body. It is an act which can be performed as well by any ministerial officer.

State v. Campbell, 48 Ohio St. 485.

It does not partake of the nature of legislative power. To apportion is not to enact a law; it is only to exercise a limited conferred power.

Cooley, Const. Lim. p. 64; *Opinion of Justices*, 18 Me. 458.

It is not true that the inhibitions of the Constitution must always be expressed. They are equally effective when they arise by implication.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *McKoon v. Devries*, 3 Barb. 196.

When a Constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way.

State v. Barnes, 24 Fla. 29; *People v. Albertson*, 55 N. Y. 50.

The Apportionment of 1892 was void because not based upon a constitutional census or enumeration.

It (Constitution) regards the apportionment as a continuing act or process, beginning with the enumeration of voters in the several towns and wards, and ending with the assignment of the towns and wards to senatorial districts.

Opinion of Justices, 142 Mass. 604.

The act of apportionment including the preliminary census or enumeration, is not an act of legislation, which the Legislature may take up at its pleasure. An apportionment is the act of the people by their agents, whereby the people ordain how their voice shall be heard through the Legislature.

Cooley, Const. Lim. p. 90.

The people had a right to, and did, say that a census should be taken at stated intervals, no matter what party would reap benefit from a reapportionment, and they also had the right to, and did, prohibit the taking of a census at any other time.

When a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way.

State v. Barnes, 24 Fla. 29; Cooley, Const. Lim. p. 78; *People v. Lawrence*, 86 Barb. 177; *Brown v. Goben*, 129 Ind. 118; *State v. Cunningham* (Wis.) 15 L. R. A. 561.

The Constitution expressly prohibits any reapportionment except one based upon a census taken in a year ending with the figure 5.

N. Y. Const. art. 3, § 5.

This prohibition is addressed to the Legislature as well as to the boards of supervisors.

Kinney v. Syracuse, 8 Keyes, 110; *Opinion of Justices*, 18 Me. 458; *People v. Morrell*, 21 Wend. 563; *Newell v. People*, 7 N. Y. 9; *People v. Albertson*, 55 N. Y. 50.

The senate apportionment is unconstitutional because in estimating the number of inhabitants in the new senate districts, the Legislature did not and were not furnished with any information whereby they could exclude from 16 L. R. A.

the basis of representation "persons of color not taxed."

If the apportionment of 1892 be not unconstitutional, a legislature and governor elected in 1894 may redistrict the state, without regard to any of the restrictions of the Constitution, and may place disproportionate power in the hands of a minority of the people.

It will not do to say that a Legislature might not, or would not go so far.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 327, 4 L. ed. 582.

THIRD CASE.

APPEAL by relator from an order of the General Term of the Supreme Court, Fourth Department, affirming an order of the Special Term, entered in the office of the clerk of Oneida County denying a motion for a peremptory mandamus to compel the Board of Supervisors of Oneida County to divide that county into assembly districts in accordance with the provisions of the Law of 1892. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. H. J. Cookinham, for appellant:

Mandamus is the proper proceeding to compel a board of supervisors to perform a duty required by law.

People v. Chenango County Supra, 8 N. Y. 330; *People v. Ulster County Supra*, 84 N. Y. 268; *People v. Schellein*, 95 N. Y. 184.

A peremptory mandamus may issue in the first instance where the applicant's right to the writ depends upon questions of law only, and notice has been served upon the defendant.

N. Y. Code Proc. § 2070; *People v. Rome, W. & O. R. Co.* 4 Cent. Rep. 197, 108 N. Y. 95.

A citizen of the county has sufficient interest in the performance of a duty imposed upon the board of supervisors to institute proceedings for mandamus.

People v. Sullivan County Supra, 56 N. Y. 249; *People v. Halsey*, 87 N. Y. 344; *People v. Rice*, 14 L. R. A. 643, 129 N. Y. 449.

The Act known as chapter 5 of the Laws of 1892, which provides for an enumeration of the inhabitants of the state, is constitutional.

The constitutional requirement that an enumeration shall be taken in the year 1855 and at the end of every ten years thereafter is not mandatory, but only directory.

Rumsey v. People, 19 N. Y. 41.

When a statute requires that something shall be done, or that something shall be done in a particular manner, but does not provide what shall be the consequences if it is not done as directed, such statute is directory only.

People v. Cook, 14 Barb. 259, 8 N. Y. 67; *Ex parte Heath*, 8 Hill, 42; *People v. Chenango County Supra*, *supra*.

There can be no implied limitation to the powers of the Legislature.

Bank of Chenango v. Brown, 36 N. Y. 467; *Re Thirty-Fourth Street R. Co.* 3 Cent. Rep. 805, 102 N. Y. 343; *People v. New York Board of Police*, 9 Cent. Rep. 727, 107 N. Y. 235; *People v. Tompkins*, 64 N. Y. 53; *People v. Allen*, 6 Wend. 486.

The report of the enumeration of inhabitants made by the secretary of state to the Leg-

islature, known as Senate Document No. 60, furnished the proper evidence upon which to act in fixing the senate districts and apportioning members of Assembly among the counties of the state.

Lanning v. Carpenter, 20 N. Y. 448; *De Camp v. Boeland*, 19 Barb. 81.

It was not necessary to make a separate enumeration of colored citizens not taxed, for the reason that this requirement of the state Constitution is in conflict with the Constitution of the United States.

Neal v. Delaware, 108 U. S. 870, 26 L. ed. 587; *Strauder v. West Virginia*, 100 U. S. 803, 25 L. ed. 664; *People v. King*, 1 L. R. A. 298, 110 N. Y. 416.

A statute composed of different parts and referring to different subjects may be in part constitutional and in part unconstitutional.

Wynehamer v. People, 13 N. Y. 378; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 877; *Unity v. Burrage*, 108 U. S. 447, 26 L. ed. 405.

The words of a statute, and by this is meant the Constitution, if in common use, are to be taken in their natural, plain, and ordinary signification and import.

1 Kent, Com. 12th ed. 363; *Potter's Dwarr. Stat.* 656; *People v. Potter*, 47 N. Y. 875.

No technical words are used in the Constitution, in regard to the time when the Legislature should pass an apportionment bill. The words are: "And the said districts shall be so altered by the Legislature at the first session after the return of every enumeration."

The natural, plain, obvious, and ordinary signification and import of these words is that the apportionment shall be made at the first session of the Legislature after "the return of every enumeration," whether such session be an annual or extraordinary session.

As the power is conferred upon the governor to convene the Legislature, it follows, as a necessary conclusion, that he must determine when the extraordinary occasion arises which calls upon him to exercise this power.

Opinion of the Court, 49 Mo. 215.

The governor had the right to issue his proclamation convening the Legislature in extraordinary session before the annual session of 1892 had terminated.

People v. Fancher, 50 N. Y. 288.

The court cannot say that the apportionment bill is unconstitutional, for the reason that the division of the state into senatorial districts was unfairly made. This Act of the Legislature is the determining of a question of fact, and is not reviewable by the court.

Rumsey v. People, 19 N. Y. 41; *People v. Lawrence*, 86 Barb. 177; *United States v. Williams*, 5 McLean, 188; *People v. Durston*, 7 L. R. A. 715, 119 N. Y. 569.

The court cannot look outside of the statute for a fact to determine whether the statute is constitutional or not.

Re New York Elec. R. Co. 70 N. Y. 827.

The Act making apportionment is constitutional although one district contains more inhabitants than another. Some discretion must be left to the Legislature.

Prouty v. Storer, 11 Kan. 261; *Opinion of Justices*, 18 Me. 460.

All intendments must be taken in favor of 16 L. R. A.

the statutes; and "before a court will deem it its duty to declare an Act unconstitutional, a case must be presented in which there is no rational doubt."

Ex parte McCollum, 1 Cow. 550; *Rich v. Flanders*, 39 N. H. 804; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210; *People v. Briggs*, 50 N. Y. 553; *Kerrigan v. Force*, 68 N. Y. 881; *Speer v. School Directors*, 50 Pa. 150; *Baltimore v. State*, 15 Md. 876.

The court will not impute to the Legislature corrupt or improper motives, but it must be taken for granted that the Legislature always acts with good motives and for the best interest of the public.

People v. Draper, 15 N. Y. 532; *Amy v. Wattertown*, 130 U. S. 319, 32 L. ed. 953.

Messrs. J. L. Sayles, W. E. Scripture and D. F. Searle, for respondent:

The Legislature has not the inherent power to take an enumeration or make an apportionment. The sovereign people, and not their servants, determine the number and location of their representatives. And it is no part of "legislative power" to add to or take from that number, or in any manner change the representation. The legislative power we understand to be the authority under the Constitution to make laws and to alter or repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed.

Cooley, *Const. Lim.* p. 90.

The Legislature, in the absence of an express grant, has no power to subject the citizen to the inquisitorial annoyance necessarily attendant upon the taking of a census.

People v. Webb, 23 N. Y. S. R. 524; *Kilbourn v. Thompson*, 108 U. S. 168, 26 L. ed. 877; *People v. Keeler*, 1 Cent. Rep. 157, 99 N. Y. 477.

The Legislature is a creature of the Constitution.

N. Y. Const. art. 8.

It has no power except that which is given by the Constitution.

N. Y. Const. art. 8.

All Acts of the Legislature in contravention of the Constitution, or not within the limit of its authority, are absolutely void.

People v. Allen, 42 N. Y. 404; *People v. Brooklyn Board of Education*, 18 Barb. 400; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Lanning v. Carpenter*, 20 N. Y. 447; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 889.

The Act of the Legislature requiring the board of supervisors to meet on the third Tuesday of July, 1892, and divide the county of Oneida into two assembly districts, known as chapter 897 of the Laws of 1892, is unconstitutional and void.

The alteration of the senate and assembly districts therein made was not based upon an enumeration of the inhabitants taken in conformity with section 3, article 4, of the Constitution which requires such enumeration. "In the year 1855, and at the end of every ten years thereafter."

The practical construction given by the Legislature to a constitutional provision and for many years so accepted and acted upon by the executive and administrative departments, has almost the force of a judicial exposition.

People v. Dayton, 55 N. Y. 367.

Pursuant to the first Constitution, the Legislature provided for the taking of a census in the year 1790.

N. Y. Laws 1790, chap. 7.

And at irregular intervals afterwards up to 1825 the census was taken and Apportionment Acts passed.

N. Y. Laws 1795, chap. 11, 1796, chap. 19.

Pursuant to the Constitution of 1821, the Legislature of 1825 enacted a general law for the enumeration of that year and at the end of every ten years thereafter.

N. Y. Laws 1825, chap. 100.

In 1835 the Legislature amended the Law of 1825 and took the enumeration under its provisions as amended.

N. Y. Laws 1835, chap. 40.

In 1845 the Legislature repealed the previous laws and enacted a new general statute for taking an enumeration in that year and at the end of every tenth year thereafter.

N. Y. Laws 1845, chap. 140.

In 1855 no enumeration was taken. Whatever the reason for the omission may have been it could not confer upon any other Legislature the power to take the enumeration at some other time than at the end of the decade.

Lanning v. Carpenter, 20 N. Y. 453; *DeCamp v. Ebeland*, 19 Barb. 87, 102.

That which the Constitution says shall remain unaltered cannot be lawfully altered either directly or indirectly.

Kinney v. Syracuse, 3 Keyes, 111, 80 Barb. 849.

The apportionment was in violation of the constitutional provision that such apportionment shall be "at the first session after the return of every enumeration."

DeCamp v. Ebeland, and *Lanning v. Carpenter*, *supra*.

The enumeration is to be taken and a return thereto made under the direction of the Legislature at the end of the decade, and the apportionment is to be made at the next session thereafter. The members of the different Legislatures understood the meaning to be as we contend. The enumeration was taken in 1825. An apportionment was made at the regular session in 1826. So in 1835, 1836, 1845, 1846, 1855, 1856, 1865, 1866.

The words "at the first session after the return of every enumeration," as used in the Constitution, do not permit an apportionment to be made at an extraordinary session.

N. Y. Const. art. 4, § 4.

There can be no good ground for doubting that what was meant to be understood by the "next session," is the annual session, for the language employed to refer to it is wholly unqualified, while the session to be convened by the governor is designated an "extraordinary session." The one is clearly intended to be the common, and the other the extra, or unusual session. And this seems to be the popular sense of the words made use of. They are addresses to the public to be understood as the words are popularly understood.

Purdy v. People, 4 Hill, 384.

The intention of the Constitution is to prevail, and that is to be collected from its words.

Ogden v. Saunders, 25 U. S. 12 Wheat. 214, 16 L. R. A.

6 L. ed. 606; *Re O'Neil*, 91 N. Y. 516; *People v. Hyde*, 89 N. Y. 12.

Any other construction would make the provisions of the Constitution as framed in 1846 inconsistent with each other.

See Story, Const. § 400; *McClusky v. Cromwell*, 11 N. Y. 601.

When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference.

Cooley, Const. Lim. p. 64; *Page v. Allen*, 53 Pa. 338, 98 Am. Dec. 272; *State v. Barnes*, 24 Fla. 29; *McKean v. Devries*, 8 Barb. 196.

The members of Assembly are not proportioned among the several counties of the state as nearly as may be according to their respective inhabitants, as required by sections 4 and 5, article 8.

Giddings v. Blacker (Mich.) *ante*, 402; *State v. Cunningham* (Wis.) 15 L. R. A. 561.

Peckham, J., delivered the opinion of the court:

The first above entitled proceeding is an appeal from an order of the general term of the supreme court, third department, denying the application of the relator made to it for a mandamus against the secretary of state, directing him to issue election notices under the Apportionment Law of 1879, and enjoining him from filing election returns, etc., under the Apportionment Law of 1892, or performing any act under that law.

The second proceeding is an appeal from an order of the general term, fifth department, affirming an order of the special term denying a motion for a mandamus to compel the supervisors of Monroe county to forthwith commence and to immediately divide the county into three assembly districts in accordance with the Apportionment Act of 1892.

The third proceeding is an appeal from an order of the general term, fourth department, affirming an order of the special term, which denied a motion for a mandamus to compel the Oneida county board of supervisors to meet and proceed to divide Oneida county into assembly districts under the Apportionment Act of 1892.

All the proceedings have for their object the decision of the question as to the validity of the Apportionment Act of 1892. The boards of supervisors of the counties of Monroe and Oneida are the only boards in the state which have refused to make a division of their counties into assembly districts for the purpose of carrying out the provisions of the Act of 1892.

The secretary of state has issued and delivered to the clerk of Oneida county an election notice in which provision is made for the election of but two members of Assembly therein, and the supervisors claim the right of the electors of the county to elect three members under the Apportionment Act of 1879, and therefore it is specially asked that the secretary be compelled to issue notices for the election of three members of Assembly in the county of Oneida, pursuant to the apportionment contained in the Law of 1879, and that the secretary be commanded to desist from doing any act or thing under chapter 379 of the Laws of

1892, or to in any way recognize that Act as valid or binding.

This apportionment of 1892, it is alleged, violates the provisions of the Constitution in several particulars, which are set forth, and the court is called upon at the instance of all parties to these litigations to decide the questions involved at the earliest practicable moment, in order that the supervisors and the election officers may be guided in the discharge of their duties by the opinion of this court as to the validity of the Act of 1892.

We have given all the consideration possible to these cases since the argument thereof, and while the questions are in themselves most important and far reaching, yet we are compelled by the necessities of the case to decide them at the earliest moment. We however feel more competent to do this because however important the questions may be we think the proper and correct answers are quite plain and clear.

The rule which has governed courts ever since the adoption of our Constitution, both Federal and state, in relation to the exercise of the power to declare an enactment of the legislative body unconstitutional, has been plainly laid down in many reported cases and has been rigidly adhered to by both the Federal and state courts. Before courts will deem it their duty to declare an Act of the Legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no rational doubt. The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal. *Judge Denio in People v. Draper*, 15 N. Y. 546, expressed the rule in substantially the above language. There is no doubt of its correctness, and I have heard no counsel who have challenged it.

We must proceed to the examination of the constitutionality of the Act of 1892, guided by the rule above set forth. Section 4 of article 3 of our state Constitution reads as follows: "An enumeration of the inhabitants of the state shall be taken under the direction of the Legislature in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the Legislature at the first session after the return of every enumeration, that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators.

Section 5 of the same article, after providing for one hundred and twenty-eight members of Assembly, continues: "The members of Assembly shall be apportioned among the several counties of the state by the Legislature as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and shall be chosen by single districts. . . . The Legislature, at its first session after the return of every enumeration, shall apportion the members of Assembly among the several counties of the state in manner aforesaid," etc. The apportionment and districts must remain

unaltered until another enumeration shall be made as provided in the Constitution."

First. It is contended on the part of those who allege the invalidity of the Law of 1892 that it was passed in violation of that provision of the Constitution which directs the alteration to be made by the Legislature at the "first session after the return of every enumeration."

The Act was in truth passed at an extraordinary session of the Legislature called by the governor, and after the return of the enumeration of 1892. The point is made that an extraordinary session is not such a session of the Legislature as is contemplated by the Constitution. To my mind the objection is wholly without force. An extraordinary session is nevertheless a session of the Legislature. The governor by the terms of the Constitution has "power to convene the Legislature (or the Senate only) on extraordinary occasions." When thus convened is not the Legislature in session? And can it be for a moment correctly contended that a session thus convened is the same session which had already terminated by an adjournment without day? It is not a regular session, it is true; it is what the Constitution describes it, an extraordinary session, but yet a session of the Legislature. The Constitution does not say that the session which is to deal with the question must be a regular one. All it directs is that the Legislature at the first session after the return shall proceed to make the alterations. The Constitution provides for the assembling of the Legislature on the first Tuesday in January in each year. When it adjourns *sine die* has not the session of the Legislature ended? The term of office of its members may not have ended, but the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid act unless the governor under the special power given him by the Constitution should convene it. When thus convened the Legislature is in session, and it is clearly not the same session which was ended by a prior adjournment thereof without day. The Constitution does not provide that the next Legislature after the return of the enumeration at its first session shall make this apportionment. It is directed to be made by the Legislature at the first session after such return. Wherein does this extraordinary session fail to fill that description? It was a session of the Legislature, and it was the first which was held after the return of the enumeration, and it was competent to deal with that subject because of the recommendation of the governor.

There is no basis in the language of the Constitution for the claim that the session of the Legislature referred to in that instrument is the first session of a legislature which itself first convenes after the return of the apportionment. The Constitution does not say so, and I fail to find any reason in principle or in the nature of the subject which calls for such a construction. On the contrary, to so construe it is to arbitrarily supply words which are not used, and which neither the context nor the surrounding circumstances call for. Such construction also twists and distorts the ordinary and plain meaning of the language actually employed. The result is that in order to construe the Con-

stitution in the manner desired, words must be supplied which have not been employed and the language actually used must be construed as meaning something different from the meaning ordinarily given to it.

This court is not prepared to make such an attempt.

We also fail entirely to see the force of any argument based upon the assertion that the Constitution intended that some considerable interval should elapse between the return of an enumeration and the apportionment of senators and members of Assembly under it. There is nothing whatever in the language of the Constitution which assumes or seems to provide that any material interval ought to pass after the return of the enumeration and before the enactment of the statute. On the contrary, the language of that instrument, with regard to that provision, would seem clearly to point to definite and prompt action at the earliest practicable moment; in other words, action at the first session of the body that can make the alteration. Such language is not that which would be used for the purpose of advising or directing delay.

Judicial notice may be taken of the fact that an enumeration of the inhabitants of the state was ordinarily a matter that occupied some time to complete it, and the members of the constitutional convention of 1846, as well as the people, knew that it might, and in all probability it frequently would, happen that the Legislature which ordered the enumeration would complete its other business and adjourn without day before the enumeration provided for was itself completed. In such event, the Legislature, not being in session, could not apportion the districts and members. In order, however, to insure prompt action upon the matter and at the earliest opportunity, the Constitution provides for the alteration consequent upon an enumeration at the first session after its return. I think that under this constitutional provision the Legislature which ordered the enumeration might remain in session until after its return and then itself proceed to the alteration made necessary by the results of such enumeration.

It would seem to be a complete perversion of the ordinary and plain meaning of language to change what on its face is clearly a direction for prompt action, into one providing for or securing delay. There is nothing in the nature of the subject which calls for it. On the contrary, as these alterations are to last but ten years before an enumeration is again presented for another alteration, every intendment would point to the prompt and speedy fulfillment of the constitutional duty, so that the Legislature should at once represent the people of to-day, and not those of years ago.

An argument in favor of that construction of the Constitution which would cause a delay in making alterations after an enumeration has been returned is suggested in the fact that an examination of the different returns might reveal some great mistake or a gross fraud, and to such an extent that no alteration of a previous apportionment ought to be based upon such an enumeration. It is of course true that mistakes are possible, and it is conceivable that a fraud might possibly be perpetrated in some

portion of the state. The idea however that the Constitution looks to any delay in legislative action following the enumeration, because of such possibilities, finds no lodgment in the language used in the instrument itself. Such possibilities attach to all human affairs, and would be the accompaniment of the second as well as of a first enumeration.

But the possibilities of any error or fraud which would really work any material injustice are so remote, both as to perpetration and discovery, that an argument for delay based upon them can have no weight whatever when brought before and compared with the plain language of our fundamental law. The question of an interval of time is also answered by the fact that the Legislature might provide for taking an enumeration in November or December, and the filing of the returns in the last of the month of December. The incoming Legislature, which might meet in a day or two thereafter, is concededly competent to deal with the subject. And yet here is no interval of time provided for or authority existing.

Another argument against regarding the extraordinary session of the Legislature as competent to deal with this subject consists in the assertion that if such a session can be claimed to fill the conditions of the Constitution, it would in that event rest with the governor whether an Apportionment Act should be then passed, for he might call an extraordinary session and not recommend the consideration of this subject, and if he did not the Legislature, it is said, could not pass an Apportionment Act, although the extraordinary session were the first session after the return of the enumeration.

If the governor should call such a session and not recommend this subject for consideration, it might then be a question which of the two constitutional provisions should prevail, that which provided for the passage of the Apportionment Act at the first session, or the one which provided that in an extraordinary session the Legislature should consider no other subject than such as should be recommended to it by the governor. If the former provision should be held to prevail, the Act could be passed, and if the latter, it could not. In such case the extraordinary session would not be the first session of the Legislature within the meaning of the Constitution. Admitting that unless the governor recommended the consideration of the subject to the Legislature at the extraordinary session called by him, an Apportionment Act could not then be passed, it by no means follows that the Legislature could not pass the Act at such extraordinary session, provided the subject were recommended to its consideration by the governor. In the one case the extraordinary session is not the first session after the return of the enumeration within the meaning of the Constitution, and in the other case it is. This is saying nothing more than that where a Legislature which has ordered an enumeration and adjourns without day before the return thereof, unless the governor call an extraordinary session, the first session of the Legislature after the return of the enumeration will not occur until the regular legislative session provided for by the Constitution, but that if the governor after a return of the enumera-

tion should choose to exercise his constitutional power, and convene the Legislature in extraordinary session and recommend the subject of the apportionment to it, such extraordinary session would have the constitutional power to deal with the subject.

There is nothing either dangerous or in the slightest degree calculated to awaken the fears of the friends of good government in holding that such a session of the Legislature is under the circumstances stated fully competent to deal with the subject. And the holding is itself plainly called for by the language of the instrument under consideration.

Again, the fact that the public printer has for many years included in one volume the laws passed at the regular and at extraordinary sessions of the same Legislature, and indorsed the volume as containing the laws passed at the ninety-first or other regular session, taking no note of the extraordinary session, is not of the least consequence. For convenience of indorsement or for reference to a volume the regular and extraordinary session may be regarded as the same, but their inherent difference as separate sessions of the Legislature cannot be obliterated, and the fact that they constitute two sessions cannot be expunged by any action of the printer or of a state officer. No court in this state has decided the proposition that an extraordinary session of the Legislature which was the first session thereof after the return of the enumeration, could not pass an Apportionment Act.

The language of *Judge Denio in Lanning v. Carpenter*, 20 N. Y. 453, as to the lack of power of the Legislature to alter the assembly, senate or judicial districts until the session of the Legislature commencing in 1886, was evidently based upon the assumption that the return of the enumeration was not to be made until the commencement of that session. In such case the legislative session of that year would be the first session after the return of the enumeration. The case does not hold or pretend to hold that the Legislature of 1886 could not have provided for an earlier return of the enumeration, which might then have been acted upon by the regular session of the Legislature, if then in existence, or at an extraordinary session thereof called by the governor and actually in session before January 1, 1886. That question was not before the court and received no consideration at the hands of the learned judge.

We think there is no force in the several objections made as to the extraordinary session not being the first session of the Legislature.

Second. The Act is alleged to violate the Constitution because based upon an enumeration taken in 1892 instead of 1885. It is true that it was the duty of the Legislature in 1885 to direct an enumeration of the inhabitants of the state in that year, and if it had discharged that duty it would have been the duty of the Legislature at the first session after the return of that enumeration to proceed to apportion the districts. The Legislature of 1885 omitted to perform the duty of directing an enumeration which was cast upon it by the Constitution. Each succeeding Legislature up to 1892 also omitted to perform this duty, and thus for seven years the constitutional mandate had

been violated. It is wholly immaterial to discuss the reason for such omission. It is clear that such omission ought not to prevent the performance of the duty by the next succeeding Legislature. The provision of the Constitution is so far mandatory that we can say the Legislature of 1885 ought to have complied with it by directing the enumeration, yet as it did not, the duty continued and the power of the next Legislature to deal with the subject cannot be disputed upon any well-founded principle. And this duty continued and was cast upon each succeeding Legislature until the constitutional obligation was fulfilled. The same may be said of the obligation to make the apportionment. If it be not made at the first session after the return of the enumeration, the duty to make it devolves upon the Legislature at the next and each following session until the duty is performed. It cannot be tolerated that a Legislature by a mere omission to perform its constitutional duty at a particular session, could thereby prevent for another ten years the apportionment provided for by the Constitution. The apportionment made in 1879, which the Oneida board of supervisors asks us to still enforce, was itself not made by the Legislature at the first session after the return of the enumeration of 1875. In the case of *Rumsey v. People*, 19 N. Y. 41, the learned judge delivering the opinion of the court says the apportionment is valid, although not passed at the first session after the enumeration. It would seem as if authorities ought not be required upon such a proposition.

Here is a plain duty imposed upon a Legislature and it wholly fails to perform it. The Constitution does not in turn limit the performance of this duty to the particular Legislature. It is a duty which in its very nature and essence is continuous. If the first Legislature fail to perform it, can it be that upon a subject of this kind this failure shall be sufficient to thereafter prevent the performance of the constitutional mandate for the whole decennial term? There is, as it seems to us, neither sense nor principle upon which to base so extraordinary a proposition.

Because the duty has been omitted for one year we think it rests with accumulated force upon the next and each subsequent Legislature until it has been performed. It is of a nature which requires performance and it is to the interests of the whole people that it should be performed as directed, and if not at that time, then at the earliest possible moment thereafter. We are of opinion that the objection made has no color of validity.

Third. A third objection is raised to the validity of this Act. It is stated that as to the senate districts it is not based upon an equal number of inhabitants, excluding "persons of color not taxed."

One answer to this objection is offered by stating that these proceedings have reference to the invalidity of assembly districts only, and that in the provision of the Constitution for their formation it is not required to exclude from the enumeration persons of color not taxed.

We are inclined to the view that the Act of Apportionment is so closely connected as a whole that if the senate districts are based up

on an absolutely unconstitutional enumeration, and to such an extent that it can be judicially seen that great injustice to many of the inhabitants of the state is the necessary and unavoidable result of such an enumeration, we cannot separate the assembly from the senate district and the whole Act must go down.

The objection itself is one which in its nature appears to be most ungracious. It urges a ground of invalidity which if allowed strikes out from the senate constituency all colored citizens who are not taxed. These men, it is claimed, must not be counted as inhabitants of the state for the purpose of creating senate districts. Since the adoption of the amendments to our Constitution in 1874 this view of the law which is now urged with so much eagerness has not been regarded as the true one.

The law which provided for the enumeration in 1875 did not contain any direction to separate persons of color into two classes, those who were and those who were not taxed, and to exclude the latter as a basis of apportionment, nor did the Apportionment Act of 1879 itself provide for the exclusion of persons of color not taxed in making up the senate districts. This of course is not in any way conclusive of the question, although perhaps of some importance as a legislative interpretation made by two different Legislatures and almost immediately after the adoption of the Amendments of 1874.

We think however there is an answer to the objection which we will now proceed to give. From the earliest period of our state history up to 1874 a discrimination of some kind was made against the negro in regard to his right to vote.

By the Constitution of 1777, which created a property qualification as a condition of voting, the negro then being in a state of slavery was unable to comply with its provisions and hence was unable to vote. In 1821, although a property qualification or its assumed equivalent was imposed upon all citizens as a condition of voting, yet it was made more onerous in the case of colored citizens, and such citizens were exempted from taxation unless seised and possessed of a certain prescribed amount of real estate.

In the Constitution of 1846 no property qualification as a condition of voting was imposed upon the white citizen, but it was therein provided that "no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seised and possessed of a freehold estate of the value of \$250 over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such election. And no person of color shall be subject to direct taxation unless he shall be seised and possessed of real estate as aforesaid." Const. 1846, § 1, art. 2.

Here was among other things a property condition annexed to the exercise of the right to vote on the part of a colored person.

The meaning of the exclusion in sections 4 and 5 of article 3 of the Constitution of 1846 is at once plain when the above fact is considered.

In order to vote a colored person had to be taxed as provided for in the Constitution, and unless he was the owner of a certain amount

of real estate, he was exempt from all direct taxation. Here there was a class of colored persons who, by the term of the Constitution itself, were exempt from the taxation therein spoken of. And when the Constitution in the subsequent article (8) speaks of "persons of color not taxed," it clearly and without doubt refers to the colored persons not taxed as provided for in the preceding article limiting their right to vote and providing for their exemption from direct taxation, unless owners of real estate as prescribed in the same article.

The framers of the Constitution evidently thought that persons of color who were not entitled to vote ought not to be counted in making up the number of inhabitants upon which to base the alteration of senate and assembly districts.

The Constitution remained for many years in this condition, both as to the formation of senate and assembly districts and as to the right of the colored persons to vote. While it remained in this condition the War of the Rebellion commenced and came to an end. Before 1874 the Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution were ratified and their adoption duly proclaimed.

Those Amendments showed the great change which had come over the public mind in this country relative to the rights of the colored person. Slavery had been banished from the land by virtue of one of these Amendments, and the right of the colored person to vote was treated of by the last of such Amendments, and the right was not to be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. I allude to these Amendments only for the purpose of showing the trend and strength of the sentiment of the people of the North, and also of this state, upon the subject embraced in these Amendments. History shows that this state was one of the ratifying parties to all of them, and their adoption by this and the other states shows that in the public estimation the time had passed when a man's color should be permitted to disqualify him from the exercise of any political rights or privileges.

All these Amendments to the Federal Constitution had been ratified and adopted before the proceedings ending in the adoption of certain amendments to our own Constitution were inaugurated. The amendments to our state Constitution passed two Legislatures consisting of different Senates, and were submitted to the people and adopted by them in the fall of 1874. The first section of article 2 was amended by wholly omitting the condition for the exercise of the elective franchise by the colored person, so that his right to vote was from that time placed upon the same foundation as that of the white inhabitant. The condition that he must be the owner of real estate to the amount of \$250, and actually taxed thereon, disappeared and with it also disappeared all legal distinction between colored persons into those taxed and those not taxed.

An amendment to the fifth section of article 3 was at the same time submitted to the people and adopted, and the clause providing for the exclusion of persons of color not taxed was

omitted from the section as adopted. In some way not affecting this question the amendment to section 4 of the same article striking out the exclusion as to senate districts regarding persons of color not taxed, was not submitted to the people and hence in words that section remains as it was. Does the section therefore still demand the exclusion of persons of color not taxed? I think not. It will be remembered that the plain meaning of the phrase in the two sections regarding the enumeration, as the Constitution stood at the time of its adoption as a whole, was that the Legislature was to exclude from the inhabitants persons of color not taxed, as provided for in article 2, section 1, of the same Constitution. That section did provide both in regard to their taxation before being permitted to vote and also as to their exemption from direct taxation, and hence when a subsequent section alludes to persons of color not taxed it naturally if not necessarily follows that it means by the use of such an expression the persons of color not taxed as already provided for in the same instrument. And when by amendment the provision which is thus referred to is stricken out, does not such exclusion impliedly abrogate the provision which was based upon the part thus dropped out? I think it does in a case like this where the reason for the continued existence of the provision in the fourth section of article 3 has been wholly taken away by the amendment already made to the first section of article 2.

A repeal by implication is not favored even in regard to a statute, still less can it be favored in regard to any provision of our organic law. It is however a question of intention in both cases. The power that made can unmake.

A constitutional provision can be impliedly abrogated by the adoption of another and later one which is antagonistic to it, although the original provision may in terms remain unaltered. The later will of the people constitutionally made known must in such case take the place of the other provision, even though it may still in form remain in the organic law as a part thereof. It can only be said that in the case of the constitutional amendment the fact of its opposition to a former provision and the intent to displace it by the amendment adopted must be so plainly shown by the provisions themselves that there can be no rational doubt in regard to it. I think these conditions are entirely filled by the proof showing the adoption of the amendments to section 1 of article 2, and to section 5 of article 3. I have no manner of doubt that the people intended by the adoption of these amendments to effectually blot out all distinctions of a political nature between white and colored persons, and I think these amendments taken in connection with the sections as they stood before amendment clearly show that such intention has been effectually accomplished so far as the Constitution is concerned.

We are fully conversant with the indisputable proposition that courts cannot dispense with a constitutional or statutory provision, merely because it appears that the policy upon which it was established or created has ceased or changed. *Brown v. Clark*, 77 N. Y. 369. When, however, that change in constitutional

policy is proved by wholly incontestable and overwhelming evidence, and indeed is nowhere challenged or denied, and where effect to such change has been given in terms by amendments to more than one section of the Constitution, and where it appears that the provision in still another section, although not stricken out by an amendment in terms, is by the other amendments left without reason or excuse for its existence, it is not too much to hold that in such a case the alterations and amendments which have been actually made in the course of the attempt to effect the change of policy, do in effect and by implication strike out and abrogate a provision which, by reason of the amendments, has no longer any excuse for existence.

Another answer has been suggested to the general objection under discussion. It is that there can be no presumption that any particular proportion of colored persons not taxed lives in any one district, and it cannot be presumed without proof that any one has therefore been injured by a failure to exclude such colored persons from the number of inhabitants upon which to base the senate districts. If the same proportion of whites to colored persons not taxed existed in all the districts, it is clear no one would suffer any harm from this failure to exclude such colored persons, and if no one would be harmed it of course follows that no court would spend time in attempting to remedy errors which injured no one and which brought up nothing but abstract questions for adjudication.

No court should be called upon to presume any particular fact without the least legal evidence of its existence, for the purpose of thereby furnishing a reason for overthrowing an enactment of the Legislature which must be presumed to have been enacted from good motives and for proper purposes.

Unless an unequal proportion of colored persons not taxed to white persons should be found or presumed to exist in the different districts, it cannot be said that any human being suffers harm. There is no evidence of the fact in these papers, and its existence ought not to be presumed.

I think on both grounds herein set forth the answer to the claim of invalidity may well be placed.

So far in the discussion we have not alluded to any legal effect which the adoption of the amendments to the Federal Constitution may have upon the provisions of our state Constitution on the same subject. We do not decide the case upon any such ground and we intimate at present no opinion upon that subject.

For the reasons above given we are of the opinion that the objection to the validity of the Act of 1892, based upon the failure to exclude persons of color not taxed, cannot prevail.

I have given these objections such an extended discussion, not because I have felt the least doubt as to their proper decision, but because they have been so eagerly and zealously urged by counsel at the bar, and because of the opinions of some of the learned judges in the courts below, which gave a force and validity to one or two of them, which it is impossible for us to allow, and therefore we feel called

upon to give our reasons for our dissent at greater length than we should otherwise deem necessary.

There is another objection to this Act which we will now consider.

Fourth. It is finally objected that the Act is invalid because the senate districts do not contain an equal number of inhabitants as nearly as may be. These proceedings relate only to the assembly districts in Oneida and Monroe counties, but the inequalities in the senate districts in other portions of the state are cited for the purpose of showing a violation of the constitutional mandate in their formation, and as a consequence the invalidity of the whole Act, including the apportionment of members of Assembly. This question of inequality contains, in my judgment, the only debatable proposition arising in these cases.

The Act of 1892, when compared with the returns of the population as contained in the last enumeration, must be conceded (when a like comparison is made of the former Acts with the enumerations which preceded them) to be the one which most nearly approaches fairness and equality, yet it is the only one which has been brought before the courts.

From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of members in representation has been the leading idea at all times in regard to republican institutions. Political divisions of the state have in New England been the bodies which were entitled to representation, and the town as a town, and irrespective of the number of inhabitants, has had its representative in the Legislature, so that a large town necessarily had no more representation than a much smaller one. This is the case to-day in some of the New England states.

The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the Legislature, resides, of course, in the first instance, with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial. In intrusting such power to any particular body, the people could by their Constitution give written instructions as to how it should be carried out, yet the essential nature of the power still remains. If a portion of it be intrusted to a body of men acting as a board for the mere purpose of making a mathematical calculation, and with instructions to discharge its duties in a way which is solely mathematical, it is clear that the board has no discretion whatever, and it is bound strictly by the terms of the grant of power. In such case the people have not in reality parted with the whole power. There may then be a power in the court to correct the very slightest deviation from what can be clearly seen to be a mere ministerial duty. There being no possibility for the exercise of the slightest discretion, a violation of a rule in mathematics would become a violation of the

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Constitution, and as such might be the subject of review by the courts. The power to review would exist because of the fact that the people had so bound and limited the exercise of the power to readjust the political divisions of the state that the power itself, thus limited, had become in its exercise by the body to which it was intrusted one of a ministerial nature only. Its nature as a political power in the board itself would in such case have been changed by the refusal of the people to permit of its exercise upon any other than a mathematical basis. Hence a direction to a body created by the people for such a purpose, which permitted no discretion in its exercise under any circumstances, might properly form the subject of enforcement by the courts. This, however, is not the case under our Constitution. The power to alter these political divisions has been deposited by the people with the Legislature and under such circumstances as necessarily compels the exercise of legislative discretion in carrying out the power granted. The political nature of the power is thus retained. The learned judge who delivered the opinion at special term in the *Pond Case* himself admits that some discretion is vested in the Legislature, and that in the nature of things it must be so left. He was of opinion that the discretion thus vested in the Legislature had been overstepped, and that the Constitution had been thereby violated, and that the courts could review and reverse this action of the Legislature. Discretion is necessarily reposed in the Legislature because of the direction of the Constitution that in making up the senate districts they must at all times consist of contiguous territory, and that no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators. It is also provided that in apportioning members of Assembly every county shall be entitled to one member.

This renders the mathematical process impossible, both as regards senate districts and the apportionment of members of Assembly. We start then with the proposition that to the Legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the Legislature might possibly have come nearer to an equality, after complying with the special conditions mentioned in the Constitution? This would be to assert a power in the court to supervise the exercise of the discretion granted to the Legislature, if such discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the Legislature by the Constitution, unless it is plainly and grossly abused. The expression, "as nearly as may be," when used in the Constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the Legislature in the way of a general statement of the principles upon which the apportionment shall be made. The

legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the Legislature. We do not intimate that in no case could the action of the Legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of and an intentional disregard of its commands both in the letter and the spirit had been indulged in.

In the report made to the Senate of the United States, in April, 1832, by a committee of that body of which Mr. Webster was chairman, it was stated that the words of the Federal Constitution were equivalent upon this subject to a direction to apportion the representatives among the states upon the basis of population, as nearly as may be. 3 *Webst. Misc. Wks.* 369. It was then stated that the process theretofore adopted by Congress was unconstitutional, and that the true process was a mathematical one, which the report set forth. It was not then adopted by Congress, which adhered to its old method. There is no intimation in the report that the action of Congress, although what was termed unconstitutional, was subject to the revision of the courts. No such remedy was ever suggested. Congress has since that time adopted the theory of the report, and made a mathematical problem of the subject, and referred it to the secretary of the interior to carry out its instructions on the basis of arithmetic.

In this case mathematics cannot enter into the whole problem, because of the constitutional obligation as to county lines and county representation, and hence the sole question now is whether the legislative discretion has been so far abused as to render the Act liable to an overthrow by the courts. This brings us to an examination of the Act itself.

It can be stated at the outset that although the fairest that has been passed upon the subject, the Act is not an absolutely ideal one. There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of one hundred and twenty-eight assemblymen and thirty-two senators. Local pride, commercial jealousies and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected; all these things and many others might have weight among the representatives upon the question of apportionment, so that in order to accomplish any result at all compromise and conciliation would have to be exercised. Looking at the Act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts.

In regard to the senate districts, some criticism has been indulged in, both in the courts below and by counsel here, for the purpose of showing that they are inequitably made up. So far as regards the Oneida and Monroe districts, there does not seem to be much room

for adverse criticism. Those who claim the Act to be void cite other senate districts which, when compared together, are alleged to be unequal, and hence they claim the constitutional obligation in regard to senate districts has been disobeyed, and therefore the whole Act is void.

It is proper to here remark that there are figures in the record in these proceedings from which it may be determined what are the numbers of inhabitants in the different senate districts in the city of New York. Certain figures have been referred to by counsel, but they have been obtained, not from the record in these proceedings, or from any public record, but from some source whose accuracy cannot be relied on, and which at all events is not in any manner before the court.

The real burden of their complaint lies in the alleged violation of the Constitution in regard to assembly districts. So far as these parties litigant are concerned, it would seem that courts would not be specially astute to discover some inequality in senate districts which did not affect the propriety of equality of the representation in the senate districts of which they are inhabitants.

As to the senate districts, when it is considered that in their make-up county lines must be adhered to, unless a county is equitably entitled to two senators, it is plain that great and necessary discretion is left to the Legislature in their formation. The union of different counties in the state for the purpose of making up a senatorial district which must consist of contiguous territory, and in regard to which counties cannot be divided, necessarily results in inequalities which can in no possible way be avoided.

Certain districts may be picked out from the whole number and compared with certain others, and inequality be charged against them. But when all the counties in the state are to be arranged and brought into connection upon some plan in which the express commands of the Constitution as to territory and county lines are to be observed, it will pass the wit of man to make such an alteration of the senate districts for this state that may not be the subject of adverse criticism and of alleged possible improvement. We are of opinion that the Legislature, by the alteration of the senate districts under the Act of 1892, has not violated the legitimate and necessary discretion intrusted to it by the Constitution.

As to the assembly districts the burden of complaint rests upon the apportionment of four or five members of Assembly out of one hundred and twenty-eight.

The learned counsel for the appellant in the case of the relator Carter makes up a list of the members of Assembly as they have been apportioned and as he claims they should have been apportioned. In this list he shows that Albany is entitled to three, while four members are actually awarded; Dutchess is entitled to one, while two have been awarded; Kings is entitled to nineteen, while but eighteen have been awarded; New York is entitled to thirty-one, while but thirty have been awarded; Monroe is entitled to four, while but three are awarded; Queens and Rensselaer are entitled to but two each, while three each have been awarded them. This list shows that at least

two counties (New York and Kings) have by the action of the Legislature lost each one member, while it is notorious that both were in accord with the dominant party in the Legislature. It cannot be said that in regard to the others partisan consideration entered into the subject, because the counties to which the members were awarded are, when divided into districts, very uncertain as to the political complexion of their representatives in the Assembly. By this Act each county has been in fact awarded every member to which it was entitled by the ratio which obtained between population and representation. The only claim asserted or in fact existing is that in apportioning the remaining members after each county had been awarded its full number of members to which it was entitled upon the ratio adopted, the members thus remaining were in some few instances awarded to counties which had a less surplus over their ratio than some other counties, no counties having enough to entitle it to another member upon the ratio existing.

In regard to these fractional parts of a ratio, an examination of the debates in the constitutional convention of 1846 shows that the subject of the representation of such fractions was discussed and efforts were made to provide in terms for a rule of representation for them, so as to limit the discretion of the Legislature. Debates on Constitution of 1846, page 866. See also debates of constitutional convention of 1866 and the commission of 1872, where the subject was debated.

The convention of 1846 finally framed the provision without any statement as to the fractions of ratios or how they should be treated, and the question was thus left to legislative discretion to be exercised in good faith and not to be abused.

The reason for the particular action of the Legislature upon this question must be sought for in some considerations other than partisan, for I think it is shown these did not enter into the question upon this point.

The inference is fair that these changes were absolutely necessary in order to secure the passage of the bill, having regard to the conditions under which legislative action is practicable. The Constitution is silent as to the ratios, and some of the assailants of the bill insist upon making up a new ratio, which shall require a larger number of inhabitants than the one one-hundred-and-twenty-eighth part, in order to entitle any county to a member, and they obtain this ratio by deducting the population of thirty counties, which must have one member each, from the total population of the state, and then dividing it by ninety-nine, the number remaining to be apportioned, which gives them a new ratio of 48,800, which is 8,559 in excess of the ratio based upon an absolute equality of apportionment. This operates unjustly against the counties entitled to the largest number of members, so that in the case of New York, entitled to at least thirty-one members, there is a loss of thirty-one times 8,559, or 110,829. And so correspondingly in the case of Kings. There is no arithmetical necessity in the adoption of this new ratio, if there be a sufficient number of members of Assembly, to be apportioned to

give one to every one one-hundred-and-twenty-eighth part of the entire population, with four to spare. By adopting the larger ratio, which the opponents of the measure insist on, eleven members of Assembly remain to be assigned to counties not having a full multiple of the ratio necessary to entitle them to an additional member. As to eight of these it is conceded that they are actually assigned to counties having the highest fractional excesses, but not so large as the other counties named if the assignment was made according to the plurality of excess. But it must be observed that by the adoption of this new, arbitrary and unreasonable ratio, New York's representation was reduced from thirty-one to twenty-nine, and Kings from nineteen to eighteen, and that loss of three fell to a portion of the state which according to its population had a much larger proportion of the business and wealth of the state.

Here were two ratios presented for adoption, each one of which had its defects, and the Legislature certainly cannot be charged with any desire to be unfair or unjust if, in the distribution of the members of Assembly after each county had received its full quota according to the highest ratio, it took into account the large losses incurred by the populous counties if such ratio were adopted without modification.

It is also to be noted that the three members were assigned to counties all of which have shown by the census increased population.

Other considerations might be added to show that the Legislature of 1892, in the passage of the Act under review, did not approach the danger line of an abuse of legislative discretion, but this opinion, which has grown to such large proportions, as well as the total lack of time, both warn me to desist from an attempt which is really unnecessary. It is proper at this stage to advert to the consequences which would or probably might follow the overturning of the Act.

It is said indeed that courts have no right to look at the consequences which may follow their decision of legal questions. This is quite an erroneous statement of the principle. After a decision has been come to, it is true that courts have nothing to do with consequences. But in seeking for a correct solution of any legal question, especially the question of the proper construction of a statute or a Constitution, the result which may follow from one construction or another is always a potent factor, and is sometimes in and of itself conclusive. In speaking upon the same subject in *Rumsey v. People*, 19 N. Y. 52, the learned judge, in delivering the opinion of the court, said, upon a question of construction: "We have a right to consider the evil which would result from the prevalence of the alternative . . . should the Act be annulled and the new county (Schuyler) annihilated; the consequences would be disastrous." The learned judge then proceeds to state what they would be, and argues from them that another construction ought, if possible, to be given to the Act.

We are asked to say that in this Act of 1892 the Legislature has abused or overstepped the discretion devolved upon it by the Constitution. What is the result which would follow? In the first place we should have every

enumeration and every Apportionment Act brought before the courts for review, and as it would not be necessary to act immediately, any citizen at any time during the running of the decennial period would have the right to invoke the aid of the court to set aside as void any such act, and leave the people to suddenly confront such a situation as is now presented. This in itself is sufficient to induce a court to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should such a power be exercised. Every county in the state but the two before us has acquiesced in the requirements of the Act, apportioned its members among the towns and wards of the county or city, and done everything necessary to proceed to an election under its provisions. The greatest confusion and disorder would result from a holding that this Act is invalid. Whether any members of Assembly could actually be elected under any other law at this late day, is quite problematical. The spectacle of a Legislature elected under an unconstitutional law, or part of the members elected under it and part under another, is one which ought not to be contemplated without the greatest anxiety by all honest citizens.

When we come to the question of what law is in force in this state if the law of 1892 is not, the situation becomes more alarming. In the case of the relator Carter we are asked to command the secretary of state to issue notices for the election of members under the Act of 1879. This Act, if enforced now, would work still greater injustice than has ever been suggested against the Act of 1892.

The same reasoning which would set aside as void the Act of 1892 would be still more powerful and cogent as showing the total invalidity of the Act of 1879. That Act when passed, was well known to be a most unjust and unequal one, particularly in regard to the interests of New York and Kings counties. Gov. Robinson, in his memorandum filed with the Act, which he refused to approve, shows beyond question its gross disregard of the constitutional mandate as to equality. The governor therein called particular attention to the matter, and said: "In the distribution of members of Assembly, the bill is still further from meeting the requirements of the Constitution. I find that Cattaraugus County, with 45,787 inhabitants, has two members, while Suffolk, with 50,830, is given but one. Orange, with 82,225 inhabitants, has but two members, while St. Lawrence, with only 78,014, gets three. Nor can I understand the philosophy which gives to the latter county, with 78,000 inhabitants, the same representation as Monroe, which exceeds it in population by nearly 50,000. These discrepancies are not to be explained. They admit of no apology or excuse. They are of the same class as that so-called necessity which entirely deprives 150,000 inhabitants in New York and Kings of their proper representation." So wrote Governor Robinson, while refusing to veto the Act, because as it stood it was better than the condition of things which it was to replace. Should this court now, after thirteen years, and when the injustice and inequality have vastly increased, still order the secretary of state to

issue election notices under such a law and should a legislature be elected under it? It is said in answer that we need not decide upon the invalidity of the Act of 1879, but leave it to the secretary of state what course to pursue and what law to regard, so long as he does not regard the Act of 1892. This is, as it seems to us, a most absurd proposition, and at the same time one fraught with the most alarming contingencies. To hold the Act of 1892 void for this reason, and yet to say nothing in regard to the law of 1879, which is far more obnoxious, to the very arguments upon which we are asked to avoid the Act of 1892, is to place the people of the whole state in a most improper and unfair position. The necessity of deciding is also founded upon the position of the relator in the case against Rice, that he shall be ordered to give notices under the Act of 1879. The question will arise at once, What Act are we living under and what apportionment is the true one upon which to base election of members of Assembly? The people are entitled to know what law they are living under, and where the apportionment is to be found which is legal and under which they could proceed to elect members if there were time enough left in which to put the machinery at work to accomplish that end. But there is not in fact time enough left for such purpose.

If the Act of 1892 is void, the Act of 1879 is also plainly void, and no election of members of Assembly should be tolerated under it. This might relegate the people to the Act of 1866, and thus we might have an attempt at an election for members of Assembly under an Act more than a quarter of a century old and a legislative representation of the people of that time. This would be a travesty on the law and upon all ideas of equality, propriety, and justice.

We are compelled to the conclusion that this Act of 1892 successfully withstands all assaults upon it, and is a valid and effective law.

Upon the argument our attention was called to certain cases decided in Michigan and Wisconsin, involving to some extent the questions decided herein.

In some of them the violation of the spirit of the Constitution was gross beyond cavil or argument. They would come within the description of an abuse of legislative discretion. In others the positive commands of the Constitution as to counties were plainly violated. The actual decisions might perhaps be upheld on the lines laid down in this opinion, but there are some things stated in some of the opinions which go beyond what this court is prepared to concur in.

The discretion necessarily vested in the Legislature must be finally disposed of then, unless, as we have said, there is such an abuse of it as to clearly show an open and intended violation of the letter and spirit of the Constitution.

The order in the first above entitled proceeding should be affirmed, with costs in all courts, and those in the second and third above-entitled proceedings should be reversed, and the motions for a mandamus granted, with costs in all courts.

Gray, J.:

I concur in holding the Apportionment Act to be valid. The gravest objection which has

been urged against its validity is that it has violated the constitutional requirement as to equality of representation in the Legislature. I consider that the other points which have been presented have been sufficiently answered. They do not seem to me to suggest reasonable grounds for assailing this legislative Act. But if any provision of the fundamental law of the state, intended to secure the equal representation of its citizens in the legislative department, has been violated by the Act in question, it is then properly the duty of the judicial department of power to declare it unconstitutional, and therefore void. The judiciary has a duty to pronounce all legislative Acts null which are contrary to the manifest tenor of the Constitution of the state.

Is that the case here? If it is, it arises out of the apportionment of members of Assembly. I fail to see that in the arrangement of senate districts there exist any substantial grounds for complaint. As to members of Assembly, the constitutional requirement is that the Legislature shall apportion them among the counties "as nearly as may be according to the number of their respective inhabitants." I think this language imports that some amount of discretion may be exercised by the Legislature in perfecting an apportionment. For such an opinion I find support both in the juxtaposition of the words and in the manner of their introduction into our Constitution. If no discretionary power resided in the Legislature to vary from a mathematical and methodical adjustment of members of Assembly, according to the population of counties, the presence of the words "as nearly as may be" is meaningless. Their absence would better consist with the sense contended for. But they were brought in by an amendment of our first Constitution, which was adopted in 1801. Previously the Constitution required that "the Legislature do adjust and apportion" the representatives in Assembly to the number of electors in the counties. By the amendment in 1801 that provision was amended so as to require them to apportion "as nearly as may be, according to the number of electors," etc. In this change or substitution of language I deem an intention evidenced to confine something to the judgment of the Legislature, and in view of many obvious considerations, very wisely and justly so.

It was apparent that greater or less inequalities must arise in an apportionment, and that after each county had received its full number of assemblymen according to the ratio of apportionment established, there would remain some members to be distributed among those counties having excesses of population over the ratio. The contention of counsel is that that distribution must be in the order of the highest excesses or remainders over, and any discretion in the matter is denied.

In the present case, for instance, there were eleven members of Assembly to be so distributed among counties having fractional excesses, and the showing is that three were apportioned out of the strict order in which those excesses stood. It may be remarked, in passing, that in an apportionment of one hundred and twenty-eight members among the counties, this showing evidences no glaring departure from strict

equality, not any scheme to defraud the people in the matter of representation. It is the general rule of law that the courts have no concern with the motives of the legislative body in passing an Act. If they find the power conferred to so enact, they may not intervene to prevent the execution; and at all times they should be slow to interfere with the legislative department of power. If there were here a flagrant disregard and an unmistakable violation of the constitutional injunction that the apportionment should be "as nearly as may be," according to the number of citizens, the courts might feel justified in declaring the Act void for unconstitutionality. But we have no reason to impute any fraudulent motives, and the showing of three instances of departure from a methodical apportionment is not enough to evidence any deliberate violation of the constitutional requirement. The legal presumption is in favor of the constitutionality of every Act of the Legislature, and that presumption is not overcome in this instance, where the legislative Act simply evidences the exercise of discretion in performing a political duty.

We may concede that adherence to a simple or mathematical system of distribution of members among the counties in the order of their excesses of population over the ratio is the better rule; but deviations may be demanded by public exigencies. Some consideration must be had of the difficulties which environ the passage of an Act of apportionment in the conflicting claims and demands of representatives, some latitude of action must be permitted in considerations which pertain to the geographical situation and necessities of counties, and some allowance must be made for the active opposition engendered by political feeling. As the bill was reported an exact and mathematical apportionment appeared, but to secure the passage of the Act some changes were made by the Legislature. I do not think that the Legislature is to act as a mechanical contrivance for the mathematical distribution of members of Assembly. The Constitution does not say so in unmistakable terms, and if it does not courts should hesitate to assert it. Something is confided to the wisdom and judgment of the legislative body in performing this constitutional duty, and if in the execution of the duty the result is not perfect, the courts should presume that the Legislature endeavored to accomplish it as nearly as might be. I think, according to a logical and candid view of the constitutional requirement, it might be impracticable, unless there was some discretion vested in the Legislature with respect to carrying it into effect. There has been no abuse of this discretion, and for us to judge the Act unconstitutional and to declare it void would be, in my judgment, a most unwise construction, and would be to arrogate a power of interference as dangerous in the precedent as it seems unwarranted in the law.

Earl, Ch. J., O'Brien and Maynard, JJ., concur with Peckham and Gray, JJ. Andrews and Finch, JJ., dissent upon point discussed in opinion of Andrews, J., but concur with Peckham, J., on all other points.

Andrews, J., dissenting:

I am of opinion that the Apportionment Act of 1892 is void for the reason that in apportioning members of Assembly among the counties of the state it violates the rule of equality prescribed by the Constitution. It is the cardinal principle of free representative government that every elector shall have equal weight in exercising the suffrage. Proportionate representation according to population is the rule both in the Federal and state Constitutions, except where by reason of constitutional arrangements and compromises its full application has been departed from. The rule can never be disregarded consistently with our representative system, except under the express sanction of the people, given in the Constitution, or necessarily implied from its provisions. This is a constitutional principle so fundamental and so well recognized that the citation of authorities in its support is unnecessary.

The Constitution of New York in prescribing the manner of constituting the Legislature has adhered to the principle of representation according to citizen population, except so far as it was necessarily modified to accomplish another purpose also deemed of great importance, viz.: that the autonomy of the counties should be preserved in the formation of senate districts and that each county should be entitled to at least one member of Assembly. The Constitution (art. 3, § 4) prescribes that counties shall not be divided in the formation of senate districts except where a county shall be equitably entitled to more than one senator and (art. 3, § 5) that each county, except the county of Hamilton, shall be entitled to one member of Assembly, and that when a county is entitled to more than one member, it shall be divided into districts; but that no town shall be divided in the formation of assembly districts. This scheme of creating territorial districts for the election of senators and members of Assembly necessarily results in some inequality. But except as modified by these provisions, the Constitution carefully preserves the principle of representation according to population. It enjoins upon the Legislature to so constitute the senate districts "that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens and persons of color not taxed" (art. 3, § 4), and it commands that "the members of Assembly shall be apportioned among the several counties of the state by the Legislature, as nearly as may be, according to the number of the respective inhabitants, excluding aliens." Art. 3, § 5.

The intention of the people to preserve and guard by the Constitution the principle that every voter is to have equal weight and voice in the selection of representatives, subject only to the modification before referred to, is unmistakably indicated in other parts of the legislative article. The provisions describing decennial enumerations of the inhabitants of the state, and a decennial arrangement of senatorial and assembly districts, were inserted to accomplish this object. The supreme purpose of these provisions was to secure at short recurring periods a readjustment of inequalities which might arise from the growth or shifting

of population during the decennial period. Further, to prevent such inequality and to secure the practical operation of the fundamental principle of equal suffrage, the Constitution in the provision quoted enjoined upon the Legislature that the senate districts should be organized and the members of Assembly should be apportioned as "nearly as may be" according to the number of inhabitants.

By what process the Legislature reached the results embodied in the Apportionment Act does not distinctly appear. It had before it the enumeration of the representative population in each of the counties of the state. The problem (in respect to the Assembly) was to apportion among the several counties the one hundred and twenty-eight members of Assembly, "as near as may be," according to the number of the respective inhabitants, excluding aliens. It seems to have first assigned to twenty-nine counties (reckoning Fulton and Hamilton as one), each having less than a full ratio of population necessary to constitute an assembly district, one member each, leaving ninety-nine of the one hundred and twenty-eight members unassigned. It then assigned to each of the other counties a member or members, corresponding with the number to which it was shown to be entitled, as ascertained by dividing the whole population of the county by the ratio. This left remainders in all the counties, and eleven of the one hundred and twenty-eight members unassigned.

The eleven counties having the largest remainders were: Orange, 44,474; Onondaga, 44,460; Kings, 39,400; Ulster, 39,593; Monroe, 34,833; Steuben, 32,600; St. Lawrence, 31,800; Westchester, 31,226; Queens, 26,876; Dutchess, 26,272; Chautauqua, 25,085.

If, in apportioning the eleven unassigned members, the apportionment had been made upon the principle of assigning them to the counties having the highest remainders, one would have been assigned to each of the counties above named in their order. The Legislature did assign an additional member to each of the first four counties named, and when it came to Monroe skipped and gave no additional member to that county, but did instead award one to Steuben. It refused to give an additional one to St. Lawrence, but gave one to the succeeding county, Westchester. It gave one to Queens and one to Dutchess, but gave none to Chautauqua. In preference to Monroe, St. Lawrence and Chautauqua, it gave an additional member to Albany, having a much smaller remainder than the others. It gave one to New York county, which had a remainder of 8,813, and one to Rensselaer, having a remainder of 24,081. Neither Albany, New York county nor Rensselaer had a remainder equal to any of the eleven counties named, and in some of the cases the disproportion was very great.

The inequality in the distribution of political power under this apportionment is illustrated by another form of statement contained in the opinion of *Judge* Dwight. Dutchess county, with a population less than St. Lawrence, receives double the representation of the latter; Albany county, with less than twice the population of St. Lawrence, receives four times its representation; and Monroe county, with

24,000 more population than Albany, receives one less representation.

The question is, Was this apportionment of members to counties having smaller remainders of representative population than other counties, and giving the former additional representation denied to the latter, a compliance with the command of the Constitution that the apportionment should be made "as nearly as may be" according to the number of inhabitants of the respective counties. I think the question admits of but one answer, and that it is incontestable in reason, that the constitutional rule required that the eleven members should have been assigned to the counties having the highest remainders. This would have been the nearest approximation to equality, according to population. That this is so is a mathematical certainty, and admits of no controversy.

A question identical in principle was considered by Mr. Webster in a report made to the United States Senate in 1882, by a committee of that body, of which Mr. Webster was chairman, relating to the rule which ought to prevail in the apportionment of members of Congress among the states. The Federal Constitution provides (art. 1, § 8) that "representatives and direct taxes shall be apportioned among the several states according to their respective numbers," etc. The question considered by the committee was as to what was the constitutional method of apportioning unassigned representatives as between states having fractions of population less than a full ratio. The committee were unanimously of the opinion that the loss of members arising from the residuary numbers should be made by assigning as many additional members as are necessary for that purpose to the states having the largest fractional remainders, and this was the rule subsequently adopted by Congress. 8 Webst. Wks. 368. It will be observed that the words "as near as may be" are not in the provision of the Federal Constitution, but it was the opinion of the committee that the meaning was the same as if these words had been inserted. Mr. Webster said: "The Constitution therefore must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states according to their respective numbers, as near as may be. That which cannot be done perfectly, must be done in a manner as near perfection as can be. If exactness cannot from the nature of things be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule; it takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth, or exact right, when that exact truth or that exact right cannot be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule dictated by justice and conforming to the common sense of mankind; a rule of no less binding force in

cases to which it is applicable, and no more to be departed from than any other rule or obligation."

Again (p. 879): "The Constitution, as the committee understood it, says, representatives shall be apportioned among the states according to their respective numbers, as near as may be. The rule adopted by the committee says, out of the whole number of the House, that number shall be apportioned to each state which comes nearest to its exact right according to its number of people."

No one can fail to perceive the analogy between the question discussed in this report and that which is involved in the apportionment now under consideration. The argument urged upon us that the words "as nearly as may be" give a discretion to the Legislature if it means anything, as applied to the circumstances of this case, means that the Legislature may disregard the plain meaning and mandate of the Constitution. I deny that the rule that apportionment must be "as nearly as may be" according to population, is, or under any circumstances can be discretionary. I can conceive that an Apportionment Act should not be held to be unconstitutional for every trivial departure from the rule of equality. Some mistakes will invariably be made in the enumeration in the first instance, and afterward by the Legislature in making the apportionment, although it may act under the most sincere desire to apply the rule of the Constitution. But because the apportionment cannot be exact according to population, and some inequality is unavoidable, this does not absolve the Legislature from applying the rule in every case, and it cannot, under the cover of the words "as nearly as may be," disregard the rule and relegate the proceeding to the domain of discretionary powers and escape its binding obligation. When the court can see that the rule of the Constitution was not in fact applied, and the circumstances for its application were clear and unequivocal, then there is nothing left to the court but to declare the apportionment void. The suggestion that the circumstances under which Legislatures act in such matters give opportunity for the play of passion and prejudice, and therefore this must be considered in determining the validity of an Apportionment Act, seems to me to have no place in this discussion. The very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a departure from the fundamental law by legislatures can in one case be justified by the frailties of human nature, and the constitutionality of an Act may be made to depend in one case upon such a consideration, the constitutionality of all legislation may be governed by the same rule. I have said the very object in imposing restraints in the Constitution is to protect great principles and interests against the operation of such eccentric and disturbing forces. The discretion of the Legislature, if any, in apportioning members, ends where certainty begins, and that point was reached when the counties having the largest remainders were ascertained. The attempt to justify the apportion-

ment of 1892 by the fact asserted (which seems to be true) that the apportionment of 1879 was subject to as great or greater objection on the score of inequality than the later Act, fails because the fact is irrelevant. It is one thing that a Legislature has disregarded its duty on a former occasion and that the people have acquiesced in the usurpation, and quite a different and a much more serious thing if such a disregard of constitutional limitation should receive judicial sanction.

Reference was made on the argument to the senate districts constituted by the Constitution of 1846, and by the convention which framed that instrument. The tables presented by the attorney-general show that the ratio for a district was about 81,000, and the greatest variations were in New York, which with four senators had a remaining surplus of about 48,000, a little more than half enough for another senator, and in the thirtieth district, which consisted of the counties of Allegany and Wyoming, in which there was a deficiency of about 28,000. These were the two extremes. The problem to be solved had three inflexible elements preventing equality and compelling insistent approximation. The convention found in existence a Senate of thirty-two members elected in eight districts or four from each. Those districts were to be changed from eight to thirty-two, each electing a single senator. That was the first condition. The next was that no county should be divided unless it was entitled to two or more senators; and the third that the districts should be composed of contiguous territory. The debates show that it was quite generally conceded that a nearer approach to equality could only be reached by enlarging the number of the districts, which the convention was unwilling to do; and no different and better apportionment consistent with the conditions was formulated by anybody, or shown to be reasonably possible. It was the opinion of the members of the convention, as shown by the debates, that no nearer approach to the equality for which they struggled could be reasonably attained. To cite a necessary inequality as a precedent for an unnecessary one, a discrepancy compelled by inexorable conditions for one which there was perfect freedom to avoid, the compulsion of an inherent difficulty for a wrong both voluntary and needless, constitutes no answer to the inequalities in the assembly apportionment. If in 1846 there had been one additional senator to be allotted to some one district and such allotment had been denied to the first district with a surplus of 48,000, and given to the thirteenth, with a surplus of about 1,000, it would have been a precedent for what was done in the case at bar.

The convention in projecting the new scheme was treading on unfamiliar ground, but it did not leave in doubt the rule by which future Legislatures should be governed.

The departure from the constitutional method in the Act of 1892 is substantial, and its validity having been challenged in the courts, it cannot be upheld without establishing a dangerous precedent for the future.

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The claim that the Legislature in making an apportionment may take into consideration the probable unequal growth of populations, has no support in the Constitution. The apportionment is to be based on existing populations, as ascertained by the preceding enumeration. The decennial enumeration and apportionment is the constitutional remedy for any such temporary inequalities. If the Legislature was permitted to act upon the ground suggested, it would introduce a most uncertain element, and might be made the cover for great abuses. It is plain that in the present case the inequalities are not attributable to any such consideration. Monroe county, containing a rapidly growing city, and with a much larger population than Albany county, was given three members, and Albany was given four. It is unnecessary to consider in this case the question of the constitutionality of the Act of 1892, so far as it relates to senate districts. The inequalities in some instances are very great, and seem to have been unnecessary. For example, one of the districts in the city of New York has a population of 241,188, while another district in the same city has a population of 106,720, and they are not bounded by ward or election district lines. But having reached the conclusion that the Apportionment Act in the apportionment of members of Assembly violates the Constitution, the question as to the senate districts is unimportant in the decision of this case. The Act must stand or fall as a whole, and if in respect to one branch of the Legislature the Act is unconstitutional, it cannot be upheld as to the other.

I shall not undertake to show that the question presented is of judicial cognizance. That it is a judicial question cannot, under the authorities, be denied. The Legislature and the courts are alike bound to obey the Constitution, and if the Legislature transgresses the fundamental law and oversteps in legislation the barriers of the Constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the Constitution itself against infringement.

The power of the courts to set aside an unconstitutional apportionment has quite recently been asserted and exercised by the courts of Wisconsin and Michigan. *State v. Cunningham* (Wis.) 15 L. R. A. 561; *Giddings v. Blacker* (Mich.) *ante*, 403; *Houghton County Supra. v. Blacker* (Mich.) *ante*, 432. These cases consider with much ability the question of judicial power, and determine that a substantial departure in an Apportionment Act from the rule of equality, renders it void.

I recognize the gravity of the question now presented. Nor do I fail to appreciate that holding the Apportionment Act void will produce temporary inconvenience, but the evils which may flow from this are not to be compared, I think, with the public injury which will result from sanctioning a disregard of one of the vital principles of representative government.

RHODE ISLAND SUPREME COURT.

Arthur T. PARKER
v.
Lydia A. MACOMBER.

(.....R. L.....)

1. A person prevented from continuing his contract by the arbitrary act of the other party may disregard it and recover the value of his services rendered in partial performance of it.
2. The death of a woman whose services and attendance are contemplated in a contract by which she and her husband agreed to board, care for and maintain her aunt during life, makes such a substantial failure in the consideration that the aunt is justified in rescinding the contract.

3. The prevention by the act of God of full performance of an entire contract will permit a recovery upon an implied assumpsit for personal services already rendered in part performance of the contract.

4. A count in quantum meruit is not necessary to permit a recovery for personal services in part performance of a contract which it has become impossible to complete where the declaration contains the common count in *indebitatus* for work and labor.

(April 11, 1892.)

PETITION by defendant for a new trial of an action brought to recover the value of board, care and services which had been furnished by plaintiff to defendant, and in which

NOTE.—*Recovery for services on contract interrupted by sickness or death.*

The doctrine of the above case that a recovery may be had for services performed under a contract the completion of which is prevented by sickness or death is supported by practically unanimous authorities.

The illness of an employé has been held in numerous cases a sufficient excuse for failure to complete an entire contract for services, and to entitle him to recover on a *quantum meruit* for the services actually performed. *Fenton v. Clark*, 11 Vt. 557; *Seaver v. Morse*, 20 Vt. 623; *Hubbard v. Belden*, 27 Vt. 645; *Fahy v. North*, 19 Barb. 341; *Clark v. Gilbert*, 20 N. Y. 279, 84 Am. Dec. 186; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 868; *Ryan v. Dayton*, 23 Conn. 188, 65 Am. Dec. 590; *Green v. Gilbert*, 21 Wis. 303; *Coe v. Smith*, 4 Ind. 79; *Lakeman v. Polard*, 43 Me. 468; *Dickey v. Linscott*, 20 Me. 453; *Hargrave v. Conroy*, 19 N. J. Eq. 231.

And after recovery from his illness the employé need not return and offer to complete his service. *Seaver v. Morse* and *Hubbard v. Belden*, *supra*.

The terms of the contract furnish the measure of recovery, subject to reduction for the damages caused to the employer. *Clark v. Gilbert*, *supra*.

But an Indiana case holds that the recovery cannot be for more than the amount of benefit conferred, and in no case more than a proportionate part of the contract price for the work done. *Coe v. Smith*, *supra*.

This was a case in which an attorney was employed for a lump sum to conduct a law-suit.

So in Wisconsin it is said that the recovery is not on the contract, but on *quantum meruit*. *Green v. Gilbert*, *supra*.

The damages caused by the failure to perform the services may be deducted from the recovery. *Patrick v. Putnam*, 27 Vt. 757.

Perhaps these cases do not, when considered with reference to the facts, really deny the rule of the New York case which allows the contract rate of compensation to govern after deducting the damages.

The same doctrine which is held in the above cases appears also in the decision that an agreement to give notice before leaving service does not apply to a case of sickness. *Fuller v. Brown*, 11 Met. 440; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82.

Another Massachusetts case extends the doctrine by a decision that the sickness of an apprentice indentured for three years is no ground for the abatement or diminution of his stipulated wages during that time so long as he lives. *Caden v. Farwell*, 96 Mass. 137.

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The doctrine is also applied in a decision that an agreement to pay a person employed by the year in case of his death during the year at a certain "pro rated sum" per annum, requires payment to be computed to the day of his death, and not merely to the time when he ceased work by reason of sickness. *Dunlap v. Montgomery*, 123 Pa. 27.

The employment of an attorney is within the above rule as to the effect of the interruption of his services by sickness or death. *Coe v. Smith*, 4 Ind. 79.

So is the employment of a consulting engineer; and his death during his period of employment authorizes a recovery for what he had already earned. *Stubbs v. Holywell R. Co.*, 1 L. R. 2 Exch. 811.

But an absolute agreement to serve twelve months as a condition of compensation is not excused by sickness. *Greene v. Linton*, 7 Port (Ala.) 138.

The death of an overseer under a contract for a year was held in an early Alabama case not to permit *pro rata* compensation for a part of the services which had been performed. *Givhan v. Daley*, 4 Ala. 336.

But this rule has been changed in that state by Ala. Code, § 2223. *Dryer v. Lewis*, 57 Ala. 551.

In admiralty a special rule has been followed. In *Chandler v. Grievae*, 2 H. Bl. 608, note, it was held that the wages of a seaman for the whole voyage became due by admiralty usage when he became disabled during the voyage.

This rule was followed in *Sims v. Jackson*, 1 Pet. Adm. 157; but is said by the court in *Gray v. Murray*, 3 Johns. Ch. 167, 1 L. ed. 580, to have been rejected, after full consideration, in *Natterstrom v. Smith*, 2 Hall, L. J. 350.

In *Cutter v. Powell*, 6 T. R. 820, no wages were allowed a sailor who died on a voyage and who had taken for his services a promissory note for much more than "ordinary wages" provided he proceeded, continues and does his duty "to port."

See discussion of this case in the opinion of the main case above.

In *Gray v. Murray*, 3 Johns. Ch. 167, 1 L. ed. 580, a supercargo whose contract was for a percentage on the value of the property brought home died during the voyage, but provided substitutes to be paid out of his commissions and who completed his work, and it was held that the full compensation agreed upon was earned.

For note on the effect of intervening impossibilities to perform as a relief from the obligation of a contract, see *Stewart v. Stone* (N. Y.) 14 L. R. A. 215.

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a verdict had been returned in favor of plaintiff. *Denied.*

The facts are stated in the opinion.

Mr. Samuel W. K. Allen, for defendant, in support of the petition:

The contract is entire, and plaintiff must show full performance or a readiness to perform in full all the obligations on his part before he can recover.

The declaration contains only a portion of the common counts and no special count. The evidence at least shows a contract which has not been executed. Such evidence will not support such a declaration.

The plaintiff should have declared specially on his contract.

1 Chitty, Pl. ed. 1809, p. 339, 16th Am. ed. pp. 350-360.

Mr. Charles J. Arms, for plaintiff, *contra*:

This agreement was doubly within the Statute of Frauds, as it was not to be performed within one year and stipulated for the conveyance of a leasehold interest in land.

Potter v. Arnold, 2 New Eng. Rep. 621, 15 R. 1. 850.

Plaintiff being precluded from suing upon the invalid agreement relies upon the defendant's implied promise to pay him what his labor and services were reasonably worth.

Quantum meruit and *quantum callebat* counts are wholly unnecessary, and under an *indebitatus* count in assumpsit or debt plaintiff may recover, although there be no evidence of a fixed price.

1 Chitty, Pl. 16th Am. ed. § 352.

A party who refuses to go on with an agreement void by the Statute of Frauds after having derived a benefit by a part performance must pay for what he has received.

Lockwood v. Barnes, 3 Hill, 128, 38 Am. Dec. 620.

An oral agreement within the Statute of Frauds for services cannot be set up in defense to an action on a *quantum meruit* for services performed under it.

King v. Welcome, 5 Gray, 41.

Plaintiff contends that induced by the contract he furnished to defendant labor, supplies, and services. It would be iniquitous to rule that he has no redress for his loss and injury. If the provisions of the Statute of Frauds is to have this effect, instead of preventing fraud, it will be making it the instrument and means of perpetuating fraud.

Ray v. Young, 13 Tex. 550; *Wonsettler v. Lee*, 40 Kan. 387; *Butcher Steel Works v. Atkinson*, 68 Ill. 421; *Freeman v. Foss*, 5 New Eng. Rep. 302, 145 Mass. 361; *Miller v. Eldridge*, 126 Ind. 461; *Towsley v. Moore*, 80 Ohio, St. 184; *Frazer v. Howe*, 106 Ill. 563; *Mills v. Joiner*, 20 Fla. 479; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Cohen v. Stein*, 61 Wis. 508; *Cadman v. Markle*, 5 L. R. A. 707, 76 Mich. 448.

Indebitatus assumpsit will lie, whether plaintiff was prevented by the act of defendant or by inevitable accident.

Notes to Cutter v. Powell, 2 Smith, Lead. Cas. 9th Am. ed. pp. 1226, 1227; *Freeth v. Burr*, L. R. 9 C. P. 208.

Upon rescission, plaintiff had the right, if he had done anything under the contract, to 16 L. R. A.

sue immediately for compensation on a *quantum meruit*. That he should do so is consistent with reason and justice, for it is clear that defendant cannot be allowed to take advantage of her own wrong and screen herself from payment for what has been done, by her own tortious refusal to perform her part of the contract, which refusal alone has enabled plaintiff to rescind it.

Note to Cutter v. Powell, 2 Smith, Lead. Cas. 9th Am. ed. p. 1241; *Perkins v. Hart*, 24 U. S. 11 Wheat. 237, 6 L. ed. 463; *Mitchell v. Scott*, 41 Mich. 108; *Hoagland v. Moors*, 2 Blackf. 167; and cases cited in 1 Walt. Act. & Def. 882; *Kelly v. Rowane*, 38 Mo. App. 440; *Moulton v. Trask*, 9 Met. 577; *Selby v. Hutchinson*, 9 Ill. 819; *Dubois v. Delaware & H. Canal Co.* 4 Wend. 285; *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705.

Where the plaintiff is at liberty to treat the contract as at an end, though only partly performed, he may declare on the common counts and recover what his services were worth.

Cadman v. Markle, 5 L. R. A. 707, *note*, 76 Mich. 448; *Dane*, Abr. chap. 9, art. 22, §§ 17, 18; *Anthony*, Am. Prec. 114, 115.

If plaintiff had been incapacitated by the death of his wife for the performance of his contract—which was not shown at the trial—he could still recover in this action what his services were reasonably worth.

Fuller v. Brown, 11 Met. 440; *Seaver v. Morse*, 20 Vt. 620; *Fenton v. Clark*, 11 Vt. 557; *Haynes v. St. Louis Second Baptist Church*, 12 Mo. App. 546.

Douglas, J., delivered the opinion of the court:

This is an action of assumpsit, brought to recover compensation for board, maintenance, care, and nursing for 390 weeks from April 1, 1881, to October 1, 1888, at \$5 per week,—\$1,950. The declaration contains the common counts in *indebitatus assumpsit* for goods sold and delivered, work and labor, money had and received, and for interest. The jury returned a verdict for the plaintiff, and assessed his damages at \$1,072.50, being at the rate of \$2.75 per week for 390 weeks. It appeared that the services rendered were induced by a parol agreement between the parties by which the plaintiff agreed that he and his wife should live in the house of the defendant and care for and maintain her during her natural life, and the defendant agreed, in consideration of these services, that she would charge no rent for the house, would pay \$8 per month board, and would give the house and leasehold interest in the lot to the plaintiff at defendant's death. She did not pay the board as agreed, but did pay some milk bills for the plaintiff on account. Plaintiff's wife died February 13, 1888, and from that time he furnished housekeepers. In August, 1888, defendant notified plaintiff to leave the house, and he removed October 1. Evidence was introduced, against the objection of defendant, of the value of the services rendered. The defendant now prays for a new trial, on the ground that the services were performed under an entire contract, which was not completed by the plaintiff because of the death of his wife, whose personal attendance formed an essential part of the consideration

of it, and because the evidence objected to was inadmissible under the declaration. The plaintiff contends that after the death of his wife the same services were rendered by the housekeepers whom he engaged, and that he was prevented from completing the contract by the defendant, who ejected him from the house, and not by his wife's death.

The questions which are raised by the petition are whether the plaintiff can recover what his services are reasonably worth, notwithstanding the making of the contract, and, if so, whether this declaration is sufficient without a count in *quantum meruit* to admit evidence of the value of the services and to sustain judgment therefor. We cannot doubt that when this action was brought the agreement had been annulled, if it ever had had any validity. If the leasehold interest were for a term exceeding one year, the agreement amounted to an attempt to convey an interest in real estate by parol, and was void under the Statute of Frauds. In such case, as the defendant refused to continue the arrangement, whether justifiably or not, the plaintiff is entitled to recover the value of his services already rendered. *Lockwood v. Barnes*, 3 Hill, 128, 33 Am. Dec. 620; *King v. Welcome*, 5 Gray, 41.

While it seems to be assumed that the lease was for a long term, and the probabilities of the situation lead us to the same supposition, unfortunately there is no evidence reported which enables us to find the fact, and we cannot presume that the agreement was void without proof. We must therefore consider the agreement as originally binding, and determine the rights of the parties upon that view of the case.

If the plaintiff was prevented from continuing his contract by the arbitrary act of the defendant, he may disregard it, and recover the value of the services he has rendered in partial performance of it. *Greene v. Haley*, 5 R. I. 260. If the death of the plaintiff's wife was a substantial failure of the consideration, then the defendant was justified in rescinding the contract, as the full performance of it on the part of the plaintiff had become impossible. We think such was the case. The personal services and attentions of the wife to the defendant, who was the plaintiff's aunt, were undoubtedly contemplated by the parties as more agreeable and efficient than the services of strangers could be, and may well be considered an essential part of the benefits which the defendant was to receive. *Yerrington v. Greene*, 7 R. I. 589; *Knight v. Bean*, 22 Me. 581; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747.

The question is then presented whether a person who has rendered personal services under an entire contract which the act of God has prevented him from fully performing can recover upon an implied assumption what those services are reasonably worth. In case of the destruction of the fruits of the services, so that neither party has the value of them, the loss must be adjusted according to the scope of the contract and the circumstances of the case, and different courts may come to diverse conclusions in cases which are very similar to each other. But when, as in this case, the defendant

has received and retains the benefit of the services, we think that the plaintiff should recover. It is not just that we should benefit by the labor of another, and make no return, when the event which ends the service happens without fault of either party, and is not expressly or impliedly insured against in the agreement which induced the labor. This conclusion seems now to be established by authority, as well as to rest in sound reason. We know of no case which holds that, if the special agreement is no longer binding, the plaintiff may not resort to a *quantum meruit*. The leading case of *Cuttler v. Powell*, 6 T. R. 320, held the special contract not to have been annulled by death, and there were circumstances connected with the agreement which gave color to that construction. The contract was to perform a voyage for a compensation to be paid upon arrival largely in excess of the ordinary wages for such services. The sailor died before the voyage was finished, and it was held that his administrator could not recover anything. The king's bench seem to have felt the harshness of the rule they were bound by even in that case, and caused inquiry to be made if some custom of the maritime law might not be found to mitigate the severity of the contract; but at the end of the term, no such usage having been found, they gave judgment for the defendant. W. W. Story says of this decision: "But this case may be explained by the fact that the thirty guineas was an extra price for the voyage, much larger than the ordinary wages would amount to for the length of such a voyage, and that both parties understood and intended that the contract should be entire, and that the sailor should take the risk of the whole voyage. In other tribunals, and where there is no expressly entire contract, the death or sickness of the laborer is a sufficient excuse for nonperformance, and he may recover *pro tanto* for the time he has labored." 1 Story, Cont. 19; Smith, Lead. Cas. 9th Am. ed. 1288, note to *Cuttler v. Powell*.

The death of either party puts an end to a contract for personal services, unless it is otherwise agreed. President Tucker, of the Virginia court of appeals, referring to the same case, says: "That case can only be sustained, I think, on the ground, principally relied on, of extra wages. But, notwithstanding these and other cases which vigorously deny compensation unless there is entire performance, there can be no doubt, that where the subject is divisible, where the failure as to part can be fairly and accurately compensated by an apportionment of the consideration, the law permits, as justice certainly requires, that it should be done." *Bream v. Marsh*, 4 Leigh, 21, 29. In *Haynes v. St. Louis Second Baptist Church*, 12 Mo. App. 536, 539, it is said by the court: "If money is to be paid when the work is done, nonperformance of the work is a good defense; and where there has been a partial performance only, and not a performance of what is substantial in the contract, as a general rule plaintiff cannot recover. The rule always applies when the nonperformance is voluntary on the plaintiff's part. But when the nonperformance is caused by the defendant or by the act of God, the rule is not always applied, and

in this country *Cutter v. Powell* has not been followed, but in contracts for services sickness and death have been held to excuse the non-performance of an entire contract." See also *Carpenter v. Gay*, 12 R. L. 306; *Farrow v. Wilson*, L. R. 4 C. P. 744.

Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 888, is closely analogous to the case at bar. The plaintiff's declaration contained the common counts only for work, labor, and services rendered by his testate as a skilled workman to the defendants. A contract was set up in defense, by which the testator had agreed to work a year at \$40 per month, \$10 of which was to be paid monthly. Before the end of the year he became unable to work from sickness, and so continued till his death. It was held by the referee that by reason of this sickness and death of the workman he was discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for his services preceding the sickness. The supreme court affirmed the decision, and the court of appeals, after a careful examination of the authorities, held that the contract contemplated the personal services of the workman, and that full performance, being prevented by sickness or death, was not a condition precedent to the right to recover, and laid down the general proposition that one who, under a contract requiring his personal services, and providing for partial payment during the employment and the remainder at the end of the term, performs services valuable to the employer, but before the expiration of the stipulated period

is disabled by sickness from completing his contract, is entitled to recover as upon a *quantum meruit* for such services as he rendered. *Allen, J.* (page 200), in considering the case of *Cutter v. Powell*, says it "is distinguishable in this: that by the peculiar wording of the contract it was converted into a wagering agreement by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and to render at all hazards his personal services during the voyage, before the completion of which he died." See, also, to the same general effect, *Fuller v. Brown*, 11 Met. 440; *Seaver v. Morse*, 20 Vt. 620; *Fenton v. Clark*, 11 Vt. 557; *Cadman v. Markle*, 76 Mich. 448, 5 L. R. A. 707, note; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Coe v. Smith*, 4 Ind. 79; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, Id. 759; *Lakeman v. Pollard*, 43 Me. 463; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 500; *Green v. Gilbert*, 21 Wis. 401.

The question remains whether the plaintiff's declaration is sufficient without the count in *quantum meruit*. We think it is sufficient. A count in *quantum meruit*, as well as one in *indebitatus assumpsit* for work, labor, skill, care, and diligence, etc., claims a certain sum as due. In either case the plaintiff may recover less, and the judgment is for so much of his stated claim as is found to be justly merited. The counts in *quantum meruit* and *quantum valebat* are therefore unnecessary in any case. 1 Chitty, Pl. *352, 353.

The petition for a new trial must be denied and dismissed.

MINNESOTA SUPREME COURT.

Charles CHURCH, by His Guardian ad Litem, Rosetha Church, *Appt.*,

CHICAGO, MILWAUKEE & ST. PAUL R. CO., *Resp.*

(.....Minn.....)

*1. A construction train of defendant, in charge of a conductor, having

*Head notes by MITCHELL, J.

pulled into a station, the conductor temporarily left the train to attend to his usual duties at the station, leaving the trainmen to do some switching, so as to transpose some of the cars: one of the brakemen, called "head brakeman," having charge of the switching movements of the train. At the request of this "head brakeman," the plaintiff, a bystander at the station, got on the cars to assist in the switching, and while doing so sustained injuries caused by the movement of certain car trucks which were loaded on one of the cars, and which were

NOTE.—Volunteer, who is.

One who has no interest in the performance of the work, which he undertakes, whether of his own volition, or at the suggestion of others engaged in the work, and merely to assist them in its performance, is a volunteer and assumes all the risks of the employment, and cannot recover for injuries occasioned by an accident happening through the negligence of those with whom he is acting. *Mayton v. Texas & P. R. Co.* 68 Tex. 77; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Flower v. Pennsylvania R. Co.* 69 Pa. 210. See *Mellor v. Merchants Mfg. Co.* 5 L. R. A. 792, and note, 150 Mass. 322. See also *Brook v. Copeland*, 1 Esp. 203; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 622; *Priestley v. Fowler*, 3 Mees. & W. 1; *Davies v. Mann*, 10 Mees. & W. 546; *Lynch v. Nurdin*, 1 Q. B. 29; *Barnes v. Ward*, 19 L. J. C. P. 196; *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chap-* 16 L. R. A.

lin, Id. 243; *Hutchinson v. York, N. & B. R. Co.* Id. 243; *Wigmore v. Jay*, Id. 354; *Wiggett v. Fox*, 11 Exch. 539; *Manchester, S. & L. R. Co. v. Wallis*, 23 L. J. C. P. 85; *Lygo v. Newbold*, 23 L. J. Exch. 108; *Tarrant v. Webb*, 18 C. B. 797; *Southcote v. Stanley*, 25 L. J. Exch. 339; *Paterson v. Wallace*, 1 Macq. 748; *Potter v. Faulkner*, 31 L. J. Q. B. 80; *Warburton v. Great Western R. Co.* L. R. 2 Exch. 30, 36 L. J. 1 Exch. 2.

But it would be otherwise if such volunteer was acting at the time in furtherance of his own or of his master's business.

In such a case he will not stand in the relation of a fellow servant to those he assists, and if he is injured by their negligence the doctrine of *respondent superior* will apply and their master will be held responsible. 2 *Thomp. Neg.* 1045, citing *Holmes v. Northeastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 123; *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 222.

not properly blocked. Held, that the brakeman had no authority to employ additional men to assist in switching. The fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that, if any one on the ground had such authority, it was the conductor.

2. The plaintiff was a mere volunteer, and assumed all the risks of the situation.

(June 22, 1892.)

APPEAL by plaintiff from an order of the District Court for Ramsey County overruling a motion for new trial after verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. S. P. Crosby, for appellant:

One who is engaged in defendant's work, at the request of the man in charge, though he expects no pay, and is employed for a mere temporary purpose, is, for the time being, a servant of defendant, and entitled to the same protection as any other servant.

Johnson v. Ashland Water Co. 71 Wis. 553, 77 Wis. 51.

In conducting a railroad, personal presence of directors and officers all along the line being impossible, subordinates with more or less discretionary authority are indispensable.

Michigan Cent. R. Co. v. Dolan, 32 Mich. 511.

The principal cannot expect third persons to have notice of limitations and restriction which are in their nature secret and undisclosed.

Mechem, Ag. 708, 784, §§ 714, 715.

The plaintiff in the case seeing Oleson in charge of the train and directing its movements had a right to presume that he was clothed (temporarily at least) with all the authority of a conductor and had a right to call to his aid such assistance as he deemed necessary for the proper performance of his duties in doing the switching called for.

Merchants Nat. Bank of Boston v. State Nat. Bank of Boston, 77 U. S. 10 Wall. 604, 19 L. ed. 1008.

Express authority for this purpose was not necessary. In such an emergency there must

be discretion and authority somewhere, to supply the place of disabled or missing servants, and no one could exercise this power so well or so prudently as the conductor in charge of the train.

Georgia Pac. R. Co. v. Propst, 83 Ala. 524, 85 Ala. 203, 90 Ala. 1; *Soan v. Central Iowa R. Co.* (Iowa) 11 Am. & Eng. R. R. Cas. 145; *Derrigan v. New York & N. E. R. Co.* 52 Conn. 285, 23 Am. & Eng. R. R. Cas. 438; *Houston & T. C. R. Co. v. Rand* (Tex.) 9 Am. & Eng. R. R. Cas. 399.

The conductor of the train had power and authority, necessarily implied from the necessities of the case, to require the plaintiff to act as brakeman on the trip; and the railroad company cannot be heard to say that he was acting outside the scope of his employment.

Wood, Neg. 876, § 439; *Mann v. Oriental Print Works*, 11 R. I. 152; *Mobile & G. R. Co. v. Peebles*, 47 Ala. 322; *Thomp.* Neg. 974, 1045; *Lalor v. Chicago, B. & Q. R. Co.* 52 Ill. 401, 4 Am. Rep. 616; *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 553, 21 L. ed. 739; *Derrigan v. New York & N. E. R. Co. supra*; *Whittaker's Smith*, Neg. 148, note b.; *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. Rep. 186.

The true test is whether the person in question is employed to do any of the duties of the master.

Whittaker's Smith, Neg. 148, note b.; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 262, 44 Am. Rep. 573; *Beach*, Contrib. Neg. 334.

The question is not solved by comparing the act with the authority.

Higgins v. Waterliet Turnp. & R. Co. 46 N. Y. 26.

An agreement by an agent of a corporation made in the course of the business entrusted to him is binding on the corporation, although in excess of his instructions.

Adams Exp. Co. v. Schlusser, 75 Pa. 246; 1 Wait, Act. & Def. 288, and authorities cited; *Brooks v. New York, L. E. & W. R. Co.* (Pa.) 21 Am. & Eng. R. R. Cas. 67; *Evans*, Ag. 594, 606; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

Church stood in the relation of a servant to defendant as in the language of *Judge Tyler* in the Wisconsin case *supra*, not a volunteer, and the law protects him.

So where an owner of freight transported by a railway company was allowed to assist in its delivery, and in so doing was injured, through the negligence of defendant's servants, he could recover damages of the company. *Holmes v. North Eastern R. Co.* and *Wright v. London & N. W. R. Co. supra*.

So where a street-car passenger volunteered to assist the driver in backing the car upon a switch, and was injured through the negligence of the driver of a car, coming in from an opposite direction, he could recover damages of the company. *McIntire St. R. Co. v. Bolton*, 1 West. Rep. 65, 48 Ohio St. 224.

One who volunteers to associate himself with defendant's servant in the performance of the defendant's work, and this without the consent or even the knowledge of the defendant, cannot stand in a better position than those with whom he associates himself with respect to the master's liability. *R. D.*

Potter v. Faulkner, 81 L. J. Q. B. 80; *Abraham v. Reynolds*, 6 Jur. N. S. 53.

Instances.

A foreman of an engine asked a boy ten years old to put in the hose and turn in the water at a station. *Flower v. Pennsylvania R. Co.* 69 Pa. 210.

The conductor of a train ordered a boy standing near by to uncouple the cars, which he refused to do but on being threatened, complied, and in uncoupling the cars he was injured. *New Orleans, J. & G. N. & Co. v. Harrison*, 48 Miss. 112.

In these cases the court held that the defendant was not liable. *Wood*, Mast. & Serv. 908, notes; *Degg v. Midland R. Co.* 1 Hurlst. & N. 773.

The fact that the plaintiff was requested by an employé of the railway company to assist him makes no difference. *Flower v. Pennsylvania R. Co.* and *New Orleans, J. & G. R. Co. v. Harrison, supra*; *Osborne v. Knox & L. R. Co.* 68 Ma. 49.

R. D.

Cleveland v. Spier, 16 C. B. N. S. 399; *Thomp. Neg.* 1046.

A mere passer-by, asked to help by workmen, is not a volunteer assistant. Nor is a person who performs a part of a contract or duty which another is bound to perform, by the permission of the person who would otherwise have to do it.

Whittaker's Smith, *Neg.* 146, 147.

A person ceases to be a volunteer if his assistance is given on request.

Ewell's Evans, Ag. 682; *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *McIntire St. R. Co. v. Bolton*, 1 West. Rep. 65, 48 Ohio St. 224; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Holmes v. North Eastern R. Co.* L. R. 6 Exch. 123; *Wilson v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Eason v. S. & E. T. R. Co.* 65 Tex. 577.

Mr. W. H. Norris, for respondent:

A person who assumes to assist the servant of another, without being authorized so to do by the master, and who while thus acting becomes injured, has no right of action against the master for his injury, upon the ground that he is a mere volunteer, and further, that an unauthorized request of an employé does not bind the master.

Sparks v. East Tennessee, V. & G. R. Co. 82 Ga. 156; *Rhodes v. Georgia, R. & Bkg. Co.* 84 Ga. 320, 41 Am. & Eng. R. R. Cas. 302; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589; *Eberhart v. Terre Haute & I. R. Co.* (Ind.) 4 Am. & Eng. R. R. Cas. 599; *Atchison, T. & S. F. R. Co. v. Lindley*, 6 L. R. A. 646, 42 Kan. 714; *Flower v. Pennsylvania R. Co.* 69 Pa. 210.

Mitchell, J., delivered the opinion of the court:

Taking the admissions in the pleadings, the evidence admitted, and accepting as true all that plaintiff offered to prove, the facts in this case were as follows: Plaintiff had been in the employment of the defendant as a brakeman on a freight train running east of Calmar, Iowa. Having been taken ill, he had gone, on a leave of absence, to his home in Northfield, Minn. On the day in question he went down to defendant's depot in Northfield, for the purpose of writing or telegraphing to Austin for a pass over defendant's road to go back to his work. While he was at the depot a wrecking train came into the station in charge of a conductor, and with an engineer, fireman, and two brakemen, one of whom is called "head brakeman." This train was on its way to pick up a wreck, and, in addition to an engine and tender, consisted of two or more flat cars, upon one of which was loaded a derrick, and on another two pair of heavy car trucks. After the train pulled into the station the trainmen proceeded to switch the cars and transpose them so as to put the "derrick car" in the rear, and place the "truck car" next in front of the derrick. On its arrival the conductor left the train to attend to his other usual duties at the station while this switching was being done, the head brakeman being in charge of the switching movements of the train. While this switching was going on, the head brakeman

being on the cars and the other brakeman at the switch, and a third man being necessary (as plaintiff offered to prove) to do the switching, the head brakeman, seeing plaintiff standing by, requested him to get onto the cars and assist. The plaintiff did so and while thus engaged sustained the injuries complained of, caused, as is claimed, by reason of the trucks on the flat car not being properly blocked.

It was necessary for the plaintiff to establish, as the essential foundation of his right to recover, the existence of the relation of master and servant between himself and the defendant company, and this in turn depended upon the authority of the head brakeman to employ him to assist in the switching. In our opinion, none of the evidence introduced or offered had any tendency to prove any such relation between plaintiff and defendant, or any such authority on the part of the head brakeman. The fact that plaintiff had been or was in the employment of the defendant elsewhere is wholly unimportant. He was not at the station on defendant's business. He was not an employé of defendant at that place or as to the switching of that wrecking train. The case stands precisely as if the head brakeman had called on any other bystander at the station to assist. While the head brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority. The conductor had not abdicated the general charge and control of the train, or turned it over to the brakeman. The latter had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily. It was wholly immaterial whether two brakemen were or were not sufficient to do the switching. Even if they were not, that fact would not, under the circumstances, give a mere brakeman authority to employ an additional force. If any one on the ground had any implied authority to do so it was the conductor, who had charge and control of the train. In doing what he did the plaintiff was, therefore, a mere volunteer, and, as such, assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such. *Flower v. Pennsylvania R. Co.* 69 Pa. 210; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62; *Sparks v. East Tennessee, V. & G. R. Co.* 82 Ga. 156; *Eberhart v. Terre Haute & I. R. Co.* 78 Ind. 292; *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320; *Atchison, T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 6 L. R. A. 646.

Counsel for plaintiff has cited no case which sustains his contention in this case. Many of those which he cites have no bearing whatever upon the question here involved. There are cases which hold that, when a regular brakeman is absent, and the proper and safe management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman.

Such, for example, are the cases of *Sloan v. Central Iowa R. Co.* 63 Iowa, 728, and *Georgia Pac. R. Co. v. Propst*, 88 Ala. 518.

And if any sudden or unexpected emergency should arise, such that the safety of the train demanded an extra force of brakemen, probably it would be held that it was within the implied authority of the conductor to employ them. But such cases are clearly distinguishable from the present, where a mere brakeman, without the knowledge of and without authority from the conductor in charge of the train, and in the absence of any sudden emergency, assumed to call upon a bystander to assist in switching. Another line of cases cited by counsel is also clearly distinguishable from the present one. They are those where one assists the servants of another at their request for the purpose of expediting his own business or that of his master. Such is the case of *Eason v. S. & E. T. R. Co.* 65 Tex. 577. The case of *McIntire St. R. Co. v. Bolton*, 48 Ohio St. 224, 1 West. Rep. 65, is also referable to the 16 L. R. A.

same class. See also *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 128. The decisions in this class of cases are placed upon the ground that, though performing a service beneficial to both, the party is doing so in his own behalf, and not as the servant of the company, and is entitled to the same protection against its negligence as if attending to his own private affairs. See also *Thomp. Neg.* 1045, and cases cited. Neither is the case of *Johnson v. Ashland Water Co.*, 71 Wis. 553, so much relied on by counsel, particularly in point. The question there arose merely on demurrer to the complaint, and the decision is really made to rest upon the fact that the complaint alleged that the person who employed the plaintiff to assist was at the time the superintendent having charge and control of the work.

There was no error in excluding the evidence offered by plaintiff, and consequently *the order appealed from must be affirmed.*

END OF CASES IN BOOK XVI

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with Oct. 1, 1892, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A statute prohibiting those engaging in mining or manufacturing to keep or be interested in any truck store, shop, or scheme for furnishing supplies and merchandise to employes is declared unconstitutional in Illinois, following decisions in West Virginia and Pennsylvania as against one in Indiana. (Ill.) 492.

The rule as to self-executing constitutional provisions is applied in a Minnesota case to a provision making stockholders liable to the amount of their stock. (Minn.) 281.

The power of the Legislature over an infant's lands extends to authorizing them to be taken for railroad uses by agreement with the infant's guardian. (Mass.) 251.

The constitutional right of women to serve as jurors is a question raised but not decided in a Wyoming case which decides on this point that their exclusion on the trial of a man for crime does not violate his constitutional rights. (Wyo.) 710.

The exercise of the police power in respect to the condition of human habitation extends to requiring water-closets therein. (Mass.) 400.

Contempt.

The constitutional provision as to the division of the powers of government into three departments is involved in a case which decided that the power to punish for contempt being judicial cannot be conferred upon a state board of tax commissioners. (Ind.) 108.

Civil Rights.

Discrimination against colored persons in theaters is not unlawful in the absence of any civil-rights statute. (Mo.) 558.

Aliens; Treaties.

The effect of a treaty guaranty to aliens in connection with that of the 14th Amendment for equal protection is held to make void a covenant not to rent property to a Chinaman. (U. S. C. Cal.) 277.

Ex Post Facto Laws.

A statute declaring a person an habitual criminal on the third conviction of a felony is held not to be an *ex post facto* law. (Mass.) 256.

Elections.

The recent Ballot Reform Laws continue to furnish important cases. The "Australian Ballot Law" of Missouri is construed by a decision involving several interesting questions as to the validity of an election. (Mo.) 754.

The requirement of the Louisiana statute that "all the names of persons voted for shall be printed on one ticket" is held to be mandatory and a vote by writing another name in place of a printed name, which is erased, is invalid. (La. Ann.) 278.

But in New York, where the ballot reform statute allows the voter to write or paste the name of any person for whom he desires to vote on his ballot, he may vote for one who has had no nomination. (N. Y.) 606.

Where pasters are allowed by the Ballot Reform Law, the fact that at a town election pasters printed at private expense for candidates of an independent meeting or caucus had also the names of excise commissioners who could not be legally voted for on that ticket, does not constitute a marking for identification which will justify a refusal to count the ballot and declare it in the result where all those printed for the candidates of such caucus were alike. (N. Y.) 606.

A statutory provision that a ballot having a mark, sign, signature, or device not permitted by the statute shall be void, is constitutional, and the same is true of a clause allowing official ballots only to those parties who cast a certain percentage of the votes at the last election. (N. J.) 769.

Gerrymanders.

Legislative apportionments attacked as gerrymanders have received unusual attention during the current year. Closely following the Wisconsin case (15 L. R. A. 561), which held the Apportionment Act of that state unconstitutional, came Michigan decisions to the same effect. (Mich.) 402, 422.

On the other hand, the New York Act which was sharply attacked was held constitutional. (N. Y.) 836.

The division of a county in the apportion-

ment of election districts is held to be constitutional in Michigan. (Mich.) 432.

Presidential Electors.

The constitutionality of an Act providing for the election of presidential electors by congressional districts is upheld by a Michigan decision as being clearly within the constitutional provision that the state should appoint them in such manner as the Legislature may direct. (Mich.) 475.

Officers.

An express provision of statute that on neglect to take the oath of office within the time prescribed by law the office shall become vacant does not create a vacancy *ipso facto* by such neglect, but the oath may be taken thereafter if it is done before any action is taken to declare the office vacant. (Wash.) 140.

The question whether the appointment to office is an executive function is discussed, but not decided, in an Oregon case, which holds that the appointment of bridge committeemen who are mere agents of a city may be by statute given to the judges of a court. (Or.) 787.

The effect of the removal of a city councilman from his ward on his right to the office, which is regarded by an Indiana court as one of first impression, is held not *ipso facto* to deprive him of his office under the Indiana Constitution and statutes. (Ind.) 688.

The right of an officer appointed for a definite term, and subject to removal for specified cause, to have notice and opportunity to defend in case of removal, is discussed, with a review of authorities, in a South Dakota case. (S. Dak.) 413.

The validity of the removal of fire and police commissioners is involved in a Nebraska case which extensively discusses the law as to removal of officers. (Neb.) 791.

The power of a board of commissioners to bind their successors in office is denied in a case relating to the designation of newspapers for official publication and printing. (Kan.) 257.

But an important Indiana case upholds a contract by a city for gas for a term of twenty-five years. (Ind.) 485.

County Legislation.

The power of the Legislature to delegate to boards of supervisors the right to allow a county officer additional pay for deputies, thereby changing a general law, is denied under a constitutional provision that the Legislature shall regulate the compensation of such officers by general laws. (Cal.) 161.

Municipalities.

The control of the Legislature over municipalities extends to the transfer of the control of a cemetery from a town to a city. (Wis.) 695.

The validity of amendments to a city charter is discussed in a Washington case, in which they are upheld against certain irregularities in submitting them. (Wash.) 214.

The question of estoppel as to the assertion of governmental power is presented to a limited extent in an Illinois case, which holds a village estopped to claim certain territory. (Ill.) 178.

A borough ordinance which practically prohibits peddling by requiring a higher license fee, but exempts residents of the borough, is void as an attempted trade regulation. (Pa.) 49.

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Insolvency.

A judgment held by a resident of the state was held not to be affected by his debtor's discharge in insolvency where the judgment was obtained in another state upon a contract of that state. (Cal.) 159.

Fisheries.

A statutory regulation of fisheries, prohibiting the use of a seine during a certain period of the year, is not unconstitutional as applied to a small lake wholly upon the lands of a private owner and connected with an unnavigable river only during the time of high water. (Ill.) 684.

Highways.

The subjection of the rights of the owners of the soil of streets in municipal corporations to public uses is held in a Pennsylvania case to extend to the laying of a drain therein by a private person with the permission of the municipal authorities but without consent of the owners of the soil. (Pa.) 715.

The right to run traction engines over a bridge is presented in an Indiana case which holds that it is proper when that is a usual and ordinary use of the bridge. (Ind.) 228.

The regular use of a steam traction engine for drawing heavy loads of stone on a common highway from a quarry, which amounts to serious hindrance to travel and endangers the safety of bridges, is an indictable nuisance. (Pa.) 148.

The power of a city council to lay a street railway in a street where only eight feet seven and one-half inches will be left for teams on each side of a street-car is upheld in Michigan against the vigorous dissent of two judges. (Mich.) 752.

The doctrine that the discontinuance of a highway does not entitle a landowner to any damages unless his access to the system of public streets is substantially impaired, is reiterated by a Massachusetts decision. (Mass.) 591.

Service of Notice.

Service of a notice which a statute requires to be made upon a person is held to mean a personal service and not merely the leaving of a notice with a member of his family. (N. J.) 200.

Lack of notice to the owner of premises of proceedings to lay out a highway over them is not fatal to jurisdiction if a tenant or other occupant was made a party and duly notified. (Ind.) 186.

Taxation.

The taxation of a mortgagee's interest in mortgaged land is held in a very exhaustive case constitutional, even as to mortgages in which the mortgagor had agreed to pay all taxes. (Mich.) 59.

The *situs* of negotiable notes for the purpose of taxation is held in an Alabama case extensively reviewing the authorities to be the domicile of the owner, and such notes are held to be personal property. (Ala.) 729.

A debt owing to a nonresident of a state is not liable to be taxed by the state. (La.) 56.

The appointment of a local board of directors by a foreign corporation to conduct its business within a state under direction of the head office, does not localize its business so as to make the corporation taxable therein any

more than if its business was conducted by any other agency. *Id.*

The rights and franchises of a water company are held proper subjects for taxation under a statute requiring all property not exempted to be taxed. (Wis.) 581.

Lots on which are situated the pumping station and works of a water company are held not to be taxable apart from the water mains, franchises, and other property constituting its plant. *Id.*

The water mains and electric wires of a water and light company are held in Illinois, in contrast with the Iowa case in 15 L. R. A. 296, to be personal property for the purposes of taxation. (Ill.) 505.

The constitutional equality and uniformity in respect to occupation taxes is held violated by an ordinance which is fair on its face, but which there is no attempt to enforce except against a distinct class of the persons affected by it. (Tex.) 608.

A statute requiring a fee of \$1 per mile of track to be paid into the state treasury by a railway company creates a tax and violates a constitutional provision that property shall be taxed according to its true value. (Ohio) 880.

General provisions in a statute for local assessment upon real property do not include public schoolhouses, although a constitutional exemption of such property from taxation is not applicable to such assessments. (Ark.) 418.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Notation.

The doctrine that a purchaser who agrees to pay all or a part of the consideration to his vendor's creditor thereby becomes the principal debtor and the other only a surety, is applied to effect a release of the vendor by extension of time without his consent for payment by the purchaser. (Kan.) 85.

Reasonableness.

An agreement that arbitrators may fix their own compensation, is subject to the implied condition that the allowance made to themselves shall not be unreasonable, and that its reasonableness may be determined by the court. (N. C.) 514.

Notice to Stop.

The right to complete a contract after notice to stop is denied, in a case which holds that the only remedy is for damages for the breach of the contract. (N. Dak.) 655.

Death of Party.

The right to recover for partial performance of a contract where full performance is defeated by the death of a party, is upheld in a Rhode Island case in which the personal services of the party dying were contemplated by the contract. (R. I.) 858.

Monopoly.

A monopoly in the business of furnishing electric lights under the Massachusetts statutes forbidding any other company to "lay or erect" electric wires in streets without consent of the authorities in a town where a company is already engaged in the business, is held effectual against any attempted evasion by the ownership of the wires where they cross the streets, by the customers of the company. (Mass.) 398.

Courts.

The power of the courts to review a legislative apportionment of election districts, and declare it unconstitutional if the Legislature has not exercised a fair and honest discretion so as to preserve the equality of representation as near as may be, is affirmed by the Supreme Court of Michigan. (Mich.) 402.

The exclusive jurisdiction first acquired by a state or Federal court does not prevent a state court from taking jurisdiction of a creditor's bill to attack a mortgage on which foreclosure has been begun in a Federal court. (Ala.) 564.

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The effect on the jurisdiction of an appellate court of issuing a *remititur* is discussed extensively in a Florida case which holds that it is not lost where the decision was due to a mistake in the transcript. (Fla.) 818.

Eminent Domain.

The right of eminent domain in favor of a manufacturing company for the condemnation of a right of way of a railroad for its own use, merely to connect its establishment with another railroad, is held constitutional under the South Carolina Constitution permitting a right of way to be taken by persons or corporations for works of internal improvement, but declaring that private property shall not be taken "for public use or for the use of corporations or for private use" without consent of the owner or just compensation. (S. C.) 586.

Condemnation of land for a private road to be laid out upon the application of a particular individual and paid for and kept in repair by him is for a public purpose where the road is in fact for public use by all who desire to use it. (Idaho) 81.

A private cemetery belonging to a religious corporation may be taken in condemnation proceedings for a public park under N. Y. Laws 1887, chap. 320, giving power to condemn "any and all lands" within a district which includes the cemetery. (N. Y.) 180.

Whether or not a railway operated by a steam motor in a public street is an additional burden is a question not settled in a Michigan case, which holds that the owner of the fee is entitled to compensation before the railway can be made by cutting and filling, using ties and T-rails, and leaving a ditch on each side so as to practically block up that portion of the highway for ordinary uses. (Mich.) 371.

The exception to the rule that compensation for land condemned should be according to its value at the time of condemnation, which has been made in cases where the land had been actually appropriated and applied to the purposes for which it was desired prior to the proceedings for condemnation, is illustrated in a Utah case where a schoolhouse had been built on land of an unknown owner. (Utah) 805.

Impairing Obligation of Contract.

The constitutional provision against impairing the obligation of contracts is violated as to a purchaser at a tax sale by a statute extending the time for redemption. (Fla.) 808.

Bank Transactions.

The effect of a third person's signing a certificate of deposit to prevent a depositor from withdrawing his money from the bank is discussed in a Vermont case which holds that there is a good consideration for the agreement and that the addition of the word "surety" to the signature does not prevent the signer from being held as a maker. (Vt.) 664.

A strong illustration of the rule that a deposit is not special unless it is kept separate from the funds of the bank is shown in a case where a certificate of deposit was given stating that it was made to indemnify the banker for liability as surety on a bond. (Ill.) 516.

The effect of obtaining the certification of a check is sharply presented in a Massachusetts case which holds that it releases the drawer if obtained by the payee or holder, but not if the drawer obtains it in his own behalf before he delivers the check. (Mass.) 510.

Bills and Notes.

The liability of the indorser of a note for annual interest before maturity of the principal is held in a Vermont case to be dependent on the prior demand of the maker, but against the opinion of the chief justice to the effect that the indorser is not liable at all until the principal is due. (Vt.) 295.

The distinction between a sale and a discount of negotiable paper is discussed in a Kentucky case. (Ky.) 223.

Even in the hands of a bona fide holder for value a note given by a married woman as surety for her husband is void under the Indiana statutes. (Ind.) 45.

The rule as to liability on a note signed by a corporation and its officer is clearly stated in a New Jersey case holding that the corporation only is liable if its name is signed to the note followed by that of its president without anything in the body of the note to show the maker. (N. J.) 148.

Oral Partnership in Land.

An oral agreement of partnership in the profits of buying and selling real property is not within the Statute of Frauds. (Cal.) 745.

Bailment of Merchant.

The liability of a storekeeper for the safety of a customer's property given into his custody while trying on garments, which is involved in a New York case in 10 L. R. A. 481, is again considered in a Pennsylvania case which makes ordinary care the measure of the duty. (Pa.) 451.

Public Inn.

The fact that a hotel stands within enclosed grounds does not prevent it from being a public inn. (Cal.) 186.

Tradename.

The right of brothers named Fish to use the name Fish Bros. and the picture of a fish on wagons which are manufactured is upheld in a Wisconsin case, although the name and picture had been previously used by them in a business which had been transferred with all its goodwill and trademarks to a corporation which has also the right to the use of such name and picture. (Wis.) 458.

Champerty.

The doctrine of champerty is reviewed in an Ohio case which holds a contract by an attorney 16 L. R. A.

ney to advance the costs and expenses of collecting a judgment in consideration of one half the proceeds if successful and of the repayment of one half the outlay in case of failure, is not unlawful. (Ohio) 728.

Illegal Purpose.

The effect of an illegal purpose on a contract is involved in a case which holds that a carrier is not excused for breach of its contract for transportation of cattle by a certain day by the fact that the shipper's purpose was to reach a Sunday market. (N. C.) 884.

License for Business.

The rule that a contract in the exercise of a business by one who has failed to obtain the license therefor which the law requires is invalid is applied to the case of a real-estate broker for whom a license is required by ordinance. (Minn.) 423.

Implied Covenants.

An implied agreement that a house is fit for habitation is held to exist in the case of a lease of a completely furnished summer residence at a watering place for the season, and the fact that it was infested with bugs was held a sufficient reason for refusing to occupy it. (Mass.) 51.

But a New York case decides that no such covenant is implied on the lease of an unfurnished dwelling. (N. Y.) 236.

Insurance.

A policy of insurance for \$200 on a storehouse, and \$3,800 on goods therein, is so far severable that a forfeiture as to the building by breach of a condition as to the title of the land will not defeat the insurance on the goods. (Ohio) 174.

What constitutes a single building or risk for purpose of insurance is a question discussed in an Alabama case, which holds that there was but one risk where partitions extended above the roof and divided a building into stores or sections which were connected by large doors through the partitions and were used under one management for the same purpose. (Ala.) 291.

The fatal effect of a false warranty by an applicant for life insurance is not avoided by his belief that it was true and the knowledge of the agent of the insurer that it was false. (N. Y.) 83.

The constructive loss of a foot within the meaning of an insurance policy is held not to be caused where the foot was injured, and could not be used unless the person wore a plaster jacket to prevent an injury in another part of the body from affecting the use of the foot. (Pa.) 446.

Carrier's Contracts.

On an extensive review of the authorities the Texas Supreme Court holds it to be established law that an initial carrier may by contract protect itself against liability for loss on a connecting line. (Tex.) 89.

The right of a passenger to pay fare after the train has stopped to eject him for refusal to pay it is held dependent on the question whether his refusal was or was not wrongful. (Ga.) 58.

The right to eject a passenger for failure to pay fare for the distance already ridden, although he offers to pay for his future ride, is

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extended by an Alabama decision to a case in which the passenger on being notified that he must pay fare for the whole distance or be put off at the next station has procured a ticket at that station for the remainder of the trip and tenders it to the conductor. (Ala.) 557.

A ticket good for a continuous passage only will not give a passenger the right to break his journey and finish it upon the train which he ought to have taken in the first place where he has voluntarily taken passage on another train which he must be held to have known would not take him to his destination. (Ark.) 818.

The right of a passenger to complete his journey commenced in good time where he is delayed by a wreck on one road so long that the time limited by his ticket expires before he reaches the last of the connecting roads, is denied in a Texas case where he had a coupon ticket which expressly limited the liability of the first carrier to its own line and made it agent simply for the other carriers. (Tex.) 471.

The illegibility of the date on a ticket which the passenger receives in that condition does not impose on him the duty of getting the indorsement of a ticket receiver as to its validity because it is questioned by the gateman, and a rule of the railroad company making such a requirement is unreasonable because it would subject a passenger to great inconvenience and might cause him to loose his train. (Md.) 449.

Transfer Tickets.

A decision on the subject of street railway transfer tickets holds that such a ticket designating the route so generally as to be applicable to several lines entitles the passenger to ride over either of them. (Minn.) 847.

The validity of a restriction that such a ticket must be used within fifteen minutes after it is punched on the first line is upheld in a Michigan case in the absence of any charter, ordinance, or contract to the contrary. (Mich.) 845.

III. CORPORATIONS AND ASSOCIATIONS.

See also, as to tax on corporation, *supra*, I.

A conflict between corporations as to the right to a certain name appears in an Illinois case in which a proposed corporation obtained a license under a certain name after another corporation had called a meeting to vote on the question of adopting that name. (Ill.) 429.

The distinction between a joint-stock company and a corporation is discussed at much length in a New York case, which holds that the inherent difference, although obscured by the statutes of the state, remains unimpaired, and that the capital of a joint-stock company is not taxable as that of a stock corporation. (N. Y.) 183.

The retaliatory provisions of the Ohio statute as to foreign insurance companies are confined by an Ohio decision to cases within the letter of the statute, and are held not applicable to a foreign insurance company where

no Ohio company has been formed to do the same kind of business. (Ohio) 611.

The right of directors to compensation does not exist unless provided for or expressly sanctioned by the charter, except for services outside their duties as directors rendered under an express contract. (Colo.) 426.

Shares of increased stock apportioned *pro rata* among stockholders to represent the increased value of property resulting from development of the business constitutes capital and not dividends or income. (Conn.) 461.

A right of action for damages because of a wrongful expulsion from a mutual benefit society is denied in a Rhode Island case on the ground among others that such action implies a waiver of the illegality of the expulsion which in effect waives the whole cause of action. Also that there is no fund for payment of damages and no rule for measuring them. (R. I.) 892.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

A common-law marriage is held to be unlawful, under the Washington statute, which requires a license. (Wash.) 699.

The right of a married woman to form a partnership in a mercantile business with her husband is denied in Arkansas, although she has the right to a separate estate and to carry on any trade or business. (Ark.) 526.

Likewise in Washington, although the statutes have abolished the civil disabilities of a wife giving her full control of her property and power to make contracts and incur liabilities as if unmarried. (Wash.) 590.

Divorce.

The legal fiction that a wife's domicile follows that of her husband is held sufficient to give jurisdiction of a suit for divorce to a court in a state where the husband resides, although the wife has always resided in another state in which she deserted him. (Mass.) 497.

Injury to bodily health is not necessary in 16 L. R. A.

order to make the infliction of mental suffering constitute extreme cruelty under the California Code, which defines it as the infliction of grievous bodily injury or grievous mental suffering. (Cal.) 660.

The repeal of a statute under which a cause of action for divorce arose was held not fatal to the action where a new statute was passed at the same time which authorized a divorce on the same grounds. (Utah) 482.

The same case holds that a general Statute of Limitations does not apply to an action for divorce.

The right of a wife to sue in equity for maintenance without asking for a divorce, where she has been deserted by her husband and left destitute, is maintained by the Supreme Court of Montana after a full discussion of principles and authorities. (Mont.) 94.

Infants.

The day on which a person becomes of age

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is the day before his twenty-first birthday. (Tex.) 542.

The marriage of a minor is held valid in Massachusetts although he was married in another state to which he went solely to evade a statute requiring his father's consent, and he is entitled to his own wages so far as necessary for his own support and that of his wife and children. (Mass.) 578.

The validity of an attorney's stipulation as against infant clients is denied where it is not shown to be for the infants' interest. (Minn.) 507.

The rule that the court will seek the best in-

terest of an infant in awarding its custody is applied in an Iowa case which denies to a father the custody of his child which he has left to the care of others without properly providing for it. (Iowa) 681.

The nature of proceedings to commit infants to a reform school is discussed in a Minnesota case which decides that they are not criminal proceedings. (Minn.) 691.

Incompetency.

A belief in spiritual manifestations is held not necessarily evidence of incapacity to convey real estate. (Iowa) 677.

V. FIDUCIARIES AND REPRESENTATIVES.

The vindication of the honor of his intestate is not a purpose for which an administrator can use funds of the estate by employing counsel to aid in prosecuting for murder one who killed the intestate and attacks his honor by matters which he alleges in justification of the crime. (S. C.) 743.

The power of a court to reject an executor appointed by will is reviewed in a Connecticut case, which decides that such power exists only when specially provided by law, and that a mere lack of honest integrity and business experience does not make one "incapable to accept the trust" within the meaning of a statute. (Conn.) 538.

The power of a foreign administrator to sue in his own name on a judgment recovered by

him in another state is sustained in a Missouri case. (Mo.) 410.

A notary who is the trustee in a deed of trust cannot take an acknowledgment thereto. (Tex.) 719.

The doctrine that a receiver of a corporation is not bound by a contract of the corporation, applies to a case in which freight charges had been paid in advance for the whole distance under a contract which gave the shipper the right to take off the freight at an intermediate point where it was at the time of the receiver's appointment; and the receiver is not bound either to complete the transportation of the freight or repay any part of the charges prepaid. (U. S. C. C. Ga.) 90.

See also, as to receiver's certificates, *infra*, VI.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

Libel.

The custom of a newspaper to publish spicy gossip without inquiry as to its truth, when it has appeared in the columns of another paper, shows such recklessness as to justify exemplary damages in an action for libel. (U. S. C. C. App. 2d C.) 803.

The malicious filing of a mechanic's lien is held in a Virginia case to constitute a libel where it is done without authority of law and results in damages. (Va.) 625.

Fireworks.

A voluntary spectator of a display of fireworks in a highway must be held to assume the risk of injury from accident without negligence, although the show is unauthorized. (Mass.) 395.

Lateral Support.

An exception to the rule that the owner of a building must himself guard against the danger of excavating near it is presented by a Missouri decision that a promise by the party who is excavating to do the work in sections will make him liable for changing his plan without notice to the owner of the building and causing its fall by digging a long and deep trench. (Mo.) 830.

Imputed Negligence.

The negligence of the owner of a carriage in driving his team is not imputable to one riding with him at his invitation and who has no authority over him. (U. S. C. C. App. 8th C.) 600.

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Licensees or Trespassers.

The rule as to the assumption of risk by trespassers or licensees is held applicable to a neighbor who is injured by a defective stairway while in search of a child. (N. Y.) 640.

So the risk of defects in a tenement building such as unsafe outside steps is assumed by one who goes there to attend the wake of a relative of a tenant in the building, at least where there is nothing to show that he had an invitation or was related to any of the occupants. (Mass.) 557.

The assumption of risks by a licensee is illustrated also by a decision denying a recovery for the death of a telegraph operator who was killed by the derailing of a train, while making a friendly call on the operator. (W. Va.) 271.

Electric Wires.

The failure of an electric-light company to have the splices on its wires perfectly insulated as required by ordinance is negligence for which it is liable for the death of a person who comes in contact with a wire while attempting to repair a roof over which the wire is stretched if he was not negligent. He had a right to assume that the wires were properly insulated and was required to allow only for patent defects in the insulation. (La.) 43.

Injury by electricity generated in a telephone wire negligently allowed to hang across a highway where a traveler touches it is held chargeable to the telephone company on the ground that the wire furnished the means by which

the injury was done. (U. S. C. C. App. 5th C.) 545.

The act of a traveler in stooping to pick up and throw out of the way a telephone wire hanging so as to endanger travelers is held not to be such negligence as a matter of law that he cannot recover for injury thereby sustained on the ground that the wire charged with electricity was a defect in the street. (Mass.) 605.

Municipal Liability.

The rule that a city is not liable for negligence of members of its fire department is affirmed in a Nebraska case where a child was killed by the negligent or reckless driving of a ladder wagon or truck in a street merely to exercise the team. (Neb.) 849.

Negligence of Carrier or Passenger.

The obligation of a railroad company to a person who has negligently stepped or fallen from a train running at high speed and lies helpless on the track requires it to stop the train and remove him from the track or notify a train which is to follow, where either precaution was possible and would have prevented him from being killed by the second train. (Ohio) 874.

The duty of a carrier to keep its platforms and approaches thereto in safe condition is illustrated in an Oregon case in which a carrier was held liable for the dangerous condition of an elevated walk to a boat landing which was used only for its purposes, although upon land dedicated for a street. (Or.) 598.

The lack of lights was not excused by the fact that the boat did not start until morning where passengers were provided with sleeping accommodations on the boat. *Id.*

The duty to allow persons to get safely on board before starting a street-car is affirmed in a Minnesota case. (Minn.) 879.

The negligence of a passenger in putting his hand out of the window, although but a few inches, is held fatal to his right to recover from the carrier. (Va.) 91.

Riding in an express car in violation of a rule of the carrier is held in a Florida case extensively reviewing the authority to defeat a right to recover for injuries caused by the carrier's negligence if they would not have been received had the passenger remained in the passenger car. (Fla.) 681.

The frequency of death or injuries caused by electric cars gives interest to a Massachusetts decision that no liability exists for the death of a person who steps off from a street-car while it is slowing up directly in front of an electric car running fifteen miles an hour where it was lighted and its gong sounding. (Mass.) 490.

Assault on Passenger.

The liability of a railroad company for an unprovoked assault on a passenger by a fellow passenger where the conductor was warned of it and could have prevented it with the assistance of employés and willing passengers, is enforced in a Mississippi case following an earlier decision with reluctance. (Miss.) 627.

The liability of a carrier for false imprisonment by acts of its ticket agent in restraining a person whom he charges with having passed counterfeit money upon him is upheld in a New York case, distinguishing the recent case of *Mulligan v. New York & R. P. R. Co.* (N. 16 L. R. A.

Y.) 14 L. R. A. 791, in which it was held that the agent was acting out of the scope of his employment because he took the bill believing it to be counterfeit merely for the purpose of detecting a supposed criminal. (N. Y.) 138.

Proximate Cause.

A good illustration of the law as to proximate cause is furnished by a Pennsylvania case in which it was held that the lack of a barrier along a steep bank beside a highway is not the proximate cause of an injury to an omnibus passenger where the omnibus went over the bank during the struggles of the horse to get on his feet after falling in the middle of the street. (Pa.) 106.

The proximate cause of nervous convulsions caused by the fright of a passenger resulting from a carrier's negligence is the negligence causing the fright. (Minn.) 203.

Previous Disease of Injured Person.

The effect of a previous disease of a person injured on liability for causing the injuries is involved in two cases which hold that liability for negligently causing the injury is not thereby defeated. (Minn.) 203; (Tenn.) 268.

Attempt to Escape Danger.

To allow recovery for injury in attempting to escape apprehended danger there must be a reasonable cause of alarm. (Ark.) 787.

Injury to Servant.

The liability of a railroad company for negligently loading a car with lumber or iron projecting over the end is discussed at length in a Florida case, which holds such loading and acceptance of the car in that condition is negligence, but that a brakeman assumes the risk of coupling such cars where they are frequently taken by his train. (Fla.) 837.

On the other hand, for such negligent loading the company was held liable in Michigan although it had provided a competent inspector of cars and the car was received, after it was loaded, from another road. (Mich.) 842.

The theory that an employé is to be regarded as standing in place of the master in respect to the performance of a duty with which the master is chargeable, is well illustrated in the case of a section foreman who failed to give notice of a snow-slide across a railroad track. (Or.) 519.

A telltale to warn brakemen of a bridge, but which is unsafe for brakemen on some of the cars of unusual height, is a defective appliance for which a railroad company is liable, although it is safe for brakemen on ordinary cars, and the risk of injury from it is not assumed by a brakeman. (R. I.) 643.

The conductor of a train who negligently leaves it standing where it is struck by another is held not a fellow servant of a brakeman on the other train who is injured in the collision. (W. Va.) 888.

A master is liable for an injury to a servant of which the proximate cause is the resultant of the combined negligence of the master himself and of a fellow servant. (N. M.) 819.

Volunteer.

The rule that a volunteer assumes all the risks of work which he engages in is applied to a by-stander who gets on a construction train to assist in switching during the temporary absence of the conductor, although re-

quested to do so by the head brakeman. (Minn.) 861.

Railroad Signals.

The liability of a railroad company for failure to give the statutory signals at a railroad crossing is held by a Michigan case to extend to injuries received by a person crossing the track at a distance from the crossing, where he was using a private crossing by license and invitation of the company and was relying upon

the performance of the duty to give such signals. (Mich.) 119.

Highway Injuries.

For injuries caused by defects in a highway bridge which a railroad company is bound to maintain over its tracks, the railroad company cannot escape liability on the ground that an action would lie for the injury against the township. (Pa.) 554.

See, as to nuisance in highway, *supra*, I.

VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.

Berries.

Blackberries while growing on the bushes are not subject to levy on execution as personal property. (Minn.) 103.

Ice.

The right to ice on a public pond by making a prior appropriation is discussed at length in a Maine case. (Me.) 774.

Dog.

A dog is held by a Utah decision to be property which cannot be taken without due process of law, but an ordinance allowing dogs to be killed by any person unless registered and collared is held to be a valid police regulation. (Utah) 889.

Fixture.

A parol gift or reservation of a barn which constitutes a fixture is ineffectual. (N. Y.) 805.

Dedication.

The dedication of a park is held to be effected by recording a map of a tract on which a space is marked "park" and selling lots facing thereon according to the map. (Cal.) 145.

Flats.

By analogy to the rule as to boundary on fresh-water streams flats in the bed of a channel into which the tide flows, but from which it wholly ebbs at low water, where they are between separate channels of a fresh-water stream, are held in a very interesting Massachusetts decision to be divided between riparian owners, to whom they are given by the Colonial Ordinance of 1641-47, by straight lines from the points where the division lines of the owners end on the bank drawn to and at right angles with the center line of the tidal channel at the ordinary stage of the waters. (Mass.) 353.

Gas.

The right to explode nitroglycerine in a gas well to increase the flow is upheld in an Indiana case although gas is thereby drawn from the premises of adjoining owners. (Ind.) 443.

Easement.

The right to fence a right of way is not given by a reservation in a deed of "a reasonable right of way across the land." (Wis.) 512.

Tenancy.

A landlord can forcibly eject a tenant without legal possession after the expiration of the tenancy although he holds possession in good faith and under a color and reasonable claim of right. (R. I.) 798.

Cotenancy and Partition.

A stipulation between cotenants to prevent them, their heirs, or assigns from ever begin-

ning proceedings for partition without written consent of all the parties, is unreasonable and void. (Mo.) 220.

One tenant in common has no lien against his cotenant's interest in the property for rents in excess of his share collected and retained by such cotenant before partition of the land. (Md.) 547.

A parol partition is insufficient as a basis for ejectment, and does not even constitute color of title for the purpose of adverse possession as against the cotenant. (Ill.) 826.

Dower.

The effect of a sale in partition to bar an inchoate right of dower of the wife of a tenant in common is thoroughly discussed in a South Carolina case holding it to be so barred although the husband had previously sold his undivided share. (S. C.) 776.

The doctrine that a widow is not dowerable of an interest in mines unopened at her husband's death is repudiated by the Supreme Court of Michigan, which says the question has not previously been determined in this country. (Mich.) 247.

A release of a wife's inchoate right of dower may be made by her husband under a power of attorney given him under N. Y. Act 1878, chap. 800. (N. Y.) 209.

Surety in Judgment.

The right of a judgment debtor, who is in fact only a surety of a codefendant, to take an assignment is held not dependent on the fact of a prior adjudication of such suretyship or an indication thereof on the face of the judgment. (Ind.) 115.

Liens; Priority.

The architect of a building who superintends its erection is entitled to a lien for "work or labor" upon the building. (Ala.) 600.

Subcontractors' liens relate back, in Minnesota, to the commencement of the work as against an intervening mortgage where a building is constructed under one entire contract between the owner and the original contractor. (Minn.) 335.

A mechanics' lien is held, in Minnesota, to be inferior to a prior unrecorded mortgage in the absence of any statute to the contrary or of any estoppel. (Minn.) 288.

The superiority of an execution lien over a prior unrecorded conveyance is fixed at the time of levy if this is made without notice of the conveyance, and the title of a purchaser under the execution does not depend on his being a purchaser for value. (Tex.) 663.

Receiver's Certificate.

The rule that a receiver's certificates may be

made a lien superior to a prior mortgage, which has been applied in the case of railroad mortgages, is denied application in a circuit court of the United States to the property of a mere private corporation such as a coal mining company. (U. S. C. C. Ill.) 603.

Power.

The rule that a power of appointment is not executed by a will which does not refer to it is enforced in a Rhode Island case where the power was created by a Rhode Island will by express statute in England, where the donee executed his will, and in New York, where he

was domiciled, the contrary rule is established. (R. I.) 367.

Will.

The construction of a conveyance as a will rather than as a deed is illustrated in an Alabama case. (Ala.) 576.

A discussion of conditions in wills in restraint of marriage is given in a Maine case, which holds that a devise to an unmarried daughter of a life estate in the testator's homestead unless she shall marry, does not make an illegal condition in restraint of marriage. (Me.) 707.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Several interesting questions relating to estoppels are involved in an Alabama case, which holds that an administrator may be estopped to set up his individual title to land sold by him under order of the court without giving notice of his own title, and that such an estoppel binds purchasers in good faith and for value at a judicial sale of his property. (Ala.) 813.

A right of action to recover back payments made under duress may exist for a payment of a mechanics' lien filed on an unfounded claim, where it is made to obtain a loan to meet pressing obligations which the owner had no other means of meeting. (Minn.) 376.

The inability to specifically perform a contract where there is no other ground for equitable interference is held fatal to jurisdiction in equity of a suit for specific performance or damages. (Wash.) 614.

Mistake.

A mistake as to the extent of one's right under the law is held not a mistake of law such as would defeat relief. *Id.*

Alteration of Instruments.

The fraudulent alteration of a promissory note discharges a mortgage by which it is secured. (Neb.) 468.

Lost Note.

That an action at law on a lost negotiable note cannot be maintained is decided by the supreme court of the District of Columbia. (D. C.) 205.

Injunction against False Statements.

The right to an injunction against false and malicious charges of infringement and threats to sue plaintiff's prospective customers if they use his device, is denied by a Missouri decision in accordance with what is therein declared to be the better authority. (Mo.) 243.

On the other hand such right is upheld in a Michigan case so far as to restrain the use of a decree obtained by fraud in a patent case to threaten alleged infringers. (Mich.) 721.

Question of Law or Fact.

The question of negligence as being one of law or fact receives a very clear and able discussion in an opinion of the Missouri supreme court holding that it is for the jury where the facts or the inferences drawn therefrom are in any degree doubtful. (Mo.) 189.

Judgments.

The invalidity of a personal judgment rendered on constructive service merely, applies 16 L. R. A.

to a judgment in a bastardy proceeding. (Ind.) 231.

In line with the decision as to personal judgments on service by publication is one that a judgment quieting title taken by default on such service will be set aside if plaintiff obtained it upon a knowingly false cause of action. (Cal.) 361.

A judgment in favor of a minor procured by his father as next friend is held a bar to an action by the father personally for a portion of the same cause of action. (Mich.) 154.

Damages.

The effect of a premature birth of a child on damages for a personal injury is involved in a Washington case in which it is held that this may be considered but that it does not alone establish a right to substantial damages. (Wash.) 308.

Evidence.

On the question of expert testimony as to negligence, it is held that opinions of experts are not admissible to show whether or not a certain speed of a railroad train is dangerous. (Or.) 519.

The rule that parol evidence cannot be admitted to change a will is applied in Illinois to prevent showing that a devise of land in the northwest quarter of a section was by mistake for land in the southwest quarter. (Ill.) 321.

Evidence that fires were repeatedly set by defendant's engines is admissible in an action for a fire set by engines which cannot be identified. (Pa.) 299.

A limitation on the rule allowing exclamations of pain to be proved is made where the witness is a physician called for the express purpose of making him a witness. (Mich.) 437.

The presumption of due care by a person found killed at a railroad crossing is recognized in a Minnesota case. (Minn.) 261.

The rule as to presumption of negligence of a carrier when a passenger is injured does not apply in case of injury to a passenger on a street-car by collision with a wagon. (Wash.) 308.

The criminal-law rule as to proof beyond a reasonable doubt is held by a New York case not applicable to evidence of mistake as a ground for reforming a written contract. (N. Y.) 561.

Limitation of Actions.

The right to redeem land from a mortgage or absolute deed given as security is governed

by the law of the place where the land lies, and a rule there prevailing that such right is barred when an action on the debt is barred must control, although in another state where the parties reside and the contract was made the bar of the debt would not defeat the right to redeem. (Cal.) 616.

A clause limiting a suit on an accident policy to one year from the time of the "accidental injury" is held not to set the time running

until death resulting from the injury where the action is brought for the death. (N. Y.) 138.

The bar of the Statute of Limitations against a judgment rendered in another state is not removed by a revivor of the judgment in that state without appearance by or service upon the defendant. (Kan.) 198.

See, as to divorce cases, *supra*, IV.

IX. CRIMINAL LAW AND PRACTICE.

An important case on the question of the power of a state to punish crimes committed in another state is a North Carolina case concerning a bigamous marriage contracted in another state, and a statute attempting to make such offense punishable in North Carolina is held unconstitutional. (N. C.) 130.

A discussion of what constitutes a felony appears in a Rhode Island case, which decides that forgery is not a felony at common law and that an indictment therefor need not charge that the offense was feloniously committed. (R. I.) 550.

The forcible passage to the upper rooms of a hotel against the remonstrance and resistance of the landlord and his wife and servants on the mere suspicion that there was an illegal sale of liquors, but without any warrant, is not justified by the common-law power of peace officers or by the statute giving marshals of law and order societies authority without warrant to arrest persons who have violated any law. (N. J.) 500.

The conclusiveness of an acquittal is not defeated by the fact that it was procured by bribery of the prosecuting attorney. (Ind.) 225.

A constitutional requirement that all prose-
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cutions shall be in the name of and by the authority of the state makes an information invalid, although it appears on its face that it was filed by the state's attorney, where it does not name the state as a party or aver directly or indirectly that the defendant was prosecuted in the name or by the authority of the state. (N. Dak.) 150.

The constitutional right of trial by jury is not violated by a statute which provides for the examination of witnesses and the determination of the degree of the crime by the court where a person accused of murder confesses his guilt in open court. (Ohio) 358.

The right to peremptory challenges on the selection of a new juror in place of one discharged for sickness, as permitted by the North Dakota statute in a criminal case, extends only to such challenges as have not been exhausted in selecting the other eleven jurors. (N. Dak.) 150.

The denial of a continuance on an admission by the prosecuting attorney of what an absent witness will testify is held not to violate a constitutional right of the accused to meet the witnesses face to face and have process to compel their attendance. (Ill.) 239.

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TO

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2. The wife of a tenant in common is not a necessary party in the suit for partition. *Holley v. Glover* (S. C.) 776

3. The heirs of the owner of a building who dies before the filing of a lien thereon are necessary parties to the proceeding. *Hughes v. Torgerson* (Ala.) 600

4. After the death of an administrator suing in his own name in a foreign state upon a judgment obtained in the state of his appointment, the suit may be revived in the name of his administrator appointed under the laws of the foreign state. *Tittman v. Thornton* (Mo.) 410

5. A stipulation for the removal of a cause to another county waives an objection that it was not brought in the proper county. *Goy v. Brierfield Coal & I. Co.* (Ala.) 564

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2. A mortgage is discharged by the fraudulent alteration of a promissory note which is secured by it. *Id.*

3. A material and fraudulent alteration of a promissory note defeats any recovery on the original consideration for which it was given, as well as upon the note. *Id.*

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2. A decision upon a motion for a new trial is not the subject of review in a Federal appellate court. *Id.*

3. To present a question as to damages on appeal, it must have been assigned as a cause for a new trial. *Vincennes v. Citizens Gas-light & C. Co.* (Ind.) 485

4. An appeal on a special bill of exceptions will not be dismissed for lack of a general bill which could not be considered for any purpose whatever. *Illinois C. R. Co. v. Minor* (Miss.) 627

5. The overruling of a motion to quash the entire panel of jurors, interposed before the trial began, may be considered independently of a motion for a new trial in which it was unnecessarily embodied, but which was filed too late. *McKinney v. State* (Wyo.) 710

6. The defense that a passenger who was injured by riotous conduct of fellow passengers voluntarily placed himself in danger thereof cannot be raised for the first time on appeal. *Illinois C. R. Co. v. Minor* (Miss.) 627

7. The constitutionality of a statute making the third verdict conclusive as to the amount of damages cannot be attacked for the first time on appeal. *Id.*

8. An injunction against an alleged nuisance, granted against a great preponderance of evidence, will be reversed. *Wood v. McGrath* (Pa.) 715

9. Only the entire absence of a material fact in a complaint will make it insufficient on appeal to sustain a judgment on the merits. *Bates v. Babcock* (Cal.) 745

10. The New York Court of Appeals cannot draw the inference of fraud in the first instance for the purpose of supporting a judgment which does not proceed upon that ground, even though there is evidence which would permit such inference, if there is also evidence negating its existence. *Clemans v. Supreme Assn. R. S. of G. F.* (N. Y.) 88

11. A verdict in favor of a railway passenger to compensate him for injuries to his arm caused by contact with a bridge abutment cannot be sustained on appeal, after the striking of a count alleging that he voluntarily placed his arm out of the car window, if the other counts allege that it was flung out by a lurch of the car caused by one rail being lower than the other, and the evidence shows only a four inch difference in the height of the rails, that the window was 15 feet from the abutment, which was not touched by the car, and the body of no passenger was moved from its position, the allegation being so improbable in view of the evidence that the stricken count must have influenced the verdict. *Richmond & D. R. Co. v. Scott* (Va.) 91

12. Ten thousand one hundred seventy-five dollars damages is not so excessive as to cause a reversal on the ground of corruption, passion, or prejudice, when given to a doctor sixty years old, who was injured at a railroad highway crossing by the company's negligence, where his horse and buggy were demolished, and he received permanent injuries, such as a disfigured and partially paralyzed face, broken ribs, lameness, and constant pain which disabled him to some extent from practicing his profession, the income from which was \$2,500 a year at the time of the accident. *Gratiot v. Missouri P. R. Co.* (Mo.) 189

13. An instruction that a railroad company is bound to exercise very great vigilance and care in maintaining order and guarding passengers against violence will require a reversal of a judgment against such a company based on lack of care, although other instructions correctly require a lower degree of care. *Illinois C. R. Co. v. Minor* (Miss.) 627

14. An appellate court, having reversed a 16 L. R. A.

judgment in a capital case on a transcript of the record of the court below, which was an entire misrepresentation of the real record, does not lose its jurisdiction by issuing a remittitur to the court below, but may vacate its entry of judgment and restore the cause to its docket; and the case is not altered by the fact that the misrepresentation was unintentional. *Lovett v. State* (Fla.) 818

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1. An agreement that arbitrators may fix their own compensation is subject to the implied condition that the allowance made to themselves shall not be unreasonable, and that its reasonableness may be determined by the court. *Kelly v. Lynchburg & D. R. Co.* (N. C.) 514

2. The court when asked to confirm a report of arbitrators may, upon suggestion by exception or by motion, determine whether an allowance which the arbitrators have made to themselves by consent of the parties is or is not reasonable; and a formal action is not necessary. *Id.*

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1. An occupation tax paid under coercion of criminal proceedings may be recovered back where the ordinance imposing it was unconstitutional, although fair on its face, because of

the persistent failure to enforce it against part of the persons to whom it applies. *Hoefling v. San Antonio* (Tex.) 608

2. Payment under protest of a mechanics' lien filed upon an unfounded claim, in order to clear the title of record so that the owner might consummate a loan upon the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other oppressing debts, when he had no available means of raising the money, is made under duress and may be recovered back. *Joannin v. Ogilvie* (Minn.) 876

3. Duress may be shown with respect to real property as well as personal, so as to render a payment on account of it involuntary and permit it to be recovered back. *Id.*

ATTORNEYS. See also CHAMPERTY.

1. A stipulation by an attorney that the action shall abide the event of another action pending binds his adult clients, unless it be improvidently, fraudulently, or collusively made. *Eidam v. Finnegan* (Minn.) 507

2. But such stipulation does not bind an infant party unless approved and ratified by the court upon a showing that it is for the interest, or, at least, not prejudicial to the interest, of the infant. It must appear that the matters in controversy in the two actions, so far as affect the infant, are precisely the same, and that he is represented in the two actions by the same guardian *ad litem*. *Id.*

BAILMENT.

1. A bailment is for hire, although no hire is paid, when it is a necessary incident of a business in which the bailee makes a profit. *Woodruff v. Painter* (Pa.) 451

2. A retail merchant is liable for the loss of a customer's watch and chain which is taken off, and, at the suggestion of a salesman, put in a drawer while the customer is trying on clothing, if ordinary care is not exercised for its safety, but not if it is stolen where he has exercised such care. *Id.*

BANKS.

1. A deposit is not special by reason of a certificate of deposit showing that it is made to secure the banker against a liability as surety of the depositor, where the latter knows that the money is mingled with funds of the bank; but such deposit passes to the banker's assignee in case of his insolvency. *Mutual Acc. Assn. v. Jacobs* (Ill.) 516

2. The return of a certificate of deposit is properly made to the receiver of a bank where the bank has been closed and a receiver appointed. *Ballard v. Burton* (Vt.) 664

3. Merely adding the word "surety" to his signature, by one who signs his name on the back of a certificate of deposit in order to induce a depositor to take such certificate in place of a former one instead of withdrawing his money, does not prevent him from being held liable as maker instead of as indorser. *Id.*

4. Forbearing to withdraw money from a bank for a reasonable time, although without

any definite time agreed upon, is a sufficient consideration for the signing by a third person as surety of another certificate of deposit in place of a former one which is surrendered. *Id.*

5. Absence of an assignment, or an assignment without recourse, and the nonaccountability of the assignor for the value of the note, are necessary to make a transfer of a note to a bank for value, before maturity, in the usual course of discounting, and without notice of any infirmity, a barter and sale as distinguished from a discount. *Nicholson v. New Castle Nat. Bank* (Ky.) 223

6. The purchase by a bank of a note by a lumping trade which results in a greater discount than would be produced by an exact calculation at the usual rate does not deprive the paper of its standing as a bill of exchange, if the circumstances attending the transaction show a discount, and not a bargain and sale. *Id.*

7. The title of a note and its negotiability are not affected by the fact that a national bank discounts it at a usurious rate of interest, although the bank thereby forfeits the entire interest. *Id.*

NOTES AND BRIEFS.

Banks; purchase of notes and bills by, as distinguished from discounting; what is discounting; whether discounting includes buying and selling; application of usury laws. 223

When a deposit is special so that the title remains in the depositor. 516

BASTARDY. See JUDGMENT, 1.

BENEFIT SOCIETIES.

The unlawful expulsion of a member of a mutual benefit society will not give him a right of action for damages, as such action is based on an acquiescence in the expulsion and a waiver of the illegality which must be counted a waiver of the entire cause of action. Other reasons against the action are found in the lack of any fund from which damages can be paid and in the impossibility of measuring the damages. The proper remedy is mandamus to restore him to membership. *Lavalle v. Société St. Jean Baptiste de Woonsocket* (R. I.) 892

BERRIES. See LEVY AND SEIZURE.

BIGAMY.

1. Contracting a bigamous marriage in one state cannot be made a crime in another state which can be punished in the latter, in the absence of any illegal cohabitation there, although the persons come within the state. *State v. Outshall* (N. C.) 180

2. Cohabitation within the state under a bigamous marriage contracted in another state is not punishable under N. C. Code, § 988, which attempts to make it a crime to contract a bigamous marriage in another state. *Id.*

BILLS AND NOTES. See also **BANKS**, 7; **LOST INSTRUMENTS**.

1. The liability of the indorser of a note for annual interest which becomes due before the maturity of the note is dependent upon a prior demand of the maker. *Mt. Mansfield Hotel Co. v. Bailey* (Vt.) 295

2. A note given by a married woman as surety for her husband is void, even in the hands of a bona fide holder, unless she has estopped herself to deny its validity under Ind. Rev. Stat. 1881, § 5119, providing that a married woman shall not enter into any contract of suretyship whether as indorser or in any other manner, and that such contract as to her shall be void. *Voris v. Nussbaum* (Ind.) 45

3. The use of the words "we promise to pay," in the body of a note signed in the name of a corporation followed by the name of its president, does not show that it is his individual note, or the joint note of himself and the corporation. *Reese v. Glassboro First Nat. Bank* (N. J. Err. & App.) 148

4. A note signed by a corporate name under which appears the name of an officer of the company, with his corporate official title affixed thereto, is taken conclusively to be that of the corporation, where nothing appears in the body of the note to indicate the maker. *Id.*

NOTES AND BRIEFS.

Bills and notes; rights of bona fide purchaser of note declared void by statute. 45

Right of action at law on lost bills and notes; non-negotiable paper; presumptions; negotiable paper; paper overdue or otherwise subject to equities; action against indorser; loss pending action; destroyed bill or note. 205

BLACKBERRIES. See **LEVY AND SEIZURE**.**BOUNDARIES.**

The boundary line between owners of land on opposite sides of a channel not more than 200 rods wide into which the tide flows, but from which it wholly ebbs and through which a fresh water stream flows, is the middle of the tidal channel and not affected by the fresh-water stream, although the Colonial Ordinance of 1641-47, which extends the ownership of the land on tidal waters to low-water mark if not more than 100 rods, furnishes no guide for the division, since the land to be divided is all above low-water mark. *Tappan v. Boston Water-Power Co.* (Mass.) 858

BRIBERY. See **CRIMINAL LAW**, 1.**BRIDGES.**

1. One who subjects a bridge to an unusual and extraordinary load or strain cannot recover damages for an injury which he receives in consequence. *Vermillion County v. Chipps* (Ind.) 228

2. A mistake in respect to the safety of a bridge made by a competent person employed by the proper county officers to examine it 16 L. R. A.

and put it in good repair will not make the county liable if it remains unsafe. *Id.*

8. County officers are not negligent in accepting a bridge containing defective timbers which an expert employed by them to examine it honestly believes sufficient. *Id.*

4. For injuries caused by defects in a highway bridge which a railroad company is bound to maintain over its tracks, the railroad company cannot escape liability on the ground that an action would lie for the injury against the township. *Gates v. Pennsylvania R. Co.* (Pa.) 554

BROKERS. See **CONTRACTS**, 10.**BUILDINGS.** See also **CONSTITUTIONAL LAW**, **NOTES AND BRIEFS**; **INSURANCE**, 5.

1. The placing and maintenance of water-closets in buildings which are designed for habitation and are so situated that they can be connected with public sewers may be compelled by the state under its police power, although the buildings were lawfully erected without them. *Com. v. Roberts* (Mass.) 400

2. An Act providing that buildings designed for habitation shall have sufficient water-closets connected with the public sewers, and imposing a penalty on "any person violating any provision" of it, applies to violations which continue after its passage as well as to those which then come into existence. *Id.*

3. A water-closet within the meaning of an Act providing that every building designed for habitation shall have sufficient water-closets connected with the sewer, and shall not have a cess-pool or privy, is an arrangement with a permanent water supply which can be used systematically and regularly for carrying whatever is deposited therein to the sewer, and does not include a privy vault which, although connected with the sewer, can be flushed only by a rain-storm or from a hydrant. *Id.*

CABLE RAILWAYS. See **CARRIERS**, 19.**CAPITAL.** See **CORPORATIONS**, 7.**CARRIERS.** See also **CONTRACTS**, 11; **DAMAGES**, 6-8.

1. Failure to stop a train and remove from the track one who has stepped or fallen from the train while it is going at high speed, and is helpless upon the track, where this could be done without danger or any considerable inconvenience, or to notify those in charge of another train of his exposed condition, which could be done by telegram before the other train has left the nearest station,—will render the railroad company liable for the death of such person, where he is killed by the following train, although those in charge of it are not guilty of negligence. *Cincinnati, H. & D. R. Co. v. Kassen* (Ohio) 674

2. A common carrier is required to protect a passenger from an unprovoked assault of a fellow passenger, if the conductor knows that it is threatened and can prevent it with the assistance of employes and willing passengers. *Illinois C. R. Co. v. Minor* (Miss.) 627

3. A ticket agent who follows a woman who has bought a ticket, out upon the platform, and charges her with having given him counterfeit money, with a demand for other money in its stead, and on her refusal angrily insults her by slandering her character, and puts his hand upon her telling her not to stir until he gets a policeman to arrest and search her, but lets her go when he fails to get an officer,—is acting within the scope of his employment, and renders the carrier liable for false imprisonment and slander, if the detention was unlawful and his charges false. *Palmeri v. Manhattan R. Co.* (N. Y.) 188

4. A rule requiring passengers to remain in the cars provided for them, and prohibiting them to ride in an express car or other place of increased danger set apart for another purpose, is reasonable. *Florida S. R. Co. v. Hirst* (Fla.) 681

5. A passenger who rides in an express car in violation of a known rule of the carrier, even with the permission, connivance, or knowledge of the conductor of the train, and is there injured through the negligence of the carrier, cannot recover if he would not have been injured had he remained in the passenger car as required by the rules. *Id.*

6. Although a carrier may abandon its rule prohibiting passengers to ride in an express car, the mere delinquency of a conductor in enforcing the rule is not sufficient to constitute an abandonment, without such conduct as in effect establishes the concurrence of the carrier in the disregard of the regulation. *Id.*

7. The mere failure to pay fare will not prevent a person from being entitled to the status of a passenger, where, without any attempt on his part to defraud the carrier, the conductor has failed to call upon him for the fare. *Id.*

8. A carrier's liability for the lack of proper lights on a walk leading to its boat landing, on account of which persons are injured while on their way to the boat in the evening, is not defeated by the fact that the boat did not start until morning, where passengers were provided with sleeping accommodations on the boat at an extra charge. *Skottowe v. Oregon S. L. & U. N. R. Co.* (Or.) 593

9. The fact that an elevated walk to a boat landing is upon a public street does not relieve the carrier which maintains it from liability for injuries caused by its dangerous condition, where the street has never been opened as such, or used except by the carrier and those doing business with it. *Id.*

10. The court cannot declare it to be contributory negligence for persons to walk off from an elevated walk in the dark at a place where there is no railing, while they are on their way to a boat landing. *Id.*

11. A carrier is not liable for injury to a passenger's hand from striking against a bridge, where he put it out of the car window, although it projected but 8 inches. *Richmond & D. R. Co. v. Scott* (Va.) 91

12. The prudence of a passenger's leaving a railway train to escape an apparent danger must be judged by the circumstances as they appeared to him at the time, and not by the 16 L. R. A.

result. *St. Louis & S. F. R. Co. v. Murray* (Ark.) 787

13. A reasonable cause of alarm occasioned by the negligence or misconduct of the carrier must have existed to render it liable for injuries received by a passenger while leaving a train in an effort to escape an apprehended danger. *Id.*

14. That those in charge of a railroad train used sufficient precaution to prevent collision with a train standing on the track ahead of it, and no collision in fact occurred, will not relieve the company from liability for injuries received by a passenger in leaving the forward train to avoid being injured by the collision, which appeared to him to be imminent. *Id.*

15. If the negligence of a carrier places a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought. *Purcell v. St. Paul City R. Co.* (Minn.) 203

Street railways.

16. A street-car company is liable for injury to a passenger caused by starting the car after he has got on the step or footboard, before he has a reasonable opportunity to reach a safe place. *Steege v. St. Paul City R. Co.* (Minn.) 879

17. Stepping from a street car which is slowing up, but is still in motion, in front of an electric car coming from the opposite direction at the rate of 15 miles an hour, and which was lighted and could be plainly seen, and the gong of which was ringing, is such negligence as will prevent the liability of the street-car company for the resulting death of a passenger, where there was nothing to show that his senses were defective or that he exercised any care or caution, although his fellow passengers shouted to him to stop. *Creamer v. West End Street R. Co.* (Mass.) 490

18. The relation of a passenger is terminated as soon as he steps from a street car upon the street, and does not continue during his passage to the sidewalk. *Id.*

19. It is not negligence for a passenger on a cable railway to take a seat on the outside of the grip car, in a place provided for passengers, although there is room in the trailer. *Hawkins v. Front Street Cable R. Co.* (Wash.) 808

Fare; tickets.

20. A higher rate of fare can be demanded of a passenger who has no ticket, only when the failure to procure a ticket is not due to the nonattendance of the ticket agent, or some other fault or default of the carrier. *Georgia S. & F. R. Co. v. Asmore* (Ga.) 58

21. A passenger cannot avoid expulsion by tendering fare while the train is being stopped, or after the stoppage, with a view to his expulsion, if he has made the stop necessary by refusal of a rightful demand for fare. *Id.*

22. Refusal to pay fare for the distance already ridden without a valid ticket will justify the ejection of a passenger who, on notice that he must pay such fare or be put off

at the next station, has procured at that station a ticket for the remainder of his trip. *Manning v. Louisville & N. R. Co.* (Ala.) 55

23. A coupon ticket over connecting roads, limited as to time and expressly providing that the carrier selling it is not responsible beyond its own line, but is only an agent of the connecting roads, will not entitle a passenger to be carried over the last road in the series after the time has expired, although his failure to complete the journey on time was due to a wreck on one of the other connecting roads. *Gulf, C. & F. S. R. Co. v. Looney* (Tex.) 471

24. A ticket over connecting roads, limited as to time, but which is a joint contract of the carriers, entitles a passenger who is delayed by a wreck on one of the roads to complete his journey, although the time expires before he reaches the last of the connecting roads. *Id.*

25. The illegibility of the date on a ticket which the passenger receives in that condition does not impose on him the duty of getting the indorsement of a ticket receiver as to its validity because it is questioned by the gateman; and a rule of the railroad company making such a requirement is unreasonable because it would subject a passenger to great inconvenience and might cause him to lose his train. *Northern C. R. Co. v. O'Conner* (Md.) 449

26. A ticket which is good for a continuous passage only does not entitle a passenger who voluntarily takes passage upon a train which he must be held to have known would not convey him to his destination, and who leaves that train at an intermediate point, to be carried the remainder of the journey on the train which he ought to have taken in the first place. *Gulf, C. & S. F. R. Co. v. Henry* (Tex.) 818

27. A transfer ticket issued to a street-railway passenger, by which the route is designated so generally as to be applicable to several lines, entitles him to be transported over either. *Pine v. St. Paul City R. Co.* (Minn.) 347

28. A restriction that a street-railway transfer ticket given without extra charge must be used within fifteen minutes after it is punched on the first line is not unreasonable or invalid in the absence of any contract to carry a passenger on both lines for a single fare, without exception or conditions or any provision to that effect in the charter or ordinance, or of any holding out to the public to this effect, although this might be subject to exception if no car came along within the time limited. *Heffron v. Detroit City R. Co.* (Mich.) 345

Connecting carriers.

29. An initial carrier may protect itself by contract against liability for loss not occurring on its own line, whether the shipment be wholly within one state or be interstate. *McCarr v. International & G. N. R. Co.* (Tex.) 89

NOTES AND BRIEFS.

Duty of, to protect passenger from assault by fellow passenger. 627

Passenger's negligent exposure of person at car window; question of law or fact; passengers on street cars. 91

Passenger's riding in baggage or express car 16 L. R. A.

as contributory negligence; violation of rules; where riding in such car did not contribute to accident; power of conductor to waive rule. 631

Regulations as to admission of passenger to train house. 449

Duty to maintain safe approaches beyond its own premises. 593

How far ticket may be used for passage after expiration of time limited. 471

Effect of provision in ticket for continuous passage. 318

Right of passenger to pay fare after train begins to stop for purpose of ejecting him. 53

Payment of back fare for distance already ridden as condition of being carried further. 55

Effect of rules of street railways. 345, 347

Limitation on liability for negligence. 39

CEMETERY. See also EMINENT DOMAIN, 2.

The control of a cemetery which has been acquired by a town solely for public use and in which it has no beneficial interest may lawfully be taken from it by the Legislature and vested in a city which has been organized within its limits, and which embraces the cemetery within its boundaries, if the rights and beneficial interests in the property of the inhabitants of both city and town are saved to them. *Columbus v. Columbus* (Wis.) 695

CENSUS.

Upon the omission of the Legislature to make an enumeration of the inhabitants and apportion the districts for electing members of the Legislature, in the year fixed by the Constitution for that purpose, the duty rests upon each succeeding Legislature until it is performed; and an apportionment cannot be set aside as unauthorized although it was made seven years after the constitutional time. *People, Carter, v. Rice* (N. Y.) 836

CERTIFICATE OF DEPOSIT. See BANKS, 2-4.

CERTIFIED CHECKS. See CHECKS

CHAMPERTY.

An agreement by an attorney to advance the costs and expenses of collecting a judgment which he has obtained for a client, of which one half only shall be repaid in case of failure to make the collection, in consideration of which he is to have one half the net proceeds of the judgment in case of success,—is not unlawful on the ground of champerty. *Reece v. Kyle* (Ohio) 723

NOTES AND BRIEFS.

Champerty; by a contract with attorney. 723

CHECK.

1. If the payee or holder of a check gets it certified in his own behalf or for his own benefit, instead of getting it paid, the drawer is dis-

charged,—especially where the certification amounts to an extension of the time of payment. *Minot v. Russ* (Mass.) 510

2. The drawer of a check who gets it certified in his own behalf or for his own benefit, and then delivers it to the payee, is not discharged, but continues liable, where the bank fails before payment of the check. *Id.*

NOTES AND BRIEFS.

Check; effect of certification on liability of drawer. 510

CIVIL RIGHTS. See also CONSTITUTIONAL LAW, 9.

1. A discrimination against colored persons by permitting them to sit only in the balcony of a theatre is not unlawful, in the absence of any statute to the contrary. *Younger v. Judah* (Mo.) 558

2. Colored persons to whom tickets for the orchestra of a theatre are sold at the box office may be prevented from using them and required to give them up for balcony tickets or for the return of their money, where the tickets were sold without knowledge that the persons who were to use them were colored, and the rule of the theatre, as well as a custom and usage prevailing in the state, permit colored persons in the balcony only. *Id.*

NOTES AND BRIEFS.

Civil rights; discrimination on account of color in use of theatres. 558

COMMERCE. See LICENSE, 2.

CONFLICT OF LAWS.

1. The law of the domicil of the donor of a power given by will must govern, as against the law of the domicil of the donee, in determining whether or not the will of the latter is an execution of the power. *Cotting v. Desartiges* (R. I.) 867

2. The establishment by express statute, both in England where a will was made, and in New York where the testator was domiciled, of the rule that a general devise is sufficient to execute a power of appointment, cannot prevail in respect to a trust fund held under the will of the donor, whose domicil was in Rhode Island, as against the contrary rule, which, in the absence of a statute, prevails in the latter state. *Id.*

3. The right to redeem land from a mortgage or absolute deed given as security is governed by the law of the place where the land lies; and a rule there prevailing, that such a right is barred, when an action on the debt is barred, must control, although in another state where the parties reside and the contract was made, the bar of the debt would not defeat the right to redeem. *Allen v. Allen* (Cal.) 648

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CONSTITUTIONAL LAW. See also ACTION OR SUIT, 1; BIGAMY, 1; BUILDINGS, 1; CONTINUANCE, 4; CONTRACTS, 12, 17-21; ELECTION DISTRICTS, 3; OFFICERS, 1.

1. Nonuser will not defeat a power to exercise rights expressly delegated in a written constitution. *McPherson v. Blacker* (Mich.) 475

2. The provision of Minn. Const. art. 10, § 8, that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is self-executing, and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him. *Willis v. St. Paul Sanitation Co.* (Minn.) 281

3. The exclusion of women from a jury on the trial of a man for crime, even if wrongful, does not deprive him of any rights or privileges under a constitutional provision giving women the right to vote and hold office, and declaring that both male and female citizens shall equally enjoy all civil, political, and religious rights and privileges. *McKinney v. State* (Wyo.) 710

4. A statute designating one who is convicted of a felony after having been convicted of two others, an habitual criminal and subjecting him to long imprisonment as such, is not *ex post facto*, although by its terms it may be enforced against one whose former convictions occurred before its passage. *Com. v. Graves* (Mass.) 256

5. The Legislature cannot delegate to the board of supervisors power to change or suspend a provision of a general law requiring a county clerk to pay his own deputies, by allowing him the expense of necessary deputies if in their opinion his salary is insufficient to pay for such services, where the Constitution provides that the Legislature by general and uniform laws shall regulate the compensation of all such officers. *Dougherty v. Austin* (Cal.) 161

6. The rule of law against delegation of power by the Legislature refers to the law-making power, and does not prohibit the Legislature from delegating the selection of mere municipal agents. *State, Sherman, v. George* (Or.) 787

7. The power to fine and imprison for contempt is essentially a judicial one, and an attempt to confer it on a state board of tax commissioners who have power to take testimony is in violation of a constitutional provision that no person charged with official duties under either the legislative, executive, or judicial department of the government, shall exercise any of the functions of another, since such board belongs to the executive or administrative department. *Langenberg v. Decker* (Ind.) 108

8. A statutory prohibition of fishing with a seine during a part of the year is not unconstitutional, even as applied to a lake wholly upon lands of a private owner and connected with an unnavigable stream only in time of high water. *People v. Bridges* (Ill.) 684

9. The rule of a theatre, that colored people can sit in the balcony only, does not violate U. S. Const. 14th amend, which declares that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States." *Younger v. Judah* (Mo.) 553

10. The constitutional equality and uniformity of occupation taxes is violated by an ordinance which is fair on its face, imposing a tax upon those who sell meat, but which is collected only from those who sell in their own shops, while there is a persistent failure to collect it from those who rent stalls from the city, although they pay only the rental-value thereof. *Hoefting v. San Antonio* (Tex.) 608

11. An ordinance making a dog liable to be killed by any person unless registered and collared as provided by the ordinance is not in violation of the constitutional provision against depriving a person of property without due process of law; but is a valid police regulation. *Jenkins v. Ballantyne* (Utah) 689

12. A statute which makes it a misdemeanor for persons in one branch of industry to do what is lawful for those in another branch of industry, in like relation and under like conditions, is unconstitutional. *Frerer v. People* (Ill.) 492

13. A statute making it unlawful for a person or corporation engaged in mining or manufacturing to engage or be interested in keeping or controlling any truck, store, shop, or scheme, for furnishing supplies, tools, clothing, provisions, or groceries, to employes, but which does not apply to those employing laborers in other branches of business,—violates the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law. *Id.*

14. Legislative authority to a general guardian of an infant to agree with a railroad company as to the amount of damages for a right of way across the infant's lands, or to release the claim or right to such damages, is not unconstitutional as a legislative usurpation of judicial power. *Louisville, N. O. & T. R. Co. v. Jordan* (Miss.) 251

NOTES AND BRIEFS.

Constitutional law; constitutionality of private statutes to authorize disposal of property; limitations of the power; distinctions between those *sui juris* and those who are not; giving power to guardians of infants; *non compos mentis*; as to decedents' estates. 251

Constitutional powers of tax officers. 108

Discretion of Legislature in enforcement of Constitution. 886

Police power over condition of buildings. 400

Constitutionality of laws charging the expense of police regulations on the business to be regulated. 880

Self-executing constitutional provisions; prohibitions generally; cases as to taking property for public use; as to jury; exemptions may be regarded as prohibitions; taxation; appropriations; stockholders' liability. 281

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CONTEMPT. See also CONSTITUTIONAL LAW, 7.

NOTES AND BRIEFS.

Contempt; power to punish for. 108

CONTINUANCE.

1. A continuance for the testimony of absent witnesses is properly denied if substantially the same testimony as that which is absent is offered at the trial. *McKinney v. Stats* (Wyo.) 710

2. There is no abuse of discretion in refusing a motion for a continuance if the circumstances cast suspicion on the good faith of the application. *Barnes v. Barnes* (Cal.) 660

3. Discretion may be vested in the court to deny a continuance to the accused because of the absence of a witness, upon admission by the prosecution that he will testify to the facts set out in the affidavit for continuance, without requiring an admission of their truth, in the absence of a constitutional provision prohibiting it. *Hoyt v. People* (Ill.) 239

4. Denying a continuance on an admission by the prosecuting attorney that an absent witness would testify as alleged in the defendant's affidavit for continuance, without requiring an admission of the facts which such testimony would prove if true, does not violate a constitutional right of the accused to "meet the witnesses face to face," and to have "process to compel their attendance," if a reasonable time for that purpose has already elapsed. *Id.*

NOTES AND BRIEFS.

Continuance; denial of, upon admissions by the prosecution, as affected by right of accused to meet witnesses; impeaching or contradicting affidavit. 239

CONTRACTS.

1. The interpretation which the parties themselves have put upon an indefinite or ambiguous contract will be adopted by the courts. *Vincennes v. Citizens Gaslight & C. Co.* (Ind.) 485

2. A benefit to the promisee or a detriment to the promisor is not necessary to make a good consideration for a contract, if the exercise of a present right is forborne because of the promise. *Ballard v. Burton* (Vt.) 664

3. An apparent absence of consideration is only a circumstance to be taken into account with other facts and circumstances in the case in determining whether or not a conveyance was procured through fraud and undue influence. *Lewis v. Arbuckle* (Iowa) 677

4. A belief in spiritual manifestations and in having had communication with deceased persons is not necessarily evidence of such a disordered mental condition as to render one incompetent to make a conveyance of real estate. *Id.*

Validity.

5. An oral agreement of partnership in the profits of buying and selling real property is not within the Statute of Frauds. *Bates v. Babcock* (Cal.) 745

6. A parol reservation of a barn when conveying the real estate of which it is a part, by absolute warranty deed, is ineffectual to retain title in the grantor. *Leonard v. Clough* (N. Y.) 805

7. A parol gift is ineffectual to transfer title to a barn which is part of the real estate. *Id.*

Illegality.

8. Transactions in violation of law cannot be made the foundation of a valid contract. *Buckley v. Humason* (Minn.) 428

9. Where a statute or an ordinance duly authorized and enacted makes a particular business unlawful for unlicensed persons, any contract made in such business by one not authorized is void. *Id.*

10. A person violating a valid city ordinance which makes it unlawful for any person to exercise within the city the business of a real-estate broker without a license can recover no commissions for his services. *Id.*

11. No excuse for the breach by a carrier of its contract to furnish a car and transport cattle to a certain place by a certain day is furnished by the fact that the shipper's object in naming that day was to enable him to offer the cattle for sale on Sunday, contrary to law, unless that object entered into the contract as part of the inducement or consideration. *Waters v. Richmond & D. R. Co.* (N. C.) 884

12. A covenant not to rent property to a Chinaman is void as against public policy, as violating U. S. Const. 14th amend. providing for equal protection of the laws, and as an infraction of the treaty with China guaranteeing to Chinamen in the United States all the rights, privileges, and immunities accorded to citizens and subjects of the most favored nation. *Gandolfo v. Hartman* (C. C. S. D. Cal.) 277

Performance.

13. A person prevented from continuing his contract by the arbitrary act of the other party may disregard it and recover the value of his services rendered in partial performance of it. *Parker v. Macomber* (R. I.) 858

14. The prevention by the act of God, of full performance of an entire contract, will permit a recovery upon an implied assumpsit for personal services already rendered in part performance of the contract. *Id.*

15. The death of a woman whose services and attendance are contemplated in a contract by which she and her husband agree to board, care for, and maintain her aunt during life, makes such a substantial failure in the consideration that the aunt is justified in rescinding the contract. *Id.*

16. A contractor to perform certain work cannot proceed with the work and collect the full contract price after express refusal of one of the other parties to perform on his part, although the contract was made with several persons, but one of whom has refused to carry it out. *Davis v. Bronson* (N. D.) 655

Impairing obligation.

17. Decisions on which the parties to a contract rely do not constitute a part of it so as to exempt the contract from the operation of a subsequent decision declaring a different rule.

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upon the same subject and overruling the earlier decisions. *Allen v. Allen* (Cal.) 646

18. The time for redemption of land from a mortgage or absolute deed given as security cannot be extended by a subsequent statute, as this would change the contract rights and obligations of the parties. *Id.*

19. The obligation of a prior mortgage contract is not impaired by a statute providing for the assessment to the mortgagee of taxes which had previously been paid by the mortgagor, and permitting the mortgagor, in case he pays such taxes, to deduct the amount from accrued interest on the indebtedness, and if it exceeds the interest due, then from the principal, even though the effect of the latter would be to extinguish a part of the interest-bearing debt. *Detroit Common Council v. Rents* (Mich.) 59

20. The right of redemption from a tax sale is governed by the law in force at the date of the sale; and a statute extending the time is unconstitutional as impairing the obligation of the contract. *Hull v. State, Rollins* (Fla.) 808

21. A statutory provision that the release of one shall not discharge another is not unconstitutional as applied to cases where the liability of the stockholder was incurred before, but the proceedings under the Insolvent Act were had and the corporation discharged subsequent to, its passage. *Willis v. St. Paul Sanitation Co.* (Minn.) 281

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Contracts; validity of parol partnership for dealing in lands; agreement to procure land on joint account; incorporation of such contract in partnership agreement; other contracts relating to land; transfer of partnership interest. 745

Effect of failure to procure license for business, on validity of contract therein; where contract prohibited; effect of imposition of penalty; sales of liquor; contracts of agents, brokers, etc.; contracts of physicians, surgeons, etc.; United States revenue laws; contracts in other kinds of business; application and limitation of the rule. 428

Recovery for services interrupted by sickness or death. 858

Right of one who completes in disregard of notice to desist. 655

Change of decision of a state court as impairing obligation of. 646

CORPORATIONS. See also CONSTITUTIONAL LAW, 2; CONTRACTS, 21; JOINT-STOCK COMPANY.

1. A corporation is not created by merely making and filing articles of incorporation in the office of the secretary of state, where the stock has not been subscribed and paid in or directors chosen. *State, Attorney-General, v. Fidelity & C. Ins. Co.* (Ohio) 611

2. The business residence of a foreign corporation is not established within a state for purposes of taxation, by reason of the appointment of a local board of directors to conduct the affairs of the company in that state under

direction of the head office. *Liverpool & L. & O. Ins. Co. v. Board of Assessors* (La.) 56

8. A license to form a corporation under a certain name, issued by the secretary of state, gives such corporation the right to that name as against an already existing corporation having a different name, which has passed a resolution and given notices for a meeting to vote on a change of its name to that selected by the proposed corporation,—at least where the proposers did not know at the time of their license of the proposed change. *Illinois Watch-Case Co. v. Pearson* (Ill.) 429

4. The secretary of state cannot revoke a license to form a corporation under a certain name, merely because another corporation before the license was issued had called a meeting to vote on the question of adopting such name, instead of that which it then had. *Id.*

5. Directors of a corporation are not entitled to compensation for their services as such unless it is provided for or expressly sanctioned by the charter. *Brown v. Republican Mountain Silver Mines* (Colo.) 426

6. For services of a director clearly outside of his duties as such, and in pursuance of an express contract made in good faith, he is entitled to compensation if the services are such as the company may legally contract for. *Id.*

7. Shares of increased stock which represent the increase in value of the property of an association resulting from the development of its business, and which are not, strictly speaking, the product of stock dividends and do not represent surplus earnings in the ordinary sense and which are apportioned *pro rata* among existing shareholders,—constitute capital, and not income or dividends, as between a person entitled to the income or dividends of the original shares during life and a person entitled at her death to the reconveyance of the stock. *Spooner v. Phillips* (Conn.) 461

8. The provision in Minn. Laws 1889, chap. 30, § 1, amending the Insolvent Law of 1887, "that the release of any debtor under this Act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation. *Willis v. St. Paul Sanitation Co.* (Minn.) 281

9. To make a case for the retaliatory provision of Ohio Rev. Stat. § 282, as to insurance companies of a state which imposes prohibitions upon Ohio companies "doing business in such state," it must appear at least that an Ohio company has been formed to do substantially the same kinds and lines of insurance as the foreign company wishes to do in Ohio. *State, Attorney-General, v. Fidelity & O. Ins. Co.* (Ohio) 611

10. A state statute imposing on insurance companies of another state or nation the same obligations and prohibitions that are imposed in such other state or nation upon corporations of the former state is retaliatory in character, and must be confined to cases fairly within its letter. *Id.*

11. A license to a foreign insurance company, issued by the superintendent of insurance, is not a bar to a proceeding in quo warranto on the ground that it is exercising franchises and privileges without authority of law. *Id.*

12. A foreign insurance company exercising franchises and privileges without authority of law may be ousted therefrom by a proceeding in quo warranto. *Id.*

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Corporations; essentials of. 183

Right to increased stock and stock dividends as between owner of capital and income; the English rule; how far such rule followed in this country; departures from English rule; right to subscribe for stock. 461

COTENANCY. See also REAL PROPERTY, 1.

One tenant in common has no lien against his cotenant's interest in the property for rents in excess of his share, collected and retained by such cotenant before partition of the land. *Flack v. Gosnell* (Md.) 547

NOTES AND BRIEFS.

Cotenancy; how far share of cotenant collecting rents is subject to lien in favor of his cotenant. 547

COUNTIES. See also CONSTITUTIONAL LAW, 5; ELECTION DISTRICTS, 7.

A board of county commissioners cannot bind or tie the hands of their successors in office by making a designation of newspapers for publications and printing which shall continue for longer than one year. *Shelden v. Fox* (Kan.) 257

NOTES AND BRIEFS.

Counties; delegation of legislative power to county boards of supervisors. 161

COURTS.

1. Courts will not spend time in attempting to remedy errors in an apportionment of members of the Legislature among the inhabitants of the state, which injure no one and which raise nothing but abstract questions for adjudication. *People, Carter, v. Rice* (N. Y.) 836

2. A suit in a circuit court of the United States to foreclose a mortgage, and an unexecuted decree of foreclosure and sale, in which case the issue of certificates had been authorized, do not prevent a state court from taking jurisdiction of a suit by creditors of the mortgagor who are not parties to the suit in the Federal court, but who alleged in their bill that the mortgage and bonds secured thereby are fraudulent and void as well as the issue of certificates and the decree of foreclosure, although it may be that the relief sought cannot all be granted. *Gay v. Brierfield Coal & I. Co.* (Ala.) 564

COVENANT. See also CONTRACTS, 13; LANDLORD AND TENANT, 1, 2.

A remote grantee connected with the immediate grantee by an unbroken chain of warranty deeds has all the rights of the latter to sue the original grantor for the removal from

the real estate of a barn which passed under the original deed. *Leonard v. Clough* (N. Y.) 805

CRIMINAL LAW. See also BIGAMY, 1.

1. That an acquittal was procured by bribery of the prosecuting attorney will not destroy the effect of a plea of former jeopardy, where the state was a party to the former prosecution and was represented throughout by its proper officer, while the proceedings up to and including the submission were regular. *Shideler v. State* (Ind.) 225

2. A convict may be sentenced to a prison located beyond the state, when it is authorized and required by statute. *McKinney v. State* (Wyo.) 710

NOTES AND BRIEFS.

Criminal law; statute allowing plea of guilt in capital case. 358

CUSTOM. See also CIVIL RIGHTS, 2; DAMAGES, 8.

There is no presumption of knowledge on the part of an insurance company doing a general business throughout the United States, of a custom or usage as to what constitutes a "building" or "risk," which is peculiar to a city in a state foreign to its domicile, so as to make the custom an element of its contracts relating to property in such city, without proof that it had such knowledge. *German American Ins. Co. v. Commercial F. Ins. Co.* (Ala.) 291

DAMAGES. See also APPEAL AND ERROR, 12.

1. The value of a public schoolhouse built on land of an unknown owner in the expectation that he will permit such use, and with the intention, in case he will not, to acquire it by eminent domain, is not to be included in his compensation if it becomes necessary to condemn the land. *Chase v. Jemmett* (Utah) 805

2. Exemplary damages may be allowed for wantonly publishing a libel without inquiry or justifiable motive. *Morning Journal Assn. v. Rutherford* (C. C. App. 2d C.) 808

3. The custom of a newspaper to print stories of elopements and similar gossip whenever they have appeared in the columns of another paper, without any inquiry as to their truth, shows such reckless unconcern as to the mental anguish that may be caused by such publication as will warrant a jury in finding the publisher guilty of wanton negligence which will justify a verdict for punitive or exemplary damages. *Id.*

4. The measure of damages in case one believing that he has a right to convey real estate contracts in good faith; to do so, but is prevented from fulfilling his contract by failure of title, is the amount of the advance payment, with interest, and not the alleged profit which would have accrued from the purchase. *Morgan v. Bell* (Wash.) 614

5. Damages for breach by the carrier of a written contract under which cattle were shipped cannot be recovered in an action for 16 L. R. A.

breach of a prior oral contract to transport them at a certain time. *Waters v. Richmond & D. R. Co.* (N. C.) 884

6. Only compensatory damages can be recovered for ejecting a passenger without unreasonable force, if it is done in good faith, pursuant to rules, and upon due notice to him. *Pine v. St. Paul City R. Co.* (Minn.) 847

7. Damages for the refusal to permit a passenger to take a train which his ticket entitled him to take include the amount paid by him for another ticket, compensation for loss of time, necessary hotel expenses, and also compensation for any inconvenience suffered. *Northern C. R. Co. v. O'Connor* (Md.) 449

8. A passenger injured by negligence of the carrier is entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. *Purcell v. St. Paul City R. Co.* (Minn.) 203

9. A verdict for \$10,000 will not be set aside as excessive,—especially if approved by the trial judge,—where it is given for injuries by which a woman is made a cripple during life and subject to much pain and suffering. *Skottowe v. Oregon, S. L. & U. N. R. Co.* (Or.) 593

10. Impairment of health and suffering growing out of the death and premature birth of the child of a pregnant woman by reason of injuries negligently inflicted on her by a third person, which would not have attended its birth at the usual time either alive or dead, may be considered in estimating the damages to be awarded for such injury. *Hawkins v. Front Street Cable R. Co.* (Wash.) 808

11. Mere proof that an unborn child died and was prematurely delivered because of negligent injuries to its mother is not sufficient to establish her right to recover substantial damages for the injury. *Id.*

12. Loss of the society, companionship, and solace, of one's wife, is not an element of the damages which he can recover in case of her injury through another's negligence. *Id.*

13. Damages for loss or injury to the husband may properly be recovered in an action by husband and wife for a personal injury to her, in jurisdictions where property acquired by either is community property for which the one having the disposition of it must sue, since he is the only necessary plaintiff in the action, and may include in his demand all damages naturally flowing from the injury complained of. *Id.*

14. The earning power of a healthy man living on his income, for which damages on account of his death may be given to his administrator, may include his skill in the management of wealth or capacity to manage affairs, which would be of advantage to an estate. *Skottowe v. Oregon, S. L. & U. N. R. Co.* (Or.) 593

NOTES AND BRIEFS.

Damages; the value of improvements made by one taking property by eminent domain as an element of damages; when improvement is consented to by owner, mortgagor, etc.; when

construction of improvements is a trespass; effect of good faith or mistake of trespasser. 805

DANGEROUS AGENCIES. See FIREWORKS, NOTES AND BRIEFS; TELEPHONES.

DEATH. See also CONTRACTS, 15; DAMAGES, 14.

1. A negligent injury to one having an incurable disease, followed by his death, furnishes a good cause of action if the death was materially hastened by reason of the injury as an efficient cause, but not if death was inevitable in a short time from the disease, and the injury was so slight as to simply aggravate the disease, which remains the cause of death. *Louisville & N. R. Co. v. Northington* (Tenn.) 268

2. A statute giving a right of action for the death of "any person" through the carelessness or criminal action of an agent, officer, or other employé of a railroad company, does not apply to a person killed by the negligence of a fellow servant. *Lutz v. Atlantic & P. R. Co.* (N. M.) 819

DEDICATION.

1. A dedication to the public of land for a park is effected by the owner of a tract which lies within an incorporated town, if he makes and records a map by which the tract is subdivided into blocks and lots which are bounded by streets connecting with streets of the town already laid out, marks a space thereon "park," and sells lots which, according to the map, face the park, holding out its existence as an inducement to purchasers. *Archer v. Salinas City* (Cal.) 145

2. Delay on the part of a town in using land which has been dedicated to it for a park will not impair its right thereto. *Id.*

3. Although acceptance is necessary in case of an offer to dedicate, actual dedication will vest title in the public without acceptance. *Id.*

4. A dedication to the public of a portion of land which is subject to a purchase-money mortgage will be superior to the claim of the mortgagee, if he accepts a reconveyance in satisfaction of the mortgage. *Id.*

DEED. See CONTRACTS, 4; WILLS, 2.

DEFINITIONS. See TAXES, 10.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 5, 6.

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DIVIDENDS. See CORPORATIONS, 7, NOTES AND BRIEFS.

DIVORCE. See HUSBAND AND WIFE, 6-8, NOTES AND BRIEFS; JUDGMENT, 8; LIMITATION OF ACTIONS, 1.

DOGS. See ANIMALS; CONSTITUTIONAL LAW, 11.

DOMICIL. See HUSBAND AND WIFE, 6.

DOWER.

1. The right of dower extends to a share of the proceeds of mines although not opened until after the husband's death, where they are opened on lands held only for mining purposes and available only for the minerals, and the statutes give to the widow the "use during her natural life of one third of all the lands whereof her husband was seised" during marriage. *Seager v. McCabe* (Mich.) 247

2. A prior sale by a tenant in common of his undivided interest does not prevent the bar of his wife's inchoate right of dower by a subsequent sale in partition. *Holley v. Glover* (S. C.) 776

3. The inchoate right of dower of the wife of a tenant in common is defeated by a sale in partition of the common property, although she is not a party to the proceedings. *Id.*

4. A wife's inchoate right of dower may be released by her husband on his conveyance of the land, where she has given him a power of attorney under N. Y. Laws 1878, chap. 300, authorizing him to convey for her and in her name and as her act, and to sign, seal, execute, acknowledge, and deliver all necessary releases of dower and thirds. *Wronkoff v. Oakley* (N. Y.) 209

NOTES AND BRIEFS.

Dower; release of inchoate right by attorney under power given by married woman. 209

Right to, in mines. 247

Effect of partition sale upon dower rights of one not a party. 776

DRAINS AND SEWERS. See also HIGHWAYS, NOTES AND BRIEFS.

The power of municipal authorities over streets extends to the granting of permission to a private person to lay an under drain therein from his premises without consent of other persons who own abutting lots as well as the soil of the street over which the drain runs. *Wood v. McGrath* (Pa.) 715

DURESS. See also ASSUMPSIT, 2, 3.

NOTES AND BRIEFS.

Duress; by lien on real property. 876

EASEMENTS.

The right to fence a right of way is not given by a reservation in a deed, of "a reasonable right of way across the land." *Sizer v. Quinlan* (Wis.) 513

EJECTMENT.

A plaintiff in ejectment cannot rely upon a parol partition to establish his title to the cotenant's share of the premises. *Sontag v. Bigelow* (Ill.) 826

ELECTION DISTRICTS. See also CENSUS; EVIDENCE, 6; STATUTES, 1.

1. The discretion of the Legislature in making an apportionment of senatorial districts must be honestly and fairly exercised so as to preserve the equality of representation as nearly as may be; otherwise the apportionment will be unconstitutional. *Giddings v. Blacker* (Mich.) 402

2. There can be no legislative discretion to give a county of less population than another greater representation, under a constitution requiring representative districts to contain "as nearly as may be" an equal number of inhabitants. *Houghton County v. Blacker* (Mich.) 432

But see next case.

3. Discretion as to the apportionment is vested in the Legislature by a constitutional provision that members of Assembly shall be apportioned by it among the several counties of the state "as nearly as may be according to the number of their respective inhabitants," which the courts have no power to review unless it has been so abused as to clearly show an open and intended violation of the letter and spirit of the Constitution. *People, Carter, v. Rice* (N. Y.) 886

4. No abuse of the discretion vested in the Legislature as to the apportionment of members of Assembly is shown where each county has been given a member for every full ratio of representation which it contains, and the only inequalities alleged are in the distribution of the remaining members to counties having a smaller surplus over the ratio than other counties have; at least where the reason for such action was not partisan, and the fair inference is that it was absolutely necessary to secure the passage of the bill. *Id.*

5. A Legislature cannot be charged with unfairness in distributing the remaining members of Assembly among the counties after all full ratios are provided for, because it takes into account the losses sustained by the most populous counties by reason of the adoption of a certain ratio of representation rather than of some other more favorable to them, nor because it regards increases of population shown by the census. *Id.*

6. The provision of the New York Constitution requiring the omission of colored persons not taxed from the number of inhabitants in apportioning senate districts became inoperative when the Constitution was amended by striking out the provision limiting the liability of colored persons for taxes to those assessed upon real estate, and making the payment of taxes necessary to entitle them to vote; the plain intention of the people being to blot out all distinctions of a political nature between white and colored citizens. *Id.*

7. The Legislature has no power to divide a county in the apportionment of districts for the 16 J. R. A.

election of representatives, under the Michigan Constitution, which provides for the election of representatives by single districts equal, as nearly as may be, in population, and for which no township or city shall be divided; and also that if any county is entitled to more than one representative, the board of supervisors shall divide it into the requisite number of districts. *Houghton County v. Blacker* (Mich.) 432

8. An apportionment Act must be held entirely invalid where it divides a county in violation of the Constitution, and the effect of correcting the Act in this particular, and giving the county the representation to which it is entitled, would make one more representative than the Constitution permits. *Id.*

9. The words, "convenient and contiguous territory," in a constitutional provision as to the apportionment of election districts, do not mean contiguous in contact by land, when applied to counties which are composed of islands; and consequently Keweenaw and Isle Royal Counties in Michigan may be declared convenient and contiguous to other counties bordering on deep waters of the lake,—as, to Houghton County. *Id.*

10. Former apportionment Acts may be examined by the court when it is asked to set aside such an Act, for the purpose of finding a valid one which may be declared in force. *People, Carter, v. Rice* (N. Y.) 886

11. That the effect of setting aside an apportionment Act would be to cause every subsequent Act to be brought before the courts for review, which might happen at a critical time; to originate the greatest confusion as to an impending election, with a possible total suppression of it; and at all events to continue in force an Act containing greater inequalities than the one attacked,—is of itself sufficient to induce the court to say that only in case of plain and gross violation of the spirit and letter of the Constitution should it exercise such power. *Id.*

12. On holding an apportionment Act unconstitutional, election notices will be ordered to be given under the preceding Act if that was valid, unless a new Act shall be passed before it is necessary to give the notices. *Houghton County v. Blacker* (Mich.) 432

13. In holding an apportionment of senatorial districts unconstitutional, where the prior apportionment, which had been acquiesced in for three elections, was also subject to the same constitutional objections and was brought in question by the petition asking that notices be ordered to be given under it, the notices were ordered to be given under a still earlier apportionment Act the validity of which was not brought in question in those proceedings. *Giddings v. Blacker* (Mich.) 402

NOTES AND BRIEFS.

Election districts; discretion of Legislature as to apportionment. 836

ELECTORS.

1. A state Legislature has power to direct that presidential electors shall be chosen by congressional districts, instead of by the state at large, under U. S. Const. art. 2, § 1, provid-

ing that each state shall choose electors "in such manner as the Legislature thereof may direct." *McPherson v. Blacker* (Mich.) 475

2. The constitutional provision as to the manner of choosing presidential electors is not affected by the 14th and 15th Amendments. *Id.*

8. Lack of any provision for filling the vacancy in case of the death of both an elector and an alternate elector does not make a statute providing for the election of presidential electors by congressional districts invalid. *Id.*

4. The invalidity of a provision as to the time of meeting of presidential electors, in a statute providing for the choice of such electors, which in that respect conflicts with an Act of Congress, does not make the whole Act inoperative. *Id.*

5. The lack of any provision in a statute providing for a choice of presidential electors by congressional districts, for a separate canvass of the votes cast in different electoral districts within one county, is not material, as the inspectors can designate the district in which an elector is voted for. *Id.*

6. Failure to provide for notice of the election of presidential electors is not a defect in a statute providing for such election by congressional districts, where the general statutes of the state sufficiently provide for notice of elections. *Id.*

ELECTRICAL USES AND APPLIANCES. See also HIGHWAYS, 4; TELEPHONES.

1. The failure of an electric-lighting company to have the "splices" on its wires perfectly insulated, as required by a city ordinance, constitutes negligence. *Clements v. Louisiana Electric Light Co.* (La.) 43

2. A person going on a roof to repair it, where an electric-light wire is stretched at such a height that the chances are that he will come in contact with it by going under it or by stepping over it, is not negligent in attempting to pass in either manner, if he exercises all necessary and prudent care in proportion to the danger. *Id.*

3. A person whose occupation brings him in proximity to the wires of an electric-lighting company has a right to believe that the wires have been insulated as required by an ordinance. *Id.*

4. A statute forbidding any other electric-light company to "lay or erect wires" for the purpose of carrying on its business, over or under any street, without consent of the authorities in any city or town in which a company is already engaged in furnishing electric light, impliedly forbids the maintenance or use, as well as the laying or erection, of such wires in streets; and the prohibition extends to wires in a street which were lawfully laid by a predecessor of the company, and to those laid by a company and sold to its customers, as well as to those which were laid and owned by the customers themselves, where these are mere devices to evade the statute, and the wires outside of the street lines are owned by the com-

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pany. *Attorney-General, Board of Gas & E. L. Comrs. v. Walworth Light & P. Co.* (Mass.) 386

EMINENT DOMAIN.

1. Condemnation of land for a private road to be laid out upon the application of a particular individual, and paid for and kept in repair by him, is for a public purpose where the road is in fact for public use by all who desire to use it. *Latah County v. Peterson* (Id.) 81

2. A private cemetery belonging to a religious corporation may be taken in condemnation proceedings for a public park, under N. Y. Laws 1887, chap. 820, giving power to condemn "any and all lands" within a district which includes the cemetery. *Re Street Opening & Imp. Bd.* (N. Y.) 180

3. The condemnation of a right of way for a railroad to be built by a manufacturing company to connect its manufacturing establishment with another railroad may be authorized by statute under S. C. Const. art. 1, § 23, declaring that private property shall not be taken or applied "for public use, or for the use of corporations, or for private use," without consent of the owner or just compensation, but providing that laws may secure to persons or corporations a right of way for works of internal improvement by payment of just compensation. *Ex parte Bacot* (S. C.) 586

4. A conveyance of a right of way across an infant's lands to a railroad company is not a dedication to public use without compensation because there was no money consideration, where it was made on a condition subsequent that a depot, station-house, and tank should be maintained upon the land. *Louisville, N. O. & T. R. Co. v. Jordan* (Miss.) 251

5. Authority given to a resident general guardian of an infant to agree with a railroad company upon the amount of damages for taking lands of the infant, or to release the claim or right to damages, does not require any condemnation of the property and ascertainment of the value before the guardian is authorized to make such agreement or release. *Id.*

6. A street railway in a street does not create an additional servitude. *People, Kunze, v. Ft. Wayne & E. R. Co.* (Mich.) 753

7. On the question whether or not a railway operated by a steam motor in a public street is an additional burden which an abutting owner may enjoin, the Michigan court is divided, two in the affirmative, two in the negative, and one holding that it is not settled. But it holds compensation must be made to the owner of the fee before a railway can be constructed along a highway by cutting and filling, using ties and T rails, and leaving a ditch on each side so as to practically block up for ordinary uses the portion of the highway where it is located. *Nichols v. Ann Arbor & Y. Street R. Co.* (Mich.) 871

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Eminent domain; constitutionality of condemnation proceedings to establish a private road; outlet for communication with the public; necessity of road, 81

- Condemnation of cemetery for public park. 180
 Sufficiency of notice to occupant only. 186

EQUITY.

1. A suit to compel a husband, if able, to support his wife, whom he has deserted and left destitute, is within the jurisdiction of equity,—especially where the Constitution provides that a speedy remedy shall be afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay, while the statutes provide that a married woman shall have the same protection as a man for all her rights, and the same right to appeal in her own name alone to the courts of law or of equity. *Edgerton v. Edgerton* (Mont.) 94
2. Equity will not take jurisdiction of a suit seeking specific performance of a contract or damages for its breach, when, to the knowledge of plaintiff at the time of the commencement of the action and without fault of defendant, specific performance could not be enforced and there is no other ground for equitable interference. *Morgan v. Bell* (Wash.) 614
3. A suit in equity will lie to set aside a judgment quieting title to real estate, which was taken by default after notice by publication, where defendant had no actual notice of the action until the time for making a defense therein had elapsed, and plaintiff had no title to the property, but knowingly set out a false statement of cause of action in his complaint and in the affidavit for publication. *Dunlap v. Steere* (Cal.) 861

ESTOPPEL.

1. A village is estopped from denying the legal passage of an ordinance disconnecting part of its territory, after it has published the same in pamphlet form, and the town authorities have taken and maintained possession of such territory for several years, levied taxes, worked the roads, and built a bridge, while the village authorities have made no claim to jurisdiction over it. *People, Colfax, v. Maxton* (Ill.) 178
2. The publication in pamphlet form by village authorities of an ordinance is a sufficient affirmative act by the village on which to base an estoppel against denying its validity in case it is acted on, under a statute which provides that when ordinances are so printed the pamphlet shall be received as evidence of their passage and legal publication in all places without further proof. *Id.*
3. An estoppel may be the basis of a claim to establish a trust in land of which the defendants have both the legal title and the possession. *Lindsay v. Cooper* (Ala.) 818
4. Purchasers at a judicial sale, although for value and in good faith, are affected to the same extent as the person whose title they buy, by an estoppel *in pais* which prevented him from asserting the title. *Id.*
5. The silence of an administrator in respect to any individual title or claim to property sold by him in person as that of his intestate

under order of the court, estops him and those who claim under him from afterwards setting up a legal title which he had at the time of the sale. *Id.*

NOTES AND BRIEFS.

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In pais upon defendant as basis for action to recover real estate. 818

EVIDENCE.

Judicial notice.

1. Judicial notice will be taken that employes in mines and manufactories include but a part of those who are employed by others and who depend upon their daily labor for subsistence. *Fraser v. People* (Ill.) 493
2. Judicial notice may be taken of the length of time ordinarily required to complete an enumeration of the inhabitants of a state. *People, Carter, v. Rice* (N. Y.) 836

Presumptions and burden.

3. Plaintiff must show that he was not himself guilty of negligence, when the injury complained of could not have happened without the action of both parties. *Clements v. Louisiana Electric Light Co.* (La.) 43
4. A plaintiff administrator is not required in all cases to prove affirmatively that his intestate, killed at a railroad crossing, looked or listened for approaching trains. *Hendrickson v. Great Northern R. Co.* (Minn.) 261
5. No presumption of negligence on the part of a street-car company arises from the mere fact of injury, without his fault, to a passenger on one of its cars in consequence of a collision with a wagon on the highway. *Hawkins v. Front Street Cable R. Co.* (Wash.) 808
6. The court will not, in the absence of evidence on the question, presume the existence in one election district of more persons of a certain class which has been unlawfully included in the enumeration upon which an apportionment of members of the Legislature was founded than exist in other districts, for the purpose of establishing injury to the inhabitants of such district as a basis for setting aside the apportionment. *People, Carter, v. Rice* (N. Y.) 836
7. Where the statutes make real estate liable for taxes levied on personal property when they cannot be made out of the personalty, and direct the collector to select real estate for that purpose when it becomes necessary, it will be presumed, when the books show charges of unpaid personal taxes against land, that they were necessary because the taxes could not be made out of personalty, although it is not so stated on the return. *Shelbyville Water Co. v. People, Cradick* (Ill.) 505
8. A retail storekeeper who fails to return the watch and chain of a customer which is placed in his custody while the owner is trying on clothing has the burden of showing that he has exercised ordinary care for its safety, and of explaining his neglect to restore it. *Woodruff v. Painter* (Pa.) 451
9. The bound volumes of the legislative journals containing matter not contained in

the journal as published from day to day, certified by the clerk, will be presumed to have been properly amended in such respect by authority of the Legislature, in determining whether a statute was duly passed. *Detroit Common Council v. Rents* (Mich.) 59

Documents.

10. That a bill of sale was acknowledged before a notary public there or elsewhere does not prove its execution in Missouri. *Tittman v. Thornton* (Mo.) 410

11. To entitle a bill of sale to admission in evidence, its execution must be proved according to the laws of the state where it is offered, notwithstanding it purports to have been executed in a state whose laws make acknowledgments of instruments of its class which have been recorded valid, and it is proved to have been recorded. *Id.*

12. A transcript of a record from another state properly authenticated by certificates of the judge and clerk of court as required by Act of Congress, which shows that the record is among those of the court of which they are officers, is prima facie admissible in evidence, although the record itself purports to belong to another court. It will be presumed to be in the right office until the contrary is made to appear. *Id.*

Parol.

13. A devise of land in the "northwest" quarter of a certain section of land cannot be shown by parol evidence to mean land in the southwest quarter, as such a change would amount to a reformation of the will. *Bingel v. Vols* (Ill.) 821

Opinions and conclusions.

14. One who takes a new certificate of deposit signed by a third person, instead of withdrawing his money, may testify that he would have withdrawn it if such person had not signed the certificate. *Ballard v. Burton* (Vt.) 664

15. A medical expert cannot, in an action to recover for injuries alleged to have been caused by a fall upon a defective sidewalk, be permitted to give his opinion as to the cause of the condition of a person in a hypothetical case stated to him, which embraces the evidence which has been introduced concerning the injured person, since it is a usurpation of the province of the jury. *Jones v. Portland* (Mich.) 487

16. That a physician is employed to examine a person who has been negligently injured, for the express purpose of giving his testimony in a suit to be brought for the injury, does not render such testimony incompetent; but that fact may be considered by the jury as affecting its weight. *Id.*

17. The opinions of railroad experts are not admissible on the question whether or not it is dangerous to run a train at a designated rate of speed, as that is a question which the jury are competent to decide. *Fisher v. Oregon, S. L. & U. N. R. Co.* (Or.) 519

Declarations.

18. Testimony as to statements made by the injured person to his attending physician, of 16 L. R. A.

how the accident happened, is not admissible in a suit to recover for alleged negligent injuries. *Jones v. Portland* (Mich.) 487

19. Testimony as to exclamations of pain, made by the injured person during the examination, cannot be given by a physician who has been employed to examine a person who contemplates suing for injuries received through another's negligence, for the express purpose of making him a witness in such suit. *Id.*

20. Testimony that, a short time after the alleged infliction of a personal injury, witness assisted the injured person to remove his coat, and that he complained of being hurt in the shoulder, is admissible in an action to recover for the injury, not as part of the *res gesta*, but as tending to show present pain and injury. *St. Louis & S. F. R. Co. v. Murray* (Ark.) 787

Relevancy.

21. Evidence that a note has been materially altered after execution is admissible on foreclosure of a mortgage securing it, under a general denial. *Walton Plow Co. v. Campbell* (Neb.) 468

22. Evidence of repairs to a place where an injury occurred is proper when admitted only for the purpose of showing acts of ownership or control over the place, and not as an admission of negligence. *Skottowe v. Oregon S. L. & U. N. R. Co.* (Or.) 598

23. It is improper for counsel in an action to recover for injuries received by a fall on a sidewalk to offer, in the presence of the jury, to prove that other walks in the vicinity of where the accident occurred were defective, accompanying it by a positive statement that they are all unsafe; and it will be reversible error for the court to simply reject the offer without telling the jurors of its improper character and cautioning them not to be influenced by it. *Jones v. Portland* (Mich.) 487

24. Evidence of negligence in running the train is admissible under an allegation in the petition that plaintiff sustained injuries through the negligence of defendant's servants "while running, controlling, and managing its locomotive engine and train of cars. *Gratot v. Missouri P. R. Co.* (Mo.) 189

25. Evidence that fires were repeatedly set out by sparks of unusual size from defendant's engines on that part of the line where the property was situated is admissible in an action to recover the value of property alleged to have been destroyed by fire set out by engines which cannot be identified, as tending to show general carelessness on the part of the company, when it has been shown that from the location of the destroyed property and the circumstances of the case the fire probably originated as alleged; but such proof must be confined to conditions existing at or about the time of the loss. *Henderson v. Philadelphia & R. R. Co.* (Pa.) 299

26. On the question whether or not the drawing of traction engines over a bridge which had been built for many years was usual and ordinary, where there is proof of the passage of only one engine over it, evidence as to the passage of such engines over other bridges

is inadmissible. *Vermillion County v. Ohio* (Ind.) 228

27. Testimony as to the impressions upon the passenger's mind at the time of leaving the train, and his purpose in so doing, as to the actions of other passengers, and as to the possibility of real danger, is admissible upon the question of the prudence of his act, when he sues for injuries received, claiming that he was seeking to avoid imminent peril. *St. Louis & S. F. R. Co. v. Murray* (Ark.) 787

Weight and sufficiency.

28. Insolvency is shown prima facie so as to justify a suit in equity in a foreign state to reach property of a judgment debtor, by testimony of one of his neighbors that he owned a homestead of 5 acres on which he resided, a cow or two, and was reported to have a legacy in the foreign state, and of his attorney that he knew of no property owned by the debtor where the suit was brought. *Tittman v. Thornton* (Mo.) 410

29. The existence of a corporation whose ownership is alleged in an indictment is not sufficiently proved by evidence that certain persons were doing business under a company name and owned all the property of the company, and that a statute had been passed incorporating the company, where there is no further proof of any organization effected under the statute. *State v. Murphy* (R. I.) 550

30. A person was held not to be an innocent purchaser of land from heirs without notice that another person was also an heir, where he testified that he knew the latter well and was with him much in boyhood; also that he knew the mother for many years while she was living with her second husband, but did not know the relationship of the parties. *Ross v. Morrow* (Tex.) 542

31. Showing that loose boxes placed by the foreman of a gang of railroad laborers upon a car to be pushed along the track by a hand car, and remaining in his charge, came in contact with a station platform while the cars were in motion, causing injury to an employé on the hand car, makes out a prima facie case of negligence for which the company is responsible, without showing that the foreman could have prevented the boxes slipping, or that the slipping was not caused suddenly by a joint in the rails. *Louisville & N. R. Co. v. Northington* (Tenn.) 268

32. Proof beyond a reasonable doubt is not necessary in an action to reform a written contract because of a mistake. *Southard v. Ourley* (N. Y.) 561

NOTES AND BRIEFS.

Evidence; presumption as to exercise of due care by person found to have been killed by the alleged negligence of another; (a) presumption of care; application of presumption; question for court or jury; weight of presumption; overcoming presumption; (b) presumption of negligence; (c) where no presumption is allowed; burden of proof on plaintiff; burden on defendant. 261

Of negligence in setting fires by engines. 299
16 L. R. A.

Parol evidence of mistake in description of land devised. 821

EXECUTION. See REAL PROPERTY, 2.

EXECUTORS AND ADMINISTRATORS. See also ACTION OR SUIT, 4; ESTOPPEL, 5.

1. An executor appointed by will cannot be rejected by the court except where the law has specially so provided. *Smith's Appeal* (Conn.) 538

2. A lack of honesty, integrity, and experience in business affairs, is not sufficient ground for rejecting an executor under a statute which allows the rejection of one who is "incapable to accept the trust." *Id.*

3. The vindication of the honor of his intestate is not a purpose for which an administrator can use funds of the estate by employing counsel to aid in prosecuting for murder one who killed the intestate and attacks his honor by matters which he alleges in justification of the crime. *Woodard v. Woodard* (S. C.) 748

4. Suit in a foreign state on a judgment recovered by an administrator in the state of his appointment may be maintained by him in his own name. *Tittman v. Thornton* (Mo.) 410

NOTES AND BRIEFS.

Executor and administrator; requisite moral qualifications of. 538

EXPLOSIONS. See GAS, 1; INJUNCTION, 2.

FALSE IMPRISONMENT. See CARRIERS, 8.

FENCE. See EASEMENTS.

FIRE. See EVIDENCE, 25.

FIRE COMMISSIONERS. See OFFICERS, 10-12.

FIRE DEPARTMENT. See MUNICIPAL CORPORATIONS, 11, 12.

FIREWORKS.

A voluntary spectator of a display of fireworks in a highway must be held to assume the risk of injury from accident without negligence, although the show is unauthorized. *Scanlon v. Wedger* (Mass.) 895

NOTES AND BRIEFS.

Fireworks; liability for injuries caused by the discharge of. 895

FISHERIES. See also CONSTITUTIONAL LAW, 8.

A lake wholly upon lands of a private owner, and connected with an unnavigable river only during times of high water, is included within a statutory prohibition against fishing with a seine during a certain part of the year in "any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, and other wat-

ercourses" within the state. *People v. Bridges* (Ill.) 684

FIXTURES. See also CONTRACTS 6, 7.

A barn placed by its owner upon his own land becomes real estate, although supported by stones resting upon the surface; and it will pass by any conveyance of the real estate. *Leonard v. Clough* (N. Y.) 805

NOTES AND BRIEFS.

Fixtures; buildings as real estate. 806

FLATS. See WATERS.

FORGERY. See also INDICTMENT, ETC., 3.

Forgery is not a felony at common law. *State v. Murphy* (R. I.) 550

FRIGHT. See CARRIERS, 15.

FRUIT.

NOTES AND BRIEFS.

Classification of growing fruit as real or personal property. 108

GAS. See also MUNICIPAL CORPORATIONS, 7-10.

1. The explosion of nitro-glycerine in a gas well on one's own land, to increase the natural flow, is not an unlawful interference with the rights of other persons from whose land the gas is thereby drawn. *People's Gas Co. v. Tyner* (Ind.) 443

2. The agreement of a city to take gas for certain lamps for a specified time, and also for such additional lamps as the city council may from time to time direct, does not prevent the city from purchasing gas from any other company for any lamps except those specified. *Vincennes v. Citizens Gaslight & C. Co.* (Ind.) 485

3. An exclusive use of the streets of a city for gas pipes is not implied by an ordinance granting merely the privilege of laying gas mains and pipes, and also constituting a contract for a certain quantity of gas. *Id.*

GIFT. See CONTRACTS, 7.

GOODWILL.

1. Persons have no right to represent their business as the same formerly conducted by them, where that has been transferred, with all its assets, to other parties, although they have a right to do the same kind of business. *Fish Bros. Wagon Co. v. Fish* (Wis.) 453

2. The goodwill of a business, including the right to use trademarks, even where these consist of the names of individuals engaged in the business and of a picture representing such name, passes with a transfer of all the property and assets of the business, although not specifically mentioned. *Id.*

GUARDIAN AD LITEM. See INFANTS, NOTES AND BRIEFS.

16 L. R. A.

GUARDIAN AND WARD. See EMINENT DOMAIN, 5.

HABITUAL CRIMINALS. See CONSTITUTIONAL LAW, 4.

HIGHWAYS. See also BRIDGES, 4; DRAINS AND SEWERS.

1. Lack of notice to the owner of premises, of proceedings to lay out a highway over them, is not fatal to jurisdiction if a tenant or other occupant was made a party and duly notified. *Ryder v. Horsting* (Ind.) 186

2. The grant of the right to lay a street rail way in a street where the driveway is so narrow that but 8 feet 7½ inches will be left on each side of a street car for the passage of teams is not beyond the power of a city council. *People, Kunze, v. Ft. Wayne & E. R. Co.* (Mich.) 753

3. The regular use of a steam traction engine to draw heavy loads of stone from a quarry to a railroad, taking a train of two wagons at a time, and making two trips per day, each requiring from one hour to one hour and a half for one way, and sometimes stopping half an hour to get up steam, and frequently making much noise by blowing off steam,—constitutes an indictable nuisance where travel is thereby seriously hindered and women and children are afraid to drive that way; especially where the safety of bridges on the road is endangered by the heavy loads. *Com. v. Allen* (Pa.) 148

4. A traveler on a highway who stoops to pick up and throw out of the way a loose telephone wire which is hanging so as to endanger travelers is not, as matter of law, guilty of such negligence as to prevent him from recovering against the city for the injury received from the wire, which is charged with electricity, on the ground that it is a defect in the highway. *Bourget v. Cambridge* (Mass.) 605

5. The want of a barrier along a steep bank beside a highway is not the proximate cause of injury to a passenger in an omnibus which went over the bank while the horse drawing it was struggling to get up after repeated falls, each of which took it nearer to the bank, where the horse first fell in the middle of the street, which was in good condition. *Herr v. Lebanon* (Pa.) 106

6. The discontinuance of part of a street does not entitle a landowner to any damages if his access to the system of public streets remains substantially unimpaired, although he finds travel less convenient and his shop has suffered by the diversion of travel. *Stanwood v. Malden* (Mass.) 591

NOTES AND BRIEFS.

Highways; damage of property-owner by discontinuance of. 591

Lawfulness of the use of steam traction engine on. 148

Use of, for railroad. 371

Right of one injured on, to proceed in the first instance against the one ultimately liable. 554

Power of municipality to authorize use of
for private drain. 716

HOUSE OF CORRECTION.

1. The commitment of a child to a state reform school by a justice of the peace is not in violation of a constitutional provision giving jurisdiction in all matters of guardianship to the probate courts. *State, Olson, v. Brown* (Minn.) 691

2. A minor committed to the care and custody of a state reform school on the charge of incorrigibly vicious conduct is not "punished" or "imprisoned," within the meaning of constitutional provisions as to criminal prosecutions. *Id.*

HUSBAND AND WIFE. See also **BILLS AND NOTES, 2; EQUIT, 1; JUDGMENT, 8; LIMITATION OF ACTIONS, 1.**

1. A common-law marriage is not valid under a statute requiring a license for a marriage, and providing that certain persons shall be authorized to perform the ceremony, and expressly providing, further, that a marriage shall not be void because solemnized by a person not legally authorized to perform it if the parties to the marriage or either of them believe they are lawfully married, and also that marriages solemnized before or in any religious organization or congregation, according to the ritual or form commonly practiced therein, shall be valid. *Re McLaughlin's Estate* (Wash.) 699

2. A minor's marriage valid in the state where it is made is not invalid in the state of his residence because of the fact that he went out of the state to be married, for the sole purpose of evading a statutory provision requiring his father's consent. *Com. v. Graham* (Mass.) 578

3. An infant husband is entitled to his own wages so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent. *Id.*

4. A married woman cannot become her husband's partner in a mercantile business by virtue of a constitutional right to hold separate property, and of statutory provisions authorizing her to transfer her separate personal property and carry on any trade or business. *Gilkinson-Stoss Commission Co. v. Salinger* (Ark.) 526

5. A partnership between husband and wife is not authorized by a statute providing that a wife may make contracts and incur liabilities as if unmarried, and giving her full power to manage and dispose of her own property, and also declaring that all laws which impose or recognize civil disabilities upon a wife that do not exist as to her husband are abolished. *Seattle Bd. of Trade v. Hayden* (Wash.) 580

6. The legal fiction that a wife's domicile follows that of her husband gives jurisdiction of a suit for divorce on the ground of the wife's desertion, to a court of a state to which the husband has removed and in which he has resided for the time required by statute, al-

though the marriage took place in another state in which the wife still resides, and in which her desertion began, and in which service is made upon her. *Loker v. Gerald* (Mass.) 497

7. Acts causing mental suffering, although not affecting bodily health, may constitute extreme cruelty under Cal. Civ. Code, § 94, which defines it as the "infliction of grievous bodily injury or grievous mental suffering." *Barnes v. Barnes* (Cal.) 660

8. A cause of action for divorce is not taken away by the repeal of the statute under which it arose, without any saving clause, where this is accompanied by a new statute prescribing the same grounds for divorce although making the requirements less. *Tyfts v. Tyfts* (Utah) 482

9. A statutory provision for alimony when a divorce is granted does not by implication exclude a right of action to enforce a husband's obligation to furnish his wife maintenance independent of a proceeding for divorce. *Edgerton v. Edgerton* (Mont.) 94

NOTES AND BRIEFS.

Husband and wife; partnership between. 526

Right of action for separate maintenance. 94

Domicil of wife for purpose of divorce suit. 497

Cruelty as cause for divorce. 660

ICE.

An appropriation of ice on a great pond belonging to the public is not made by one who has made no preparations to cut the ice except to dig a ditch the preceding fall for the purpose of floating in the ice, and who merely stakes out a portion of the pond in the nighttime, and serves notice the next morning of his claim thereto, as against another whose workmen are engaged in cutting it when the notice is served, and who had not only kept it free from snow and surface water, but had cut the lily-pads in the pond before the ice began to form, and who continued to cut the ice without regard to the notice and without any further action by the former. *Barrett v. Rockport Ice Co.* (Me.) 774

IGNORANCE OF LAW. See **MAXIMS, 1.**

INCOME. See **CORPORATIONS, 7, NOTES AND BRIEFS.**

INCOMPETENT PERSONS.

NOTES AND BRIEFS.

Belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed. 677

INDICTMENT AND INFORMATION.

1. An information filed by the state's attorney is invalid under N. D. Const. § 97, art. 4, requiring all prosecutions to be carried on in the name and by the authority of the state,

where the state is not named as a party, or any averment made, directly or indirectly, that defendant is prosecuted in the name or by authority of the state, although it does appear on its face that it was filed by the state's attorney. *State v. Hasledahl* (N. D.) 150

2. A verification by the state's attorney of an information filed in lieu of an indictment, under N. D. Laws 1890, chap. 71, § 8, is sufficient in form where it states that the allegations therein contained are true to his best knowledge, information, and belief. *Id.*

3. An indictment for forgery need not allege that the offense was feloniously committed. *State v. Murphy* (R. I.) 550

4. There is no duplicity in an indictment for forgery, by reason of an allegation that defendant had in his custody a false, forged, and counterfeit order, and did feloniously utter and publish the same as true, knowing it to be forged. *Id.*

5. An indictment charging an agreement to burn a building, and that in pursuance of such agreement the building was burned, is not bad for duplicity as charging both conspiracy to commit arson, and arson, since the conspiracy was merged in the consummated act of burning. *Hoyt v. People* (Ill.) 239

NOTES AND BRIEFS.

Indictment; use of word "feloniously" in. 550

INFANTS. See also CONSTITUTIONAL LAW, 14; EMINENT DOMAIN, 5; HOUSE OF CORRECTION; HUSBAND AND WIFE, 8; TRIAL, 6.

1. A person becomes of age on the day before his twenty-first birthday. *Ross v. Morrow* (Tex.) 542

2. The statutory right of a parent to the custody of his children is not absolute. Whether or not he shall have it in case he is intemperate and shiftless will be determined by a consideration of their best interests. *Re Lally* (Iowa) 681

3. A widower, intemperate, without work, and with no property but a homestead, loses all right to the custody of his child in favor of one who legally adopts it, by leaving it at a neighbor's, substantially without clothing, with the promise to send for it in a few days, and then leaving the city and remaining away ten weeks without contributing anything toward its support; especially where his only resource for its support is the indefinite promise of the tenant of his homestead—a poor man—to support the child for the use of the property, which is not adequate compensation for the service. *Id.*

4. The alleged reformation of an intemperate widower is not sufficient to cause the restoration to him of his child, which has been adopted and given a good home by relatives, when such reformation, if it exists at all, must have occurred within a few weeks of his application for the child. *Id.*

5. A promise by an intemperate father to quit drinking is not sufficient to cause the withdrawal of his children from the custody of 16 L. R. A.

a competent guardian and their restoration to him. *Id.*

6. No notice to an infant is necessary in order to make valid the act of his general guardian, under statutory authority, in transferring a right of way across his lands to a railroad company. *Louisville, N. O. & T. R. Co. v. Jordan* (Miss.) 251

NOTES AND BRIEFS.

Infants; control of guardian *ad litem* or next friend over action. 507

On what day a person becomes of age. 542

How far marriage of, works emancipation. 578

Commitment to reformatories without conviction of crime. 691

INJUNCTION.

1. The fact that an act which is dangerous to life and property constitutes a crime will not prevent an injunction against it on the application of a private citizen whose residence and family are endangered. *People's Gas Co. v. Tyner* (Ind.) 443

2. An injunction may be granted to prevent the explosion of nitro-glycerine in a gas well within a city, so near the residence of the complainant as to endanger life and property therein. *Id.*

3. Mere usurpation of corporate authority to construct a street railway will not entitle an abutting owner to maintain an injunction suit to prevent such construction. *Nichols v. Ann Arbor & Y. Street R. Co.* (Mich.) 371

4. An injunction against the slander of title of letters patent by falsely and maliciously charging infringement, and notifying plaintiff's prospective customers that they will be held responsible for using plaintiff's device, thereby injuring plaintiff's business by unfair competition,—will not be granted until the question of slander has been determined in an action at law. *Flint v. Hutchinson Smoke Burner Co.* (Mo.) 243

But see next case.

5. An injunction may be granted to restrain defendants from using a decree in a patent case, which they have obtained by fraud and collusion, in any way or form to influence or threaten any person from purchasing articles from the complainant, by claiming that the decree is an adjudication upon the merits as to the validity of the patent. *Grand Rapids School Furniture Co. v. Haney School Furniture Co.* (Mich.) 721

6. A full, complete, and adequate remedy at law for illegality of a tax, furnished by notice and opportunity to defend in the tax proceeding, will prevent an injunction against collection of the tax. *Boyd v. Selma* (Ala.) 729

7. On an application for a mere temporary injunction, the sufficiency of the complaint will not be tested as by a demurrer, if it presents a proper subject for investigation. *People's Gas Co. v. Tyner* (Ind.) 443

NOTES AND BRIEFS.

Injunction; against false statement as to plaintiff's property or business. 243

INNKEEPERS.

1. One does not lose the character of guest at a hotel merely by inquiring the price of room and board before being assigned to a room, where no agreement is made as to the time of staying and no reduction made from the price charged to transient guests. *Fay v. Pacific Imp. Co. (Cal.)* 188

2. The fact that a hotel stands in enclosed grounds the gates of which are closed at night does not prevent it from being a public inn, when the patronage of the public generally is solicited. *Id.*

3. Jewelry daily worn by a woman who is a guest of a hotel need not be deposited with the innkeeper in order to make him liable for its loss by fire. *Id.*

INSOLVENCY.

A discharge under state insolvency laws will not release a judgment obtained in another state upon a contract made there, if the creditor does not participate in the insolvency proceedings, although he resides within the jurisdiction of the court granting the discharge, and the judgment appeared on the insolvent's schedule. *Louvenberg v. Levine (Cal.)* 159

INSURANCE. See also CORPORATIONS, 9-12.

1. A false warranty by an applicant for life insurance, that he has not been rejected by any other company, avoids a contract of which it becomes a part, although he believed it to be true, while the agent of the insurer knew it to be false, having received and forwarded the former application and been notified of its rejection, if the agent did not fraudulently conceal the fact from the applicant. *Clemans v. Supreme Assem. R. S. of G. F. (N. Y.)* 88

2. Under a clause requiring a suit within one year from the time of the "accidental injury," in a policy of accident insurance providing a weekly indemnity for the insured in case of such injury, and a death indemnity for his wife in case of his death therefrom, the limitation period for her suit begins to run at his death, and not at the time of the accident to him. *Cooper v. United States Mut. Acci. Asso. (N. Y.)* 188

3. There is not a loss of a foot, within the meaning of an accident insurance policy, where the foot is not even injured and can be used, when the person wears a "plaster jacket" to prevent an injury in another part of his body from affecting the use of the foot. *Stevor v. People's Mut. Acci. Ins. Asso. (Pa.)* 446

4. Notice that three stores belonging to the same person are all located at the foot of the same street is not notice that they are all in the same building. *German-American Ins. Co. v. Commercial F. Ins. Co. (Ala.)* 291

5. The existence of brick partitions extending above the roof and dividing a building into stores or sections will not constitute each section a separate building or the goods therein a separate risk, within the meaning of a reinsurance contract limiting the amount of insurance to be placed on any one "building or 16 L. R. A.

risk," if all the sections are enclosed by a common exterior wall and are all under one management and devoted to the same use, while the floors of the different stories are on the same level and connected by large doors through the partitions. *Id.*

6. A policy of insurance for \$200 on a storehouse and \$3,800 on goods therein is so far severable that a forfeiture as to the building by breach of a condition as to the title to the land will not defeat the insurance on the goods. *Coleman v. New Orleans Ins. Co. (Ohio)* 174

7. Claiming exemption from liability for a loss on one ground will not prevent an insurance company from subsequently setting up another defense based upon facts of which, solely through the negligence of the insured, it was ignorant at the time of making its first defense. *German-American Ins. Co. v. Commercial F. Ins. Co. (Ala.)* 291

8. Failure of one insurance company to object to risks contained in schedules sent to it by another company, a certain amount of whose risks it has made a compact to reinsure, will not amount to an acquiescence on which the latter can rely in case they are not covered by the compact, since reliance may be placed on the good faith of the other company and its acting within the contract, without the necessity of making a personal investigation of the property covered by each schedule. *Id.*

NOTES AND BRIEFS.

Insurance; effect of agent's knowledge of falsity of statements in application; agent's perversion of information by the insured; agent's falsely filling up blanks; misconstruction of facts by agent. 88

Limitation of time to bring suit for. 188

Severability of contract. 174

JOINT-STOCK COMPANY.

A joint stock company created solely by agreement of the members, and in which their individual rights and liabilities are not merged as in the case of a corporation, is not taxable on its capital as a "stock corporation." *People, Winchester, v. Coleman (N. Y.)* 188

JUDGMENT. See also EQUITY, 8; HUSBAND AND WIFE, 6; LIMITATION OF ACTIONS, 3, 4.

1. Service by publication alone, which is shown by the record to be the only service, does not give jurisdiction to render a personal judgment against the defendant in a bastardy proceeding, in the absence of a statute providing for such service. *Moyer v. Bucks (Ind.)* 281

2. A judgment in favor of a minor in an action brought by his father as next friend, which includes damages for loss of earning capacity from the time of injuries occasioned by defendant's negligence, is a bar to an action by the father personally to recover for loss of services of the son during minority. *Baker v. Flint & P. M. R. Co. (Mich.)* 154

3. A judgment of divorce cannot be collaterally attacked as void because the appear-

ance of the wife by an attorney was authorized only by a letter of authority which her husband compelled her to write and sign, where such facts did not appear on the record. *Edgerton v. Edgerton* (Mont.) 94

See also HUSBAND AND WIFE, 6.

4. The suspension of a judgment pending an appeal under N. Y. Code Civ. Proc. § 1256, by entry of the words "Lien suspended on appeal," suspends the lien of the judgment pending the appeal, not only as to the property then subject to the lien of the judgment, but as to after-acquired property. *Wronkow v. Oakley* (N. Y.) 209

5. A judgment debtor who is in fact only a surety of a codefendant may, on payment of the judgment, take an assignment thereof which will be valid although there has been no adjudication of his suretyship and that fact is not indicated on the face of the judgment. *Frank v. Fraytor* (Ind.) 115

6. The assignment of a judgment which does not purport to be satisfied, to one of the judgment debtors, is sufficient to put a purchaser of a subsequent judgment on inquiry as to the rights of the assignee as surety. *Id.*

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Judgment; validity of personal judgments rendered upon constructive service of process; against nonresidents (1) in states other than where rendered, (2) in state where rendered; against residents; what property subject to, for alimony or costs. 231

Priority of lien of judgment or of prior unrecorded conveyance; in absence of express statutory definition; by virtue of statutes; effect of notice on rank of lien of judgment; priority of right of purchaser at sale under judgment; when judgment creditor purchases at sale. 669

Relief from, when rendered on publication of process. 861

Right of surety who has paid judgment to enforce it for his own benefit; at law; in equity; under statutes. 115

JUDICIAL SALE. See ESTOPPEL, 4.

JURY. See TRIAL, NOTES AND BRIEFS.

LANDLORD AND TENANT.

1. A representation that the plumbing is in good order, made on the lease of a dwelling, although false, does not affect the liability of the lessee for rent, if the statement was made in the belief that it was true. *Daly v. Wise* (N. Y.) 236

2. A covenant that a dwelling is fit for residence is not implied on the lease of the whole of an unfurnished dwelling for a definite term, under a single contract which contains no covenant that the premises are in good repair, or that the lessor will put or keep them so. *Id.*

3. In a lease of a completely furnished dwelling-house for a summer season at a summer watering-place, there is an implied agreement that the house is fit for habitation without greater preparation than the tenant might

reasonably be expected to make. *Ingalls v. Hobbs* (Mass.) 51

4. Bugs infesting a summer-house at a watering-place, which is hired already furnished for the season, may render it so unfit for habitation that the tenant may be relieved from the agreement. *Id.*

5. The risk of defects in a tenement building, such as unsafe outside steps, is assumed by one who goes there to attend a wake,—at least where there is nothing to show that he had an invitation or was in any way related to any of the occupants. *Hart v. Cole* (Mass.) 557

6. A landlord can forcibly eject a tenant without legal possession after the expiration of the tenancy, although he holds possession in good faith under color and reasonable claim of right. *Allen v. Keily* (R. I.) 798

NOTES AND BRIEFS.

Landlord and tenant; misrepresentations as to condition of building. 236

Landlord's liability to third persons. 640

Liability of landlord to tenant for forcible expulsion after termination of tenancy; in England; the prevalent American rule; a different view. 798

LATERAL SUPPORT. See also MASTER AND SERVANT, 15.

One who promises the adjoining owner that in digging near the wall of the latter's building he will excavate and lay up his wall one section at a time is liable for the fall of the building, where, after laying one section of his wall, he causes the fall of the building by digging a long and dangerous trench without notice of his change of plan. *Larson v. Metropolitan Street R. Co.* (Mo.) 330

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Lateral support; excavations near neighbor's land. 330

LEGISLATURE. See CONSTITUTIONAL LAW, 14.

LEVY AND SEIZURE. See also REAL PROPERTY, 2.

Blackberries while growing on the bushes are not subject to levy on execution as real property. *Sparrow v. Pond* (Minn.) 103

LIBEL AND SLANDER. See also DAMAGES, 2, 8; INJUNCTION, 4, 5.

Maliciously filing a mechanics' lien without authority of law, with intent to injure the business of the owner of the property, constitutes an actionable libel, where it results in damage by loss of credit and customers. *Moore v. Rolin* (Va.) 625

NOTES AND BRIEFS.

See also INJUNCTION.

Libel; by filing lien.

625

LICENSE. See also CONSTITUTIONAL LAW, 10; CONTRACTS, 10, NOTES AND BRIEFS.

1. A city cannot levy an occupation tax on persons not similarly taxed by the state under Tex. Const. art. 8, § 1, providing that such taxes by any county, city, or town "shall not exceed one half of the tax levied by the state for the same period on such profession or business." *Hoefting v. San Antonio* (Tex.) 606

2. A borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is fixed at so high a figure that it amounts to prohibition, but which excepts residents of the borough from its provisions, is void. The borough can have no better right to adopt discriminating trade regulations than the state has. *Sayre v. Phillips* (Pa.) 49

LIENS. See also ACTION OR SUIT, 8; LIBEL AND SLANDER.

1. Liens of subcontractors attach by relation as of the date of the commencement of the work, where a building is constructed under one entire contract between the owner and the original contractor; and they are entitled to a preference over a mortgage on the premises executed by the owner subsequent to that date. *Glass v. Freeburg* (Minn.) 335

2. A mechanics' lien cannot be preferred to a prior unrecorded mortgage, in the absence of any statutory provision to that effect, unless the mortgage is estopped on equitable principles from asserting the lien of his mortgage as against the lien claimants. *Miller v. Stoddard* (Minn.) 268

3. Services by an architect in the preparation of drawings, plans, and specifications for a building, and in superintending its erection, are "work or labor upon . . . a building or improvement on land," within the meaning of a statute providing for mechanics' liens. *Hughes v. Torgerson* (Ala.) 600

NOTES AND BRIEFS.

See also JUDGMENT.

Relation back of subcontractor's lien to the date of that of the original contractor. 335

Right of architect to mechanics' lien; simply furnishing plans; superintending. 600

LIFE TENANTS. See CORPORATIONS, 7.

LIMITATION OF ACTIONS. See also CONFLICT OF LAWS, 8; INSURANCE, 2; TIME.

1. A general statute of limitations does not apply to an action for divorce. *Tufts v. Tufts* (Utah) 482

2. A right of action to establish an interest in property purchased at a judicial sale under an invalid title, for which purchase-money notes are given on receiving a bond for title, does not accrue until the notes are paid. *Lindsay v. Cooper* (Ala.) 818

3. An action upon the judgment of a sister state must be brought in Kansas within five 16 L. R. A.

years, or it will be barred. *Rice v. Moore* (Kan.) 198

4. The bar of the Statute of Limitations against a judgment rendered in another state is not removed by a revivor of the judgment in that state, without appearance by or service upon the defendant. *Id.*

LOST INSTRUMENTS.

An action at law on a lost negotiable note cannot be maintained. *Butler v. Joyce* (D. C.) 205

MAINTENANCE. See HUSBAND AND WIFE, 9, NOTES AND BRIEFS.

MANDAMUS.

1. An objection that a private citizen as relator in a petition for mandamus has not made any application to the attorney-general to institute the proceeding is not valid where the attorney-general is shown to be adverse to the application by his appearance for the respondent. *Giddings v. Blacker* (Mich.) 402

2. A writ of mandamus will not be issued to compel the secretary of state to receive and file a certificate of the vote of a corporation to change its name as provided by statute, where this would result in the use of the same name by two corporations, with a possible conflict of interests and litigation, under statutes which show an intention to prevent the use of the same name by two or more corporations. *Illinois Watch Case Co. v. Pearson* (Ill.) 429

MANUFACTURING. See CONSTITUTIONAL LAW, 18.

MARRIAGE. See HUSBAND AND WIFE; WILLS, 1.

MASTER AND SERVANT. See also CONSTITUTIONAL LAW, 18; DEATH, 2.

1. A head brakeman of a construction train in the temporary absence of the conductor at a station has no implied authority to engage a bystander to get on the cars and assist in switching. *Church v. Chicago, M. & St. P. R. Co.* (Minn.) 861

2. A person who gets on a freight train to assist in switching, on request of the head brakeman during the conductor's temporary absence, is a mere volunteer who assumes all the risks of the situation. *Id.*

3. A railroad company is liable for negligently loading a car with lumber or iron projecting over the end so as to make it dangerous to employes in coupling the car, and in negligently accepting such car for coupling and transportation in such unsafe condition, where a brakeman is injured in consequence thereof. *Jacksonville, T. & K. W. R. Co. v. Galvin* (Fla.) 887

4. A brakeman on a freight train assumes the risk of injury from iron or lumber projecting over the end of a car which he is attempting to couple with another, where cars so loaded are frequently allowed in the train on which he works. *Id.*

5. The fact that loaded cars were received by a railroad company from another road does not relieve the company from liability for injuries to a brakeman, caused by the improper manner in which they were loaded. *Dewey v. Detroit, G. H. & M. R. Co.* (Mich.) 342

6. A master is liable for an injury to a servant, the proximate cause of which is the resultant of the combined negligence of the master himself and of a fellow servant. *Lutz v. Atlantic & P. R. Co.* (N. M.) 819

7. The maintenance of a telltale intended to warn brakemen of the approach of a train to a bridge, which is unsafe for brakemen on a portion of the cars, which are of unusual height, is a breach of the railroad company's duty to provide safe appliances, although it is safe for cars of the ordinary height. *Darling v. New York, P. & B. R. Co.* (R. I.) 648

8. A brakeman does not assume the risk of an unsafe telltale intended to give warning of approach to a bridge, and which should not be in itself a source of any danger,—especially where it is dangerous to brakemen on cars of more than ordinary height. *Id.*

9. A snowslide, being usually mingled with gravel and rock, is a dangerous obstruction to a railroad, distinct in nature from a snowdrift; and a section foreman having knowledge of such an obstruction to the track must give notice thereof to the managers of the road and to the conductor of an approaching train if he has opportunity. *Fisher v. Oregon, S. L. & U. N. R. Co.* (Or.) 519

10. The conductor of a train ordered to run as an extra to carry snow shovellers to a certain station beyond which the road is blockaded does not assume the risk of a snowslide between the stations on the trip he is ordered to run. *Id.*

11. A section foreman stands in place of his master in respect of the duty to give notice of a dangerous obstruction on the track, and is not as to his negligence in failing to do so a fellow servant of a conductor who is injured by reason of such obstruction. *Id.*

12. An inspector of cars is not a fellow servant of a brakeman so as to relieve the railroad company from liability for injury to the latter while coupling cars, caused by the negligent loading of a car so that lumber projected over the end. *Dewey v. Detroit, G. H. & M. R. Co.* (Mich.) 342

13. A conductor in charge of a railroad train, with a right to command and to control its movements, who leaves it standing on the main line along which another train due and expected by him has a right to pass, but which he fails to use ordinary care to warn or notify of such obstruction in its way, whereby a collision takes place, is not the fellow servant of a brakeman on the other train so as to relieve the company of liability for injury to the brakeman caused by the negligence of the conductor. *Daniel v. Chesapeake & O. R. Co.* (W. Va.) 888

14. A yard master in lawful command and control of a train as a conductor for the occasion is a conductor within the meaning of the rule making him a vice-principal as regards a

brakeman on another train with which his train has a collision. *Id.*

15. One who employs a contractor to excavate for a building is not relieved of liability for the fall of a building on adjacent premises caused by digging a trench too long and deep alongside the wall, by the fact that the work was done by a contractor, where the contract stipulated that the employer's engineer should be in charge of the work, with power to order the discharge of men who refused to obey his orders, and where by an authorized assistant he did in fact order the trench to be dug as it was dug. *Larson v. Metropolitan Street R. Co.* (Mo.) 830

NOTES AND BRIEFS.

See also CONTRACTS.

Master and servant; assumption of risk as to condition of railroad track. 519

The relation of the proximate-cause doctrine to the rule of liability of a master for injuries to his servant caused by the combined negligence of himself and a fellow servant; proximate cause; "a" proximate cause as distinguished from "the" proximate cause; right to consider relative negligence; liability exists where master's negligence was an essential element; cases where the negligence of the master is the efficient cause. 819

Who is a volunteer. 861

Liability of master for torts of servant. 126

MAXIMS.

1. The maxim that ignorance of law is no excuse for nonperformance of a contract has no application where the mistake is as to the laws of a state of the Union other than that of the contractor's domicile. *Morgan v. Bell* (Wash.) 614

2. Nemo debet esse iudex in propria sui causa. *Kelly v. Lynchburg & D. R. Co.* (N. C.) 514

3. Qui facit per alium facit per se. *Union P. R. Co. v. Lapsley* (C. C. App. 8th C.) 800

4. Volenti non fit injuria. *Illinois C. R. Co. v. Minor* (Miss.) 627

MERCHANT. See BAILMENT, 2.

MINES. See DOWER, NOTES AND BRIEFS.

MISTAKE. See also MAXIMS, 1.

Mistake as to the extent of his right, under the community law, to property which a man contracts to convey, is not a mistake of law from which equity will refuse to grant relief. *Morgan v. Bell* (Wash.) 614

MONOPOLIES. See ELECTRICAL Uses AND APPLIANCES, 4.

MORTGAGE. See also ALTERATION OF INSTRUMENTS, 2; CONFLICT OF LAWS, 2; CONTRACTS, 18, 19; DEDICATION, 4; LIENS, 2; TAXES, 5-9, 19, 20, NOTES AND BRIEFS.

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Mortgage; release of mortgagor as surety

by mortgagee's dealing with vendee, who has assumed the mortgage. 85

MUNICIPAL CORPORATIONS. See also CEMETERY; LICENSE, 2.

1. A proposed amendment to a city charter may be amended at its second consideration by the city council, and then submitted to a vote of the people without further consideration by the council after another publication period of ten days, under a charter which provides that amendments to itself may be proposed in either House, and if agreed to they shall be entered on the journals and published for ten consecutive days, and shall then be resubmitted to each House and pursue the same course as is pursued by any ordinance, and if then agreed to and not vetoed, or if passed over a veto, shall be submitted to the voters for ratification. *State, Wiesenhal, v. Denny* (Wash.) 214

2. The existence of confusion on the part of the voters, and inability to decide which way to vote upon proposed amendments to a city charter, which are caused by the submission of so many at once, will not invalidate the election, although it is increased by splitting up the original propositions as adopted by the council and published, into more than twice as many for submission to the voters, if the notice of election accurately numbered and described the final subdivisions, and the ballots referred to the numbers so given. *Id.*

3. Needless separation in submitting them to the voters, of two proposed amendments to a city charter which are indispensable to each other, will not cause the rejection of either or both if each has received a majority of the vote and such separation is justified by the law. *Id.*

4. A city charter cannot require for its amendment a majority of all the voters voting at the election at which a proposed amendment is submitted, if the State Constitution provides for the ratification of such a proposed amendment by a majority of the qualified voters voting thereon. *Id.*

5. An ordinance which is in effect an offer by a city, when accepted, creates a contract to be construed and interpreted like any other written contract. *Vincennes v. Ottisens Gas-light Co.* (Ind.) 485

6. The passage of an ordinance constituting an offer which is accepted as a contract, if the contract is included within the terms of a prior ordinance requiring proposals for work, is a repeal of the prior ordinance *pro tanto*. *Id.*

7. An ordinance granting the privilege to lay gas mains and pipes in the city streets for twenty-five years on certain conditions, containing a provision that the city shall take sufficient gas for certain lamps, without mentioning any other period, makes a contract to take the quantity of gas specified for a term of twenty-five years. *Id.*

8. A municipal contract for gas, being the exercise of a purely business power, is not void as a surrender of legislative power. *Id.*

9. A city has power to contract for a supply of gas or water for a reasonable period of time extending beyond the tenure of office of 16 L. R. A.

the individual members of the common council making such contract. *Id.*

10. Twenty-five years cannot be said to be an unreasonable time for which to contract for the supply of light or water to a city. *Id.*

11. A city is not liable at common law for the negligent acts of members of its fire department. *Gillespie v. Lincoln* (Neb.) 849

12. The reckless driving of a member of the city fire department while merely exercising a team of horses in the street on a ladder wagon or truck, by which he runs over and kills a child, does not render the city liable. *Id.*

13. The removal of a councilman from the ward for which he was elected to another ward of the same city will not of itself create a vacancy in his office, where the only constitutional provision as to the residence of municipal officers provides that they shall reside "within their respective counties, townships, and towns," while the statutes provide that a councilman must at the time of his election "be a resident of the ward, and in case of removal therefrom" the common council shall have power to declare his office vacant and order a special election to fill the vacancy. *State, Hartford, v. Craig* (Ind.) 683

14. A member of a city council is not an officer of the ward from which he is chosen, but of the entire city. *Id.*

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Municipal corporations; discrimination by municipality between its own residents and other residents of the same state. 49

Ordinance as contract. 485

Authority of Legislature to remove from trusteeship. 695

NAME. See CORPORATIONS, 3, 4; TRADE-MARKS.

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NEGLIGENCE. See also CARRIERS, 16-18; DEATH, 1; ELECTRICAL USES AND APPLIANCES, 1-3; FIREWORKS; HIGHWAYS, 4; LANDLORD AND TENANT, 5; TELEPHONES.

1. The violation of a duty specified by law is negligence. *Clements v. Louisiana Electric Light Co.* (La.) 48

2. To constitute contributory negligence of a person employed, in the presence of known danger, he must voluntarily and unnecessarily expose himself to it. *Id.*

3. Failure to use ordinary care to avoid injuring another after one becomes aware or ought to become aware of the other's danger will create a liability for injury thereby caused, although the other party had negligently exposed himself to the injury. *Cincinnati, H. & D. R. Co. v. Kassen* (Ohio) 674

4. Contributory negligence is not a defense to an action for wanton or reckless injuries. *Florida Southern R. Co. v. Hirst* (Fla.) 631

5. The negligence of the owner of a carriage in driving his team is not imputable to one riding with him at his invitation and who has no authority over him. *Union P. R. Co. v. Lapsley* (C. C. App. 8th C.) 800

6. Permitting the stairway in the rear of a private residence to become decayed and unsafe does not constitute a nuisance as to the occupant of an adjoining house, so as to entitle him to damages from its owner if he is injured while attempting to use it for purposes of his own. *Sterger v. Van Siclen* (N. Y.) 640

7. A property-owner owes no duty to one who goes upon his premises in search of a child who is accustomed to play there, to have stairways thereon in a safe condition, the neglect of which will render him liable for injuries received by such person in consequence of the breaking of a step. *Id.*

8. One who, without invitation and merely to pay a friendly call on the operator, visits a telegraph office located on railroad land near the track, in which office he was formerly employed and which is owned and occupied by a railroad company for its own purposes and convenience, although occasional messages are sent and received for outside parties for pay, is a mere voluntary licensee subject to the concomitant risks and perils, and no recovery can be had for his death caused by a collision of trains which wrecked the office, unless it was due to gross negligence of the agents or employés of the company. *Manning v. Chesapeake & O. R. Co.* (W. Va.) 271

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See also DISEASE.

Negligence; liability for injury to licensees on premises. 271

In escaping apparent danger. 787

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NEGROES. See CIVIL RIGHTS; CONSTITUTIONAL LAW, 9.

NEW TRIAL.

1. Surprise occasioned by the refusal to admit a bill of sale in evidence because not proved to have been properly executed is not a good cause for new trial, where such proof could have been procured by the use of ordinary diligence. *Vittman v. Thornton* (Mo.) 410

2. A joking remark to the jury, that they can have "all night if necessary," in answer to the foreman's promise to knock at a certain time and let the court know if they had agreed, made by an officer sent to inquire if there was prospect of agreement, is not to be regarded as a threat to keep them out all night, or as putting such a constraint upon them as to render their verdict void, where it does not appear that any prejudice resulted from it. *Darling v. New York, P. & B. R. Co.* (R. I.) 643

3. The affidavit of a juror to his belief that a message of the court and the remark of an officer influenced the verdict is not conclusive of the fact, even if it is to be held competent evidence. *Id.*

4. A motion for a new trial must be made 16 L. R. A.

within the time fixed by the statute, or all errors occurring at the trial are waived. *McKinney v. State* (Wyo.) 710

NEXT FRIEND. See INFANTS, NOTES AND BRIEFS.

NITRO-GLYCERINE. See GAS, 1; INFUNCTION, 2.

NOTARY. See ACKNOWLEDGMENT.

NOTICE. See also EMINENT DOMAIN, NOTES AND BRIEFS.

1. Notice which a statute requires "to be served upon every person" must be a personal service, but is not required to be made in any particular mode if it is actually conveyed to the person to be notified. *Wilson v. Trenton* (N. J. Err. & App.) 200

2. Leaving a copy of a notice at a person's residence with a member of his family, without proof of actual delivery to him, is not sufficient compliance with a statute requiring notice "to be served upon every person." *Id.*

3. Mailing a copy of a notice of an assessment to the address of a nonresident is insufficient service under a statute requiring notice to nonresidents to be given by publication in a newspaper. *Id.*

NOVATION. See also PRINCIPAL AND SURETY.

A creditor who accepts a purchaser from his debtor as his own debtor thereby accepts him in place of the original debtor as the principal, with the latter as surety only; and by extending the time for payment by such purchaser without consent of the original debtor, he releases the latter. *Union Store & Mach. Works v. Caswell* (Kan.) 85

NUISANCES. See HIGHWAYS, 8; NEGLIGENCE, 6.

OCCUPATION TAX. See CONSTITUTIONAL LAW, 10; LICENSE, 1.

OFFICERS. See also COUNTIES; MUNICIPAL CORPORATIONS, 13, 14.

1. A statute providing for the appointment, by the judges of a court, of the members of a bridge committee to have charge of the city's bridges, does not violate a constitutional provision that persons charged with official duties under one of the three departments of government shall not exercise powers confided to either of the other departments, on the ground that the appointment belongs to the executive department, even if this were true as to the appointment of officers generally, since such committeemen are mere agents of the city, and not officers within the meaning of the Constitution. *State, Sherman, v. George* (Or.) 737

2. The position of bridge committeeman is not an office within the meaning of a constitutional provision that no senator or representative shall, during the time for which he may have been elected, be eligible to an office the election to which is vested in the legislative assembly. *Id.*

8. Failure to take the oath of office within the time specified by law does not *ipso facto* create a vacancy which will prevent the officer from qualifying thereafter, if it is done before any steps are taken to declare the vacancy, although the statute declares that the office shall become vacant on refusal or neglect to take the oath within the time prescribed. *State, Lyons, v. Ruff* (Wash.) 140

4. A "sufficient cause" for the removal of a trustee of the state agricultural college, within the meaning of a statute, must be construed to mean one of the causes enumerated in the Constitution of the state, where that has specified the causes for removal. *State, Hitchcock, v. Hewitt* (S. D.) 418

5. A trustee of the state agricultural college appointed by the board of regents of education under S. D. Const. art. 14, § 4, is not liable to impeachment as a "state officer" under art. 16, § 8. *Id.*

6. An officer appointed for a term, subject to removal for specified causes, cannot be removed without notice of the cause assigned and opportunity given him to defend. *Id.*

7. Where the incumbent is elected or appointed for a definite term and is removable only for a specified cause, the power of removal cannot be exercised until there have been preferred against him specific charges, of which he shall have notice, and an opportunity afforded him to be heard in his defense. *State, Hastings, v. Smith* (Neb.) 791

8. Where by law there is no fixed term of office, and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing. *Id.*

9. The provision of Neb. Const. art. 5, § 12, empowering the governor to remove all officers appointed by him, applies only to officers mentioned in the Constitution. *Id.*

10. By the charter of the city of Omaha the governor is authorized to remove members of the board of fire and police commissioners only for the cause therein named,—viz., official misconduct, and upon charges specifying the particular act or acts to be proved, and an opportunity to be heard in their own defense. *Id.*

11. The general provision in Omaha City Charter, § 172, for the removal of officers of the city by the district court, does not apply to members of the board of fire and police commissioners. *Id.*

12. The Nebraska Act approved April 9, 1891, by which the charter of Omaha was so amended as to provide for the appointment as fire and police commissioners of said city, of members of the three parties casting the largest vote at the last election, does not take effect until the expiration of the terms of office of the two commissioners who were appointed May, 1889. *Id.*

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Officers; vacancy in office by failure to file bond within the time prescribed. 140

Power of public officers to make contracts binding on their successors or for a term of years; for services of teachers, attorneys, or depositaries; for water, gas, etc. 257

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ORDINANCE. See MUNICIPAL CORPORATIONS, 5, 6.

PARENT AND CHILD. See also INFANTS, 2-5; JUDGMENT, 2.

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Parent and child; right of parent to sue for injury to child. 154

PARKS AND SQUARES. See DEDICATION, 1, 2.

PARTITION. See also ADVERSE POSSESSION, 1; DOWER, 2, 8; EJECTMENT; REAL PROPERTY, 1.

Possession of land under a mining lease is not adverse to the interests of the owners of the fee, so as to prevent partition between them. *Haeussler v. Missouri Iron Co.* (Mo.) 220

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See also DOWER.

Partition; validity of agreement against right to. 220

Parol partition to give legal title or color of title. 826

PARTNERSHIP. See CONTRACTS, 5; HUSBAND AND WIFE, 4, 5.

PATENTS. See INJUNCTION, 4, 5.

PERSONAL PROPERTY. See FRUIT, NOTES AND BRIEFS.

PLEADING.

1. A count in *quantum meruit* is not necessary to permit a recovery for personal services in part performance of a contract which it has become impossible to complete, where the declaration contains the common counts for work and labor. *Parker v. Macomber* (R. I.) 858

2. The statutory rule that a statute of limitations may be pleaded without stating the facts, by a general statement that the cause of action is barred by a specified section of the statute, is not subject to an implied exception in the case of a statute as to the actions barred in another state. *Allen v. Allen* (Cal.) 646

3. A declaration for libel by filing a mechanics' lien need not aver that the lien has been ended in favor of the plaintiff. *Moore v. Rolin* (Va.) 625

4. Disclaimers in an action by writ of entry are conclusive as between the parties and their privies, as to the right and title of the demandants to the lands included in the disclaimers. *Tuppan v. Boston Water-Power Co.* (Mass.) 358

5. An objection that a disclaimer in an action by writ of entry was not filed at the same time with a plea of *nul disseisin* comes too late when first made at the argument. *Id.*

POLICE COMMISSIONERS. See OFFICERS, 10-12.

POWERS. See also **CONFLICT OF LAWS**, 1, 2.

An intent to execute a power of appointment does not appear in a will which makes no reference to the power, although the bequests somewhat exceed the amount of the testator's estate, and his relations with the donor are so intimate as to raise a presumption that he knew of the power. *Cotting v. De Sar-tiges* (R. I.) 867

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PRESIDENTIAL ELECTORS. See **ELECTORS**.**PRINCIPAL AND AGENT.** See **BILLS AND NOTES**, 8, 4.**PRINCIPAL AND SURETY.** See also **BANKS**, 4; **JUDGMENT**, 5, **NOTES AND BRIEFS**; **NOVATION**.

The purchaser of property who agrees to pay the whole or a part of the consideration to a creditor of the vendor becomes, as between himself and the vendor, the principal debtor, and the vendor only a surety. *Union Stone & Mach. Works v. Caswell* (Kan.) 85

PRIVATE ROADS. See **EMINENT DOMAIN**, 1, **NOTES AND BRIEFS**.**PROXIMATE CAUSE.** See also **CARRIERS**, 19; **DEATH**, 1; **HIGHWAYS**, 5; **TELEPHONES**.

1. Negligence in stepping or falling from a train while moving at a high rate of speed is not the proximate cause of death, where the person was run over by a following train, where this could have been prevented by proper care of the railroad company's servants after they had become aware of his danger. *Cincinnati, H. & D. R. Co. v. Kassen* (Ohio) 674

2. The proximate cause of the death of a railroad employé who was killed while in a caboose which was struck and splintered by a locomotive of another train was the negligence of the fellow servant in charge of the colliding train, and not the weakness and unsubstantial character of the caboose, which was merely a common box car. *Lutz v. Atlantic & P. R. Co.* (N. M.) 819

NOTES AND BRIEFS.

See also **MASTER AND SERVANT**.

Proximate cause; of injury resulting from fright, etc. 208

PUBLICATION. See **ESTOPPEL**, 2.**PUBLIC IMPROVEMENTS.**

1. Public schoolhouses are not liable to assessment for local improvements, under the general provision in a statute for the assessment of "all the real property situated in the district." *Board of Improvement v. Little Rock School Dist.* (Ark.) 418

2. A constitutional exemption of property 16 L. R. A.

used exclusively for public purposes—such as churches, schools, buildings, etc.—applies only to taxes for general purposes of revenue, and has no reference to special taxes or assessments for local improvements. *Id.*

NOTES AND BRIEFS.

Public improvements; exemption from local assessments. 418

QUO WARRANTO. See **CORPORATIONS**, 12.**RAILROADS.** See also **BRIDGES**, 4; **MASTER AND SERVANT**, 9; **TRIAL**, 7.

1. The general law upon the subject of highway crossings by railroads applies to such crossings by a railroad built, under the South Carolina statutes, merely to connect a manufacturing establishment with another railroad. *Ex parte Bacot* (S. C.) 596

2. Failure to give the signals required by law at a railroad crossing renders the company liable for injuries in consequence thereof to a person lawfully crossing the track in that vicinity, relying upon the performance by the railroad company of the duty to give such signals. *Sanborn v. Detroit, B. O. & A. R. Co.* (Mich.) 119

3. A private crossing of which the railroad company has knowledge, and which is used with its consent by men and teams in drawing logs, is not a railroad "crossing" within the meaning of 8 How. (Mich.) Stat. § 3375, at which signals by bell and whistle must be given. *Id.*

4. Failure of one crossing a railroad track at a dangerous highway crossing to look or listen for trains is not culpable or contributory negligence as matter of law, where his vigilance has been allayed by failure to sound a whistle or ring a bell on an approaching train. *Hendrickson v. Great Northern R. Co.* (Minn.) 261

5. A railroad company which has used reasonable care to avoid striking persons at a highway crossing is not liable for injuries so sustained. *Id.*

6. Continuing to approach a railroad crossing under the mistaken belief, honestly conceived after investigation, that an engine seen 800 or 1,000 yards away is standing on the track engaged in switching, when it is in fact coming towards the crossing at a rapid rate,—is not negligence as matter of law. *Gratiot v. Missouri P. R. Co.* (Mo.) 189

7. Running a train 80 to 60 miles an hour within the limits of a city whose ordinances forbid greater speed than 6 miles an hour is such negligence as to render the company liable for injuries to a traveler attempting, with due care, to pass over a highway crossing. *Id.*

NOTES AND BRIEFS.

Railroads; at what railway crossings signals of trains are required; private crossings. 119

REAL PROPERTY. See also JUDGMENT, NOTES AND BRIEFS.

1. A stipulation against the institution of partition proceedings, made by cotenants who undertake to bind themselves, their heirs and assigns forever, not to institute such proceedings without the written consent of all the parties, is void because it is an unreasonable restraint upon the enjoyment and use of the property. *Hausler v. Missouri Iron Co. (Mo.)* 220

2. An execution lien is superior to a prior unrecorded conveyance of which the creditor had no notice at the time of the levy; and notice thereof after the levy is immaterial. *Blum v. Schwarte (Tex.)* 668

RECEIVERS. See also BANKS, 2.

1. The issue of receivers' certificates which shall be a first lien on the mortgaged property cannot be authorized by the court in a suit to foreclose a mortgage on the property of a mere private corporation, such as a coal-mining company. *Farmers Loan & T. Co. v. Grape Creek Coal Co. (C. C. S. D. Ill.)* 608

2. A receiver of a railroad company is not obliged to complete the transportation of freight, or repay any part of the prepaid charges, although the freight had been taken by the railroad company with an advance payment of the freight for the whole distance under a contract which gave the shipper the right to take it off and have certain work done upon it at an intermediate point, where it was at the time of the receiver's appointment. *Central Trust Co. v. Marietta & N. G. R. Co. (C. C. N. D. Ga.)* 90

NOTES AND BRIEFS.

Receiver; obligation on the contract of the party whose property he holds. 90

Power to permit receiver of a private corporation to create liens on its property. 608

RECORDS. See JUDGMENT, NOTES AND BRIEFS.

REFORMATION. See WILLS, 8.

REFORMATORIES. See INFANTS, NOTES AND BRIEFS.

RESUME. Subjects discussed and points decided. 865

SCHOOLS. See PUBLIC IMPROVEMENTS.

SEARCH. See ASSAULT.

SENATORIAL DISTRICTS. See ELECTION DISTRICTS.

SERVICE. See also NOTICE.

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Service; what constitutes personal service of papers. 200

SLANDER OF TITLE. See INJUNCTION, 4.

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SNOWSLIDE. See MASTER AND SERVANT, 9-11.

SPECIFIC PERFORMANCE.

1. An action to enforce specific performance of a contract for the sale of land need not be brought in the county in which the land is situated, under a statute which requires actions to be so brought which are for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the titles of, or for any injuries to, real property. *Morgan v. Bell (Wash.)* 614

2. It is impossible for a man to perform a speculative contract to convey land which was community property, after the death of his wife and the descent of her interest to an infant four or five years old. *Id.*

NOTES AND BRIEFS.

Specific performance; effect of inability to perform, upon jurisdiction of chancery; when plaintiff knows that performance cannot be enforced; when defendant disables himself pending action; when defendant has at any time rendered himself incapable of performing; general jurisdiction over damages; the effect of modern legislation; the effect of code provisions. 614

SPIRITUALISM. See CONTRACTS, 4.

STAIRWAY. See NEGLIGENCE, 6, 7.

STATUTES. See also ELECTION DISTRICTS, 8, 9; EVIDENCE, 9; HUSBAND AND WIFE, 8

1. An extraordinary session of the Legislature called by the governor for that purpose is a session within the meaning of a constitutional provision requiring the alteration of the districts from which members of the Legislature are elected, at the "first session after the return of every enumeration." *People, Carter, v. Rice (N. Y.)* 836

2. Discrepancies between a copy of a bill as printed in a supplement to the legislative journal, and the bound volume of the journal containing the bill as signed, will not invalidate the statute, where it affirmatively appears from the journals that the Legislature finally dealt with and passed some other bill than that contained in such supplement. *Detroit Common Council v. Rente (Mich.)* 59

3. A vote of the House to print a bill in the journal as a supplement makes the bill when so printed a part of the journal. *Id.*

4. The title, "An Act to Provide for the Promotion of Certain Corporations under General Laws," is sufficient to include the powers to be given to such corporations. *Ex parte Bacon (S. C.)* 586

5. The title, "An Act to Provide for the Election of Electors of President and Vice-President, etc.," sufficiently expresses the subject of an Act which provides for the election of alternate electors as well as electors. *McPherson v. Blacker (Mich.)* 475

6. A ballot-reform law should be construed to effectuate the objects in view in its enactment. *Bowers v. Smith (Mo.)* 754

7. Statutes transplanted from other countries should be construed in subordination to the constitution and laws of the state wherein adopted. *Bowers v. Smith* (Mo.) 754

8. The effects of a proposed interpretation of a law may properly be considered, to ascertain the probable intent of its framers respecting such interpretation. *Id.*

9. The result which may follow from one construction or another of a statute or constitution is always a potent factor, and is sometimes in and of itself conclusive as to the correct solution of the question. *People, Carter, v. Rice* (N. Y.) 886

NOTES AND BRIEFS.

Statutes; effect of repeal on existing right of action. 483

STOREKEEPER. See BAILMENT, 2.

STREET RAILWAYS. See CARRIERS, 16-19, 27, 28; EMINENT DOMAIN, 6; HIGHWAYS, 2.

SUNDAY. See CONTRACTS, 11.

SUPERVISORS. See COUNTIES, NOTES AND BRIEFS.

TAXES. See also CONTRACTS, 19, 20; CORPORATIONS, 2; EVIDENCE, 7; JOINT-STOCK COMPANY.

1. The Ohio Act of April 15, 1889 (Ohio Rev. Stat. § 251a), requiring every railroad company to pay to the commissioner of railroads and telegraphs a "fee" of \$1 per mile for each mile of track operated by it within the state, creates a tax in violation of Ohio Const. art. 13, § 2, requiring uniformity, and § 5, requiring the object of it to be stated. *Pittsburgh, C. & St. L. R. Co. v. State* (Ohio) 380

2. The domicile of the creditor is the situs, for the purpose of taxation, of negotiable promissory notes given for money loaned. *Boyd v. Selma* (Ala.) 729

3. Tangible movable property may be taxed where situate, under a special statute which provides for its taxation. *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (La.) 56

4. A nonresident cannot be said to be a holder of property within a state by virtue of a debt which a resident owes him, so as to be taxable on such credit. *Id.*

5. A mortgage upon realty is sufficiently an interest in real estate to make it taxable in the state where the land is situated, although owned by a nonresident. *Detroit Common Council v. Rents* (Mich.) 59

6. Taxation of mortgages as real estate does not create illegal double taxation, although held by savings banks and representing deposits upon which the depositors are taxed. *Id.*

7. A provision that in case the mortgagee fails to pay his share of the tax it shall be paid by the mortgagor and the amount applied in reduction of the mortgage debt, contained in an Act providing for the separate taxation of the different interests in mortgaged real estate, is not void as requiring one man to pay the debt of another. *Id.*

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8. An agreement by a mortgagor to pay all assessments on all interests in the land will not be abridged or abrogated by a subsequent statute providing for the separate taxation of the different interests in mortgaged real estate. *Id.*

9. Failure to provide a method for apportioning the tax upon a mortgage covering lands lying in different taxing districts will not invalidate an Act providing for the separate taxation of the different interests in mortgaged real estate. The mortgage will be taxable in each district in proportion to the amount of land lying therein. *Id.*

10. Negotiable promissory notes for money loaned are "personal property" within the meaning of a charter authorizing taxation of such property. *Boyd v. Selma* (Ala.) 729

11. The water mains and electric wires of a water and light company are personal property for purposes of taxation. *Shelbyville Water Co. v. People, Craddick* (Ill.) 505

12. The rights and franchises of a water company are proper subjects for taxation under a statute requiring all property in the state not exempted to be taxed. *Fond du Lac Water Co. v. Fond du Lac* (Wis.) 581

Assessment and collection.

13. Failure to enter opposite the name of a personal-tax delinquent the cause of failure to collect the same, and make oath as to the truth of such cause and that the taxes remain unpaid, as required by Ill. Rev. Stat. 1891, chap. 120, § 170, may be corrected by amendment of the record at the hearing of a proceeding to collect the taxes out of real estate, under § 191 of that Act, which provides for supplying omissions of tax officers. *Shelbyville Water Co. v. People, Craddick* (Ill.) 505

14. The assessment for taxation of the lots whereon are the pumping-station and works of a water company, separate and apart from the water mains, franchises, and other property constituting its plant, is erroneous. *Fond du Lac Water Co. v. Fond du Lac* (Wis.) 581

15. The water mains, franchises, etc., of a water company are not properly assessed for taxation by an entry in the tax book of an assessment against the lots on which the pumping works are situated, by their numbers and that of the block in which they are situated; and such assessment cannot be enlarged or extended by parol proof of intention. *Id.*

16. The board of review cannot arbitrarily raise the valuation of property as fixed by the tax assessor, without evidence or against the evidence, under a statute requiring it to hear and examine any person who shall appear before it in reference to any assessment, and, when satisfied from the evidence that the assessment is wrong, to change it. *Id.*

17. The board of review has no authority to increase the assessment of property described upon the roll as certain lots in a certain block, so as to include the water mains, rights, and franchises of the water company which owns the lots and has located its pumping station upon them. *Id.*

18. The board of review cannot obviate a defect in the assessment of property so as to

sustain an unjust and excessive valuation of it as described, by receiving proof of the value of property subject to taxation and alleged to have been intended by such description. *Id.*

19. A mortgagor's right to ask for the correction of the assessment of his interest, under a statute providing for the separate assessment of the different interests in mortgaged real estate, is sufficiently preserved by a clause providing for a correction of the assessment on sufficient cause shown by any person whose property is assessed. *Detroit Common Council v. Rents* (Mich.) 59

20. Permitting a sale of the fee upon non-payment of taxes upon a mortgagee's interest in land, without any provision for distinguishing the assessment under which the sale is made, although it may result in loss to the mortgagor because of the mortgagee's default, is not unlawful where the mortgagor may prevent a sale by paying the tax, and the sale is limited to a parcel sufficient to pay the tax. *Id.*

NOTES AND BRIEFS.

Taxes; situs of property for taxation. 56
Power to tax mortgages; double taxation; where taxable: nonresident owners. 59

Situs for purpose of taxation of debts evidenced by notes and mortgages; in general; mortgages; notes; when held by agent residing in different state from principal. 729

TELEPHONES.

Injury caused by electricity generated by a thunder storm in a telephone wire which is negligently allowed to hang across a highway so low that a traveler comes in contact with it in the dark renders the telephone company liable, as the wire furnished the means by which the dangerous force was communicated and the injury caused. *Southwestern Tel. & Teleph. Co. v. Robinson* (C. C. App. 5th C.) 545

TELLTALE. See MASTER AND SERVANT, 7, 8.

TENANT IN COMMON. See COTENANCY, NOTES AND BRIEFS.

THEATRES. See CIVIL RIGHTS; CONSTITUTIONAL LAW, 9.

TIME. See also INFANTS, 1.

The period of limitation of an action which accrues at a person's majority begins to run the day before his twenty-first birthday. That day is to be included in the computation of the time; and therefore a period limited by years will expire on the second day before his birthday anniversary. *Ross v. Morrow* (Tex.) 542

TRACTION ENGINES. See HIGHWAYS, NOTES AND BRIEFS.

TRADEMARKS. See also GOODWILL, 2.

The words "Fish Bros. & Co." and the picture of a fish may be applied by brothers named 16 L. R. A.

"Fish" to vehicles manufactured by them, although such words and picture were previously used by them in a business which has now passed, with its good will and trademarks, to a corporation, provided their use is not such as to induce persons to buy their vehicles as and for those manufactured by the corporation. *Fish Bros. Wagon Co. v. Fish* (Wis.) 453

TRADENAME.

NOTES AND BRIEFS.

Rights in. 453

TRANSFER TICKET. See CARRIERS, 27, 28.

TREATIES. See ALIENS, NOTES AND BRIEFS; CONTRACTS, 12.

TRIAL.

1. The constitutional right of trial by jury does not extend to proceedings for the commitment of a minor to a reform school. *State, Olson, v. Brown* (Minn.) 691

2. A statute providing that, on confession in open court by one charged with murder, the court shall examine the witnesses and determine the degree of crime and pronounce sentence accordingly, is not in violation of a constitutional guaranty that "the right of trial by jury shall be inviolate." *Craig v. State* (Ohio) 358

3. On the discharge of a juror for sickness, and the drawing of another juror, under Dak. Comp. Laws, § 7401, which authorizes such drawing, or the discharge of the entire jury and the impaneling of another, only such peremptory challenges are allowed as have not been already exhausted in procuring the other eleven jurors. *State v. Hasledahl* (N. D.) 150

4. Where there is no controversy in regard to the facts or inferences that may be fairly drawn therefrom, the question of negligence is one of law for the court to determine. *Manning v. Chesapeake & O. R. Co.* (W. Va.) 271

5. The question of negligence must be left to the jury when the facts or the inferences to be drawn from them are in any degree doubtful. *Gratiot v. Missouri P. R. Co.* (Mo.) 189

6. The question whether or not parents allowed their son to play about a railroad track and depot grounds, so as to be regarded as having contributed to injuries received by him there, is for the jury, where they testify that they had forbidden him so to do after receiving notice that such was his habit, and were ignorant that he was there, at the time he was hurt. *Baker v. Flint & P. M. R. Co.* (Mich.) 154

7. Failure of one approaching a railroad crossing to constantly look both ways for the approach of trains will not be pronounced negligence by the court. *Gratiot v. Missouri P. R. Co.* (Mo.) 189

8. Whether or not due care requires one who, after observation as to the safety of crossing a railroad track, has received the impression that no trains are approaching the

crossing, to test the accuracy of such impression by further observation before acting upon it, is a question for the jury, and not for the court. *Gratiot v. Missouri P. R. Co.* (Mo.) 189

9. An instruction that it is the duty of a person attempting to cross a railroad track to exercise the degree of care and prudence that an ordinarily careful and prudent person would exercise under the circumstances is not erroneous because it fails to state what a man of ordinary prudence would do at such a time and place. *Id.*

10. To sustain the action of the trial court in overruling a demurrer to the evidence, which was based on the contention that it showed contributory negligence, it is not necessary to decide that there was no such negligence. *Id.*

11. When evidence is of such a character that it would be the duty of the court to set aside a verdict for one party, it will in the first instance direct a verdict for the other party. *Lutz v. Atlantic & P. R. Co.* (N. M.) 819

12. The court cannot instruct the jury that their verdict must not exceed a certain sum, although two former verdicts on the same evidence have been set aside as excessive and the verdict on a third trial is made conclusive by statute. *Illinois C. R. Co. v. Minor* (Miss.) 627

13. An instruction to find for plaintiff in an action by an employé for personal injuries, if his superior directed him to incur a danger of which he was ignorant, is erroneous where no such question is raised by the pleading. *Jacksonville, T. & K. W. R. Co. v. Galvin* (Fla.) 837

14. A charge that gross negligence will justify exemplary damages is incorrect where the term "gross" is not limited to wantonness or reckless indifference. *Florida S. R. Co. v. Hirst* (Fla.) 681

NOTES AND BRIEFS.

Trial; coercion of disagreeing jury; by court; by bailiff in charge. 648

UNBORN CHILD. See DAMAGES, 11.

USURY. See also BANKS, 7.

An agreement by a mortgagor to pay all taxes upon the land, in addition to full legal interest upon the mortgage, is not usurious. *Detroit Common Council v. Rente* (Mich.) 59

VILLAGE. See ESTOPPEL, 1, 2.

VOLUNTEER. See MASTER AND SERVANT, 2.

VOTERS AND ELECTIONS. See also MUNICIPAL CORPORATIONS, 1-4.

1. Innocent irregularities of election officers, which are free of fraud and have not prevented a full and fair expression of the popular choice, will not vitiate the result of an election, unless the Legislature has expressly so declared. *Bowers v. Smith* (Mo.) 754

2. The reception by election judges of votes at two polling places in a precinct only about 75 feet apart, instead of at one, between which the voting is divided according to the alphabetical arrangement of the voters' names, does not invalidate the returns from that precinct. *Id.*

3. Where a candidate for office makes no timely objection to the ballot as published by the county clerk before an election (Mo. Rev. Stat. 1889, § 4778), the former cannot afterwards object to the result for any error of the clerk in admitting names upon the official ballot not properly entitled to be there. *Id.*

4. The "Australian Ballot Law" (Mo. Rev. Stat. 1889, chap. 60, art. 3) does not limit the range of choice of voters in Missouri to the persons nominated in the modes prescribed by it. *Id.*

5. The lack of any nomination does not prevent voting for a person, under a provision that "the voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office." *People, Bradley, v. Shaw* (N. Y.) 606

6. The fact that paster ballots placed on ballots for town officers contain also the names of candidates for excise commissioners, who cannot lawfully be voted for on that ticket, will not justify the inspectors in refusing to count and declare them in stating the result, where these paster ballots were a part of those printed at private expense by candidates of an independent meeting or caucus, all of which were alike. *Id.*

7. A name written on an official ballot in place of the printed name of a candidate, which is erased, does not constitute a valid vote under the Louisiana statute requiring "that all the names of persons voted for shall be printed on one ticket or ballot." *State, Miss, v. McElroy* 278

8. An objection that a clause which provides that if any ballot shall have thereon a mark, sign, signature, or device other than permitted by the statute it shall be void, is unconstitutional because the voter may lose his vote by the fraud or neglect of those preparing the ballots, is not sound. The most stringent directions are given respecting the preparation of the official ballots, and the law presumes that they will be obeyed. *State, Ransom, v. Black* (N. J.) 769

9. The fact that a voter may be compelled, in exercising his right to vote, to deposit a ballot having upon it the name or style of a party of whose principles he disapproves, is not an illegal deprivation of a right to vote; for if a voter exercises his right to erase the names of all the candidates on the ticket, and inserts the names of persons who stand for an entirely different principle, the heading of the ticket becomes meaningless as an expression of the voter's sentiments. *Id.*

10. Clauses which provide that only those parties casting a certain percentage of the vote at the last election, and those parties presenting petitions signed by a certain number of voters, shall be entitled to official ballots, is a valid regulation to restrain the number of ballots to be printed and distributed within reasonable limits. *Id.*

11. The right to vote secured by the New Jersey Constitution can only become operative by legislation; and any reasonable legislative regulation for the purpose of securing an enforced secrecy of the ballot is not a deprivation of a right to vote. *Id.*

12. The clause of an election Act, prohibiting any electioneering on an election day within 100 feet of any polling-place, is a reasonable police regulation to secure good order about the polls. *Id.*

NOTES AND BRIEFS.

Voters and elections; effect of irregularities in nomination papers or in voting under Australian ballot laws. 754

WATER-CLOSETS. See BUILDINGS, 1, 3.

WATERS.

Flats in the bed of a channel into which the tide flows, but from which it wholly ebbs at low water, where they are between separate channels of a fresh-water stream, are to be divided in Massachusetts, by analogy to lands on a fresh-water stream, between riparian owners, to whom the title thereto is given by the Colonial Ordinance of 1641-47, by straight lines from the points where the division lines of the owners end on the bank drawn to and at right angles with the centre line of the tidal channel at the ordinary stage of the waters. *Tappan v. Boston Water Power Co.* (Mass.) 353

NOTES AND BRIEFS.

Waters; rules for division of flats. 353
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WATERWORKS. See TAXES, 11, 12, 14, 15.

WILLS.

1. A devise to a daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease," does not make an illegal condition in restraint of marriage, where the will contains nothing further to show any intent to prevent her marriage, but merely a disposition to provide her a home so long as she shall need it. *Mann v. Jackson* (Me.) 707

2. The inclusion of after-acquired property in an instrument of conveyance, and the reservation of all the property for the payment of the grantor's debts, will compel its construction as a will rather than as a deed, when its character must be determined from its face, —especially if it provides that it shall not take absolute effect until the grantor's death. *Crocker v. Smith* (Ala.) 576

3. A court of equity has no jurisdiction to reform a will. *Bingel v. Vols* (Ill.) 321

NOTES AND BRIEFS.

Wills; provision to terminate on marriage of beneficiary. 707

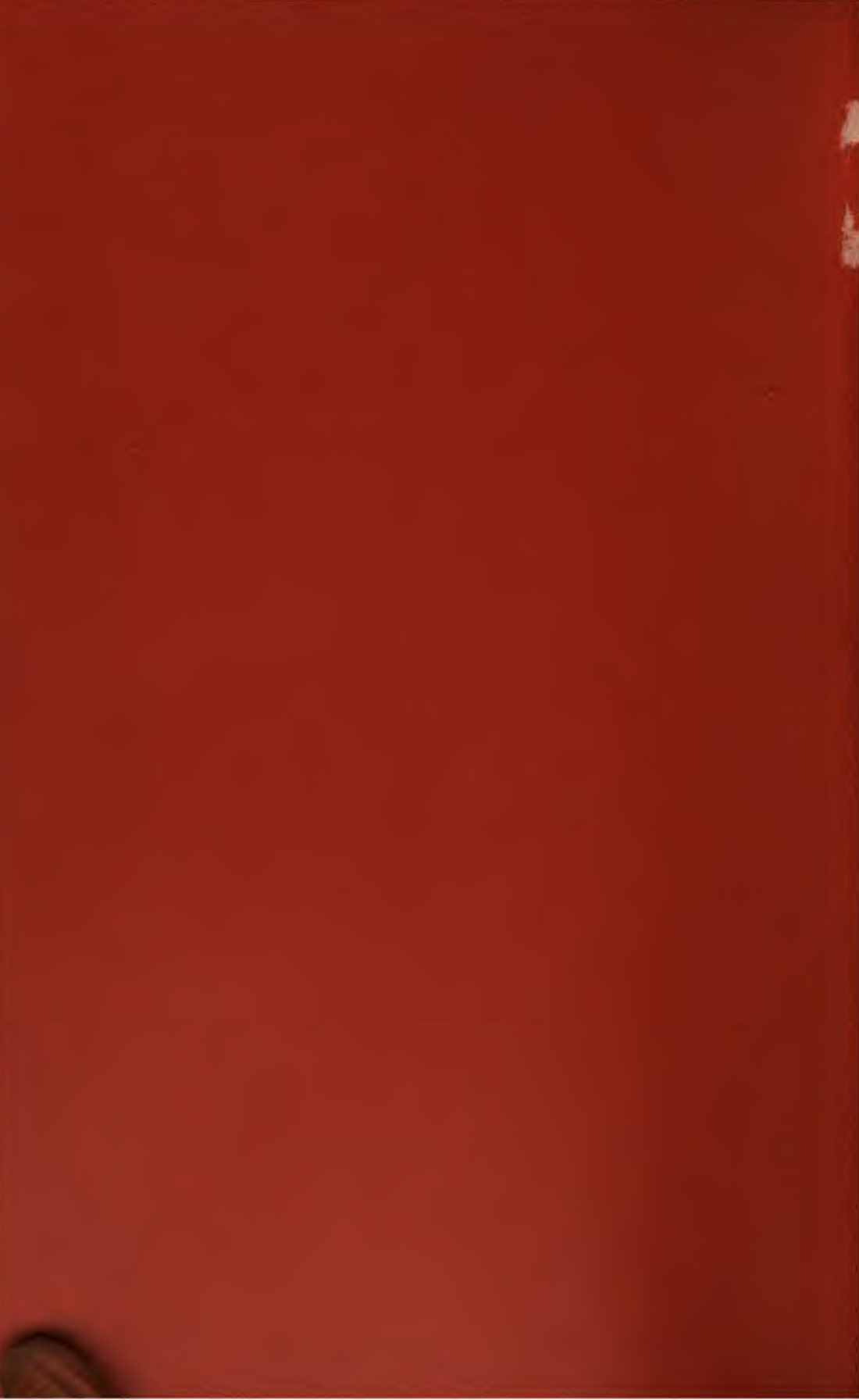
WITNESSES.

An offer by defendant upon plaintiff's cross-examination, to show that she is an habitual litigant, is properly excluded. *Palmeri v. Manhattan R. Co.* (N. Y.) 186

L. R. A. CASES AS AUTHORITIES

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L. R. A. CASES AS AUTHORITIES.

CASES IN 16 L. R. A.

16 L. R. A. 33, CLEMANS v. SUPREME ASSEMBLY R. S. G. F. 131 N. Y. 485, 30 N. E. 496.

Breach of warranty in insurance policy.

Cited in *Foley v. Royal Arcanum*, 78 Hun, 226, 28 N. Y. Supp. 952, holding that false answers to questions the answers to which have been warranted, avoid contract; *Schane v. Metropolitan L. Ins. Co.* 76 App. Div. 274, 78 N. Y. Supp. 582, holding it not question for jury whether warranties in insurance application were material; *Gaines v. Fidelity & C. Co.* 93 App. Div. 531, 87 N. Y. Supp. 821, holding policy of accident insurance rendered void by breach of warranty that beneficiary was wife of insured.

Cited in footnote to *Globe L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead.

— As to encumbrances.

Cited in *King v. Tioga County Patrons Fire Relief Asso.* 35 App. Div. 59, 54 N. Y. Supp. 1057, holding false answer as to encumbrances on property voids policy because answer a warranty.

— As to health.

Cited in *Fidelity Mut. Life Asso. v. McDaniel*, 25 Ind. App. 618, 57 N. E. 645, holding false answer that insured had not consulted physician since date of original application voids policy; *Brady v. Industrial Ben. Asso.* 79 Hun, 158, 29 N. Y. Supp. 768, holding false answer as to health, breach of warranty voiding policy; *Woehrle v. Metropolitan L. Ins. Co.* 21 Misc. 90, 46 N. Y. Supp. 862, holding false answer to question as to whether insured is in sound health voids policy, although he may not know it to be untrue; *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 318, 70 N. W. 351, holding untrue answer as to sound health, though believed to be correct, voids policy; *Provident Sav. Life Assur. Soc. v. Llewellyn*, 7 C. C. A. 581, 16 U. S. App. 405, 58 Fed. 942, holding verdict should have been directed for company where insured shown to have had delirium tremens, when application stated that he had not, and who died two months thereafter of heart failure after debauch.

Distinguished in *Jennings v. Supreme Council L. A. Ben. Asso.* 81 App. Div. 87, 81 N. Y. Supp. 90, stating that answers in medical examination were not warranties, but representations as to their truth to best of knowledge and belief.

— As to application for other insurance.

Cited in *Silverman v. Empire L. Ins. Co.* 24 Misc. 402, 53 N. Y. Supp. 407, holding false warranty as to declination by other insurance company voids policy; *Clemans v. Supreme Assembly R. S. G. F.* 50 N. Y. S. R. 520, 21 N. Y. Supp. 348, holding fraudulent concealment by agent of insurance company that application he had made for insured to another company had been declined prevents warranty from being false; *Robinson v. Supreme Commandery, U. O. G. C.* 38 Misc. 100, 77 N. Y. Supp. 111, holding answer given to question as propounded, in regard to other insurance, not false because only one of two other policies carried, mentioned; *Aloe v. Mutual Reserve Life Assn.* 147 Mo. 579, 49 S. W. 553, holding false answer to question whether insured had applied to other companies and been declined voids policy; *Kemp v. Good Templars' Mut. Ben. Assn.* 46 N. Y. S. R. 431, 19 N. Y. Supp. 435, holding verdict properly directed for insurer where insured warranted he had not been declined by any other company, though application declined without his knowledge.

Cited in note (55 L. R. A. 125, 127, 131, 135, 137) on forfeiture of life insurance by false representations as to previous applications for insurance.

Distinguished in *Jacobs v. Northwestern Life Assur. Co.* 30 App. Div. 286, 51 N. Y. Supp. 987, holding false statements inserted by agents and medical examiners after correct answer by insured, as to applications to other companies, estop insurance company.

— As to age.

Cited in *McCarthy v. Catholic Knights*, 102 Tenn. 352, 52 S. W. 142, holding policy not forfeited when insured gave false answer as to her age, when it appeared she did not know it.

When knowledge of agent imputed to principal.

Cited in *Desmond v. Supreme Council, C. B. L.* 51 App. Div. 94, 64 N. Y. Supp. 406, holding knowledge of chief examiner of insurance company that application of insured to another company had been declined not chargeable to insurer; *Levell v. Royal Arcanum*, 9 Misc. 260, 30 N. Y. Supp. 205, holding that knowledge by committee of society of false answers by insured cannot be imputed to society; *Bennett v. Massachusetts Mut. L. Ins. Co.* 107 Tenn. 377, 64 S. W. 758, holding that insured can recover premiums paid on policy, where false answers written by medical examiner, although company would have been estopped thereby.

Cited in footnotes to *Dailey v. Preferred Masonic Mut. Acci. Assn.* 26 L. R. A. 171, which holds forfeiture prevented by secretary's knowledge of other insurance; *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 318, which denies insurer's right to rely on warranty by applicant that answers properly recorded, where medical examiner knew otherwise; *Home Ins. Co. v. Mendenhall*, 36 L. R. A. 374, which holds notice to insurance agent of material facts, notice to company; *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee-simple title to insured property will not avoid policy where agent knew facts. *Wittenbrock v. Parker*, 24 L. R. A. 197, which holds knowledge by one member of firm of lawyers while transacting firm business imputed to other members; *Forward v. Continental Ins. Co.* 25 L. R. A. 637, which holds agent's knowledge of bill of sale takes same out of operation of condition as to title and encumbrances; *Michigan Shingle Co. v. State Invest. Ins. Co.* 22 L. R. A. 319, which holds forfeiture for breach of warranty of clear space prevented by agent's knowledge.

16 L. R. A. 39, *McCARN v. INTERNATIONAL & G. N. R. CO.* 84 Tex. 352, 31 Am. St. Rep. 51, 19 S. W. 547.

Limitation of carrier's liability.

Cited in *Hartley v. St. Louis, K. & N. W. R. Co.* 115 Iowa, 617, 89 N. W. 88, holding carrier not liable for horse injured on connecting line, when it had limited its liability to its own road; *Gulf, C. & S. F. R. Co. v. Wilbanks*, 7 Tex. Civ. App. 495, 27 S. W. 302, holding limitation of liability to its own line does not relieve initial carrier from liability for miscarriage of freight by connecting line with which it is in partnership; *Gulf, C. & S. F. R. Co. v. Williams*, 4 Tex. Civ. App. 297, 23 S. W. 626, holding carrier not liable for failure to deliver cattle beyond its own line, if contract for liability limited to own road; *International & G. N. R. Co. v. Mahula*, 1 Tex. Civ. App. 185, 20 S. W. 1002, holding contract limiting liability to loss upon its own line inures to benefit of each carrier to end of route; *St. Louis, I. M. & S. R. Co. v. Ewing*, 51 C. C. A. 687, 114 Fed. 1021 (dissenting opinion), as to limitation of carrier's liability to its own line; *Fremont, E. & M. Valley R. Co. v. New York, C. & St. L. R. Co.* (*Union State Bank v. Fremont, E. & M. Valley R. Co.*) 66 Neb. 165, 59 L. R. A. 941, footnote p. 939, sustaining initial carrier's right to limit liability to own line.

Cited in footnotes to *Courteen v. Kanawha Despatch*, 55 L. R. A. 182, which denies carrier's liability for accidental destruction of property while in warehouse on pier, awaiting arrival of vessel of connecting carrier; *Taffe v. Oregon R. & Nav. Co.* 58 L. R. A. 187, which denies initial carrier's liability under bill of lading beyond own line.

16 L. R. A. 43, *CLEMENTS v. LOUISIANA ELECTRIC LIGHT CO.* 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 So. 51.

Survival of action.

Cited in *American Sugar-Ref. Co. v. Johnson*, 9 C. C. A. 120, 13 U. S. App. 681, 60 Fed. 513, holding that action for negligently causing death of employee survives for acts of omission as well as of commission.

Liability for negligence.

Cited in *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1556, 16 So. 457, holding railroad liable for killing man not seen until he was right under wheels, although locomotive, with good headlight, was moving at man's walking gait; *Mitchell v. Raleigh Electric Co.* 129 N. C. 170, 55 L. R. A. 400, 85 Am. St. Rep. 735, 39 S. E. 801, holding each of two electric companies using same poles bound to see that its wires properly insulated to protect servants of either company; *Henry v. Brackenridge Lumber Co.* 48 La. Ann. 954, 20 So. 221, holding master not liable for death of employee caught in belting which he was lacing, where nothing is shown as to how accident happened; *Rucker v. Sherman Oil & Cotton Co.* 29 Tex. Civ. App. 420, 68 S. W. 818, holding owner of uninsulated electric wire liable for killing of one coming in contact therewith, while lawfully on awning; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 675, 73 S. W. 654, holding it to be duty of electric company to use every available precaution to keep wires properly insulated; *Knowlton v. Des Moines Edison Light Co.* 117 Iowa, 456, 90 N. W. 818, holding electric company liable for death of person, due to improper insulation of its wires; *Snider v. New Orleans & C. R. Co.* 48 La. Ann. 11, 18 So. 695, holding failure in duty to employ competent motorman not sufficient to sup-

port recovery for injury due to collision, unless caused thereby; *Weider v. Illinois C. R. Co.* 108 La. 157, 32 So. 366, holding carrier not liable on account of speed of train or failure to post lookout, where injured flagman would have been run over anyway.

Cited in footnotes to *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care to keep electric wires safe due towards persons licensed to approach them; *Marino v. Lehmaier*, 61 L. R. A. 812, which holds violation of penal statute against employing children of certain age in factory, negligence; *Brown v. Edison Electric Illuminating Co.* 46 L. R. A. 745, which holds prima facie presumption of negligence from injury to boy by contact with exposed point of charged wire within few inches of small roof just below second-story window; *Burt v. Douglas County Street R. Co.* 18 L. R. A. 479, which holds company liable for electric shock of passenger, due to imperfect insulation; *Moran v. Corliss Steam-Engine Co.* 45 L. R. A. 267, which holds employer using defectively insulated wire with slight current liable for injury to employee, due to outside contact with dangerous current; *Giraudi v. Electric Improv. Co.* 28 L. R. A. 596, which holds failure to raise electric light wires on roof of hotel high enough to prevent shock, negligence; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flagstaff on other building by telephone wire renders company liable for loss of barn by lightning striking flagstaff.

Cited in notes (32 L. R. A. 400) on negligence as to electric wires on or in buildings; (46 L. R. A. 71, 99) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

Contributory negligence.

Cited in *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 189, 34 L. R. A. 816, 37 S. W. 851, holding contributory negligence not shown by painter coming in contact while painting house, with electric wire improperly insulated, used for lighting; *Bemiss v. New Orleans City & Lake R. Co.* 47 La. Ann. 1675, 18 So. 711, holding it contributory negligence to step from one car of moving train to another car standing near; *Perham v. Portland Electric Co.* 33 Or. 472, 40 L. R. A. 808, 72 Am. St. Rep. 730, 53 Pac. 14, holding workman on top of bridge, killed by coming in contact with electric wires carrying high voltage, not guilty of contributory negligence because he crossed on top braces of bridge; *Mitchell v. Raleigh Electric Co.* 129 N. C. 172, 55 L. R. A. 400, 85 Am. St. Rep. 735, 39 S. E. 801, holding employee has right to presume electric light wires properly insulated; *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 276, 65 N. E. 918, holding plaintiff not required to negative knowledge of defective bridge in action for damages for resulting injury; *Potts v. Shreveport Belt R. Co.* 110 La. 6, 98 Am. St. Rep. 452, 34 So. 103, holding performance of dangerous duties of lineman's occupation not of itself contributory negligence.

Cited in note (49 L. R. A. 57) on contributory negligence in entering or remaining in employment.

Distinguished in *Smart v. Louisiana Electric Light Co.* 47 La. Ann. 873, 17 So. 346, holding electric light company not liable for death by shock from wire, of experienced lineman employed to alter position of two live wires.

Police power.

Cited in *State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May*. 59 N. J. L. 403, 36 L. R. A. 655, 36 Atl. 696, holding ordinance requiring use of fenders on trolley cars reasonable.

Cited in footnote to *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 22 L. R. A. 759, which upholds right to compel guard wires for uninsulated trolley wires crossing telephone wires.

Erection of wires carrying dangerous current.

Cited in footnote to *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

16 L. R. A. 45, *VOREIS v. NUSSBAUM*, 131 Ind. 267, 31 N. E. 70.

Contracts of married women and contracts voidable by statute.

Cited in *Leschen v. Guy*, 149 Ind. 19, 48 N. E. 344, holding that notes and mortgage executed by married woman, for which shares of stock were issued to her husband, should be canceled; *Bowles v. Trapp*, 139 Ind. 56, 38 N. E. 406, holding married woman's contract as surety for husband, known to one advancing money, voidable though note reads "for my sole use and benefit;" *Dickey v. Kalfsbeck*, 20 Ind. App. 293, 50 N. E. 590, holding complaint need not plead statute in enforcing liability of married woman in conveyance of her separate property; *Kniss v. Holbrook*, 16 Ind. App. 231, 44 N. E. 563, holding maker of note given for patent right not absolutely void in hands of innocent purchaser; *Irwin v. Marquett*, 26 Ind. App. 393, 84 Am. St. Rep. 297, 59 N. E. 38, holding check given for winnings at gambling game void; *John C. Groub Co. v. Smith*, 31 Ind. App. 689, 68 N. E. 1030, holding action not maintainable against married woman as accommodation indorser of husband's note; *Guy v. Liberenz*, 160 Ind. 529, 65 N. E. 186, holding wife, signing note and mortgage with husband, surety only, where husband alone receives consideration.

Cited in footnote to *Kitchen v. Chapin*, 57 L. R. A. 914, which holds married woman liable on her guaranty of note owned by her and payable to her order.

Estoppel against statutory defense.

Cited in *Galvin v. Britton*, 151 Ind. 14, 49 N. E. 1064, holding estoppel to setting up suretyship shown where married woman induced party dealing with her husband to rely on his representations as to his ownership; *Goff v. Hankins*, 11 Ind. App. 460, 39 N. E. 294, holding married woman not estopped to assert pledge of her organ as surety for husband's debt, when pledgee knew fact of ownership; *Cole v. Temple*, 142 Ind. 502, 41 N. E. 942, holding married woman not estopped to assert invalidity of note and mortgage executed as surety for husband, where it appears on its face that she is tenant in common; *Coats v. Gordon*, 144 Ind. 22, 41 N. E. 1044, holding married woman not estopped under statute to assert invalidity of mortgage executed by herself and husband as tenants by entirety, though knowing it to be invalid.

Effect as to bona fide holders of statute declaring notes void.

Cited in footnote to *Lynchburg Nat. Bank v. Scott Bros.* 29 L. R. A. 827, which holds usury forming part of renewal note discounted at legal rate not available defense.

16 L. R. A. 49, *SAYRE v. PHILLIPS*, 148 Pa. 482, 33 Am. St. Rep. 842, 24 Atl. 76.
Validity of statutes in regulation of trade and police power.

Followed in *Com. v. Zacharias*, 3 Pa. Super. Ct. 264, 39 W. N. C. 409, holding act regulating sale of drugs, but exempting personal representatives and widows,

invalid; *Com. v. Zacharias*, 181 Pa. 131, 40 W. N. C. 170, 37 Atl. 185, discussing invalidity of that part of act prohibiting carrying on of retail drug store without license, but excepting widows of pharmacists; *Densmore v. Erie*, 20 Pa. Co. Ct. 518, 7 Pa. Dist. R. 358, holding license fee for riding bicycles, exacted of residents of locality only, not police regulation, and invalid; *Ridley Park v. Citizens' Electric Light & P. Co.* 7 Del. Co. Rep. 397, 9 Pa. Super. Ct. 619, holding that boroughs, equally with cities, can impose license tax on electric light poles erected in borough streets; *Clark's Estate*, 10 Pa. Super. Ct. 435, 44 W. N. C. 472, Affirming 7 Pa. Dist. R. 11, 20 Pa. Co. Ct. 444, 41 W. N. C. 280, holding act providing that executors and trustees may include in account amount paid for bond of surety company as part of lawful expense, unlawful discrimination against individuals; *Com. v. Mintz*, 19 Pa. Super. Ct. 285, holding act regulating sales to junk-shop keepers and second-hand dealers, except when made by plumbers and house owners, valid; *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 307, holding that legislature, by incorporating municipality, imparts to it powers necessary to protection of persons and property, including power to prevent playing of musical instruments on street; *Cairo v. Feuchter*, 159 Ill. 102, 42 N. E. 308, holding license fee required of wholesale, and not of retail, liquor dealers unreasonable; *State v. Montgomery*, 94 Me. 201, 80 Am. St. Rep. 386, 47 Atl. 105, holding citizens of one state can go into another state to engage in lawful trade without molestation; *Com. v. Densmore*, 34 Pittsb. L. J. N. S. 345, upholding act requiring licensing of automobiles, excepting machines in stock.

Cited in footnotes to *Re Bohlen*, 36 L. R. A. 618, which holds ordinance prohibiting future burial, except on lots already purchased, void for discrimination; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers only, whose business less than \$1,000; *Knisely v. Cotterel*, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; *Broadfoot v. Fayetteville*, 39 L. R. A. 245, which sustains statute discriminating in favor of nonresidents of city as to allowing stock to run at large; *Carrollton v. Bazzette*, 31 L. R. A. 522, which holds ordinance requiring license from persons who "temporarily reside in city" before selling goods void for discrimination; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Re Sipe*, 17 L. R. A. 184, which holds invalid, ordinance against importing goods into city to sell at auction, except on paying license fee; *Re Haskell*, 32 L. R. A. 527, which sustains license for specified amount for retailers having fixed place of business in city, though heavier than that charged regular dealers at fixed places.

Distinguished in *Com. v. Zacharias*, 5 Pa. Dist. R. 477, holding act regulating sale of drugs, but exempting personal representatives and widows from provisions, valid police regulation.

— Peddlers.

Followed in *Wilcox v. Knoxville*, 2 Pa. Dist. R. 721, holding borough ordinance prohibiting nonresidents from peddling, void; *Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780, holding ordinance prohibiting peddling without license, excepting persons selling products of own farm or garden, invalid.

Cited in *Com. v. Hance*, 24 Pa. Co. Ct. 432, holding nonresident merchant soliciting orders within state not peddler under statute regulating sales by peddlers; *Com. v. Snyder*, 182 Pa. 633, 38 Atl. 356, holding local act which exacts heavy li-

cense fee of peddlers, but excepts those dealing exclusively with merchants of certain county, unjust discrimination; *Com. v. Harmel*, 166 Pa. 94, 27 L. R. A. 389, 36 W. N. C. 4, 5 Inters. Com. Rep. 92, 30 Atl. 1036, holding statute regulating peddling of clocks by all persons, without discrimination, valid; *Danville v. Weaver*, 4 Pa. Dist. R. 769, 13 Lanc. L. Rev. 86, 13 Lanc. L. Rev. 246, 17 Pa. Co. Ct. 18, 2 Lack. Legal News, 198, holding ordinance prohibiting peddling in streets, except certain kinds, and of these exacting license only from milk peddlers, valid; *Com. v. Dunham*, 4 Pa. Super. Ct. 77, holding act prohibiting sales by all hawkers and peddlers in certain county valid; *Port Clinton v. Shafer*, 5 Pa. Dist. R. 584, 14 Lanc. L. Rev. 29, 18 Pa. Co. Ct. 69, holding ordinance requiring canvassers and peddlers to take out license, but excepting persons soliciting orders for manufactures beyond state boundary, invalid; *Com. v. Wormser*, 7 Pa. Dist. R. 320; *Allentown v. Diefenderfer*, 6 Northampton Co. Rep. 97, 7 Del. Co. Rep. 88; *Wormser v. Allentown*, 7 Northampton Co. Rep. 39, 8 Pa. Dist. R. 650; *South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 199; *West Pittston v. Dymond*, 8 Kulp, 14,—holding borough ordinance prohibiting peddling without license, except by those holding mercantile licenses, invalid; *Warren v. Lewis*, 16 Pa. Co. Ct. 177, and *Com. v. Hepner*, 22 Pa. Co. Ct. 633, holding ordinance permitting sale of products by farmers, gardeners, and merchants with stores, without license imposed on all others of locality, invalid; *State v. Mitchell*, 97 Me. 73, 94 Am. St. Rep. 481, 53 Atl. 887, holding peddlers' license act, exempting from its provisions residents of towns paying taxes on stock to amount of \$25, void.

Cited in footnote to *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for peddling license.

Distinguished in *Com. v. Deinno*, 20 Pa. Co. Ct. 372, holding act forbidding hawking and peddling in certain county, but excepting those selling their own manufactures, valid; *South Easton v. Moser*, 14 Lanc. L. Rev. 238, 18 Pa. Co. Ct. 346, holding farmer delivering milk to customers within borough limits not peddler within ordinance; *Irwin v. Douglass*, 30 Pittsb. L. J. N. S. 107, 8 Pa. Dist. R. 506, holding proviso that license fee shall not be required of farmers, in ordinance requiring fee of peddlers, etc., not an exception.

— Canvassers.

Cited in *Mechanicsburg v. Koons*, 18 Lanc. L. Rev. 63, holding ordinance prohibiting any person from doing business without license, but exempting those selling to local business men, valid as tending to suppress hurtful competition; *Cohen v. Plymouth*, 7 Kulp, 102, holding ordinance requiring license to solicit orders for tea and coffee invalid; *Brownback v. North Wales (Pa.)* 49 L. R. A. 446, 45 Atl. 660, Affirming 10 Pa. Super. Ct. 230, 44 W. N. C. 260, which Reversed 16 Lanc. L. Rev. 511, 7 Pa. Dist. R. 326, holding ordinance requiring license fee from all persons soliciting orders for merchandise from house to house valid.

— Auctioneers.

Cited in *Burnell v. Clark*, 20 Pa. Co. Ct. 102, holding act regulating sale of goods at auction is trade regulation discriminating against some in favor of other merchants; *Wormser v. Easton*, 6 Northampton Co. Rep. 129, holding ordinances requiring license fees from merchants selling or advertising to sell their goods as auction consignment, bankrupt, assignment, fire, goods, etc., invalid discrimination.

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16 L. R. A. 51, *INGALLS v. HOBBS*, 156 Mass. 348, 32 Am. St. Rep. 460, 31 N. E. 286.

Implied warranty in lease.

Cited in *Jamison v. Ellsworth*, 115 Iowa, 91, 87 N. W. 723, holding that lessee of farm cannot recover for insufficient water supply when no claim made that sufficient water supply impliedly warranted; *Littlehale v. Osgood*, 161 Mass. 343, 37 N. E. 375, holding question as to implied warranty that house was in good sanitary condition, not having been raised at trial, not available on appeal.

Cited in footnotes to *Daly v. Wise*, 16 L. R. A. 236, which holds no implied covenant that unfurnished dwelling leased is fit for residence; *Angevine v. Knox-Goodrich*, 18 L. R. A. 264, which denies implied warranty that house leased for dwelling is habitable.

Cited in note (33 L. R. A. 456) on implied covenant in lease as to fitness of property for purpose intended.

16 L. R. A. 53, *GEORGIA SOUTHERN & F. R. CO. v. ASMORE*, 88 Ga. 529, 15 S. E. 13.

Ejecting passenger for nonpayment of fare.

Cited in *Phillips v. Southern R. Co.* 114 Ga. 288, 40 S. E. 268, holding that passenger cannot be lawfully ejected for not paying extra fare when company made it impossible for him to purchase ticket; *Coyle v. Southern R. Co.* 112 Ga. 126, 37 S. E. 163, discussing question whether railway obliged to carry passenger after ejection, upon offering full fare; *Central R. & Bkg. Co. v. Strickland*, 90 Ga. 568, 16 S. E. 352, holding it question for jury to determine whether passenger has used proper diligence in attempting to procure ticket before boarding train; *Garrison v. United R. & Electric Co.* 97 Md. 354, 99 Am. St. Rep. 452, 55 Atl. 371, upholding right of conductor to complete ejection of passenger refusing to pay fare, although, after stopping of car, friend offers to pay.

Cited in note (16 L. R. A. 55) on payment of back fare for distance already ridden as condition of being carried further.

16 L. R. A. 55, *MANNING v. LOUISVILLE & N. R. CO.* 95 Ala. 392, 36 Am. St. Rep. 225, 11 So. 8.

Right to eject passenger.

Cited in *Chicago & E. I. R. Co. v. Adams*, 60 Ill. App. 573, holding passenger may be rightfully ejected from train if he refuses to pay fare between stations for which he holds no ticket; *McGhee v. Reynolds*, 117 Ala. 420, 23 So. 68, holding that conductor can look to ticket as sole contract for right to ride, and, if void on face, can expel passenger for refusal to pay.

Cited in note (16 L. R. A. 53) on right of passenger to pay fare after train begins to stop for purpose of ejecting him.

16 L. R. A. 56, *LIVERPOOL & L. & G. INS. CO. v. BOARD OF ASSESSORS*, 44 La. Ann. 760, 11 So. 91.

Where property taxable.

Followed in *Parker v. Strauss*, 49 La. Ann. 1175, 22 So. 329, holding money deposited in bank to credit of nonresident firm to purchase cotton, taxable.

Cited in *Clason v. New Orleans*, 46 La. Ann. 4, 14 So. 306, holding money of non-

resident firm deposited in bank to its credit for purchase of cotton, taxable where deposited; *Bluefields Banana Co. v. New Orleans*, 49 La. Ann. 46, 21 So. 627, holding money of nonresident corporation in hands of agent, taxable; *State ex rel. Mechanics & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1545, 18 So. 519, holding bonds of another state, held there as security for insurance company's business, taxable at domicil of company; *Railey v. Board of Assessors*, 44 La. Ann. 769, 11 So. 93, holding tax on "credits" of nonresident void; *State ex rel. Mechanics & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1508, 18 So. 462, holding premiums of insurance company in process of collection taxable where collected; *New Orleans v. Stempel*, 175 U. S. 313, 44 L. ed. 177, 20 Sup. Ct. Rep. 110, holding credits in form of notes secured by mortgages in possession of nonresident's agent, to be reinvested when collected, taxable in his possession; *Holland v. Silver Bow County*, 15 Mont. 462, 27 L. R. A. 798, 39 Pac. 575, holding real estate mortgages owned by nonresident not taxable; *Pyle v. Brenneman*, 60 C. C. A. 411, 122 Fed. 789, holding bank deposit taxable at depositor's domicil.

Cited in footnotes to *Grigsby Constr. Co. v. Freeman*, 58 L. R. A. 349, which holds contractor's outfit, brought into state for use for several months in constructing railroad, taxable in state; *Re Whiting*, 34 L. R. A. 232, which holds bonds of foreign corporation within state, though owned by nonresident, subject to transfer tax; *Myers v. Baltimore County*, 34 L. R. A. 309, which sustains taxation of average amount of live stock received weekly by dealers.

Distinguished in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1032, 45 L. R. A. 526, 72 Am. St. Rep. 483, 25 So. 970, holding uncollected premiums of nonresident insurance company not taxable.

16 L. R. A. 59, *DETROIT v. RENTZ*, 91 Mich. 78, 51 N. W. 787.

Taxation of real estate mortgages and other property.

Cited in *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392, holding that mortgage interest may be taxed as real estate, though held by nonresident; *Standard Life & Acci. Ins. Co. v. Board of Assessors*, 95 Mich. 467, 55 N. W. 112, holding act attempting to provide that banks and insurance companies shall not have deducted from assets amount of real estate mortgages contravenes right to uniformity of taxation; *Standard Life & Acci. Ins. Co. v. Board of Assessors*, 91 Mich. 518, 52 N. W. 17, holding that value of mortgages assessed as real estate must be deducted from taxable net assets of insurance companies; *Latham v. Board of Assessors*, 91 Mich. 513, 52 N. W. 15, holding that assessors must assess to banks the mortgage interests they hold, and deduct value from value of capital stock; *Michigan Sav. Bank v. Detroit*, 107 Mich. 248, 65 N. W. 101, holding bank should have appealed for review of illegal assessment as provided by law, to entitle it to recover taxes paid under protest.

Cited in footnotes to *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.* 18 L. R. A. 465, which holds mortgage's duty to pay tax not discharged by assignment before tax levied; *Allen v. National State Bank*, 52 L. R. A. 760, which sustains right of state to tax nonresident mortgagee's interest in land within state; *Fuller v. Kane*, 34 L. R. A. 308, which holds stipulation for mortgagor paying all taxes does not bind him to pay taxes required of mortgagee by subsequent statute; *Holland v. Silver Bow County*, 27 L. R. A. 797, which holds not subject to taxation, real estate mortgage owned by nonresident; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 16 L. R. A. 56, which holds nonresident not taxable for debt

due from resident; *Buck v. Miller*, 37 L. R. A. 384, which holds money and securities retained in state in business of buying and selling property taxable there though owner domiciled elsewhere; *Hamilton v. Wilson*, 48 L. R. A. 238, which holds void, statute for taxation of personal judgments with specified exceptions.

Distinguished in *Holland v. Silver Bow County*, 15 Mont. 462, 27 L. R. A. 798, 39 Pac. 575, holding mortgages and other securities for debt held by nonresidents not subject to taxation; *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 403, 100 Am. St. Rep. 633, 34 So. 482, holding money of nonresidents loaned in state not taxable.

Necessary formalities for valid act.

Cited in *Cohn v. Kingsley*, 5 Idaho, 454, 38 L. R. A. 92, 49 Pac. 985, dissenting opinion), majority holding journals of both houses must show affirmatively that constitutional provisions regarding passage of bills complied with; *Norman v. Kentucky Bd. of Managers*, 93 Ky. 576, 18 L. R. A. 566, 20 S. W. 901 (dissenting opinion), majority holding bill cannot become law unless two fifths of all members of legislature vote for it, vote taken by yeas and nays and entered in journal; *New Hanover County v. Armour Packing Co.* 135 N. C. 69, 47 S. E. 411, holding journals of Assembly conclusive evidence of passage of law.

Cited in note (23 L. R. A. 342) on conclusiveness of enrolled bill.

16 L. R. A. 81, *LATAH COUNTY v. PETERSON*, 3 Idaho, 398, 29 Pac. 1089.

Public ways and rights of way.

Cited in *Towns v. Klamath County*, 33 Or. 232, 53 Pac. 604, holding act providing for open public way to be laid out, paid for, and kept in repair by petitioner as public road, valid; *Towns v. Klamath County*, 33 Or. 232, 53 Pac. 604, upholding statute authorizing taking of property for public roads, upon petition.

Cited in footnotes to *Bradley v. Pharr*, 19 L. R. A. 647, which denies power to construct private railroad on public road; *Bell v. Lamborn*, 20 L. R. A. 241, which authorizes taking by eminent domain of right of way to carry water to electric light plant; *Wisconsin Water Co. v. Winans*, 20 L. R. A. 662, which denies water-supply company's right to condemn land for pipe line; *Ex parte Bacot*, 16 L. R. A. 586, which authorizes condemnation of right of way to connect manufacturing establishment with railroad; *Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 29 L. R. A. 853, which holds condemnation of land for irrigating ditches to be "for" public purpose; *Welton v. Dickson*, 22 L. R. A. 496, which denies right to condemn land for private road from land cut off from public highway.

16 L. R. A. 85, *UNION STOVE & MACH. WORKS v. CASWELL*, 48 Kan. 689, 29 Pac. 1072.

Second appeal in 50 Kan. 780, 32 Pac. 362.

Principal debtor as surety.

Cited in *Hall v. Johnston*, 6 Tex. Civ. App. 114, 24 S. W. 861, holding extension by creditor of time for payment of indebtedness due from firm after retirement of partner releases him; *Miller v. Kennedy*, 12 S. D. 482, 81 N. W. 906, holding agreement by mortgagee with purchaser, against objection of mortgagor, to extend time of payment of mortgage assumed by purchaser discharges mortgagor; *Mulvane v. Sedgley*, 63 Kan. 112, 55 L. R. A. 555, footnote p. 552, 64 Pac. 1039,

holding action on notes and to foreclose mortgage security barred when action against purchaser assuming mortgage barred by limitation: *Bowling v. Garrett*, 49 Kan. 520, 33 Am. St. Rep. 377, 31 Pac. 135, holding purchaser of real estate assuming mortgage indebtedness becomes principal debtor and mortgagor, surety.

16 L. R. A. 90, *CENTRAL TRUST CO. v. MARIETTA & N. G. R. CO.* 51 Fed. 15.

When receiver bound by previous agreements.

Cited in *United States v. De Coursey*, 82 Fed. 304, holding receiver, not party to tariff agreement in which railroad had entered, not criminally liable for failure to follow it: *Commercial Pub. Co. v. Beckwith*, 167 N. Y. 336, 60 N. E. 642, holding that receiver of publishing company who adopts its contracts incurs its obligations.

Cited in footnote to *Bell v. American Protective League*, 28 L. R. A. 452, which denies receiver's liability on covenants of lease as assignee of term.

16 L. R. A. 91, *RICHMOND & D. R. CO. v. SCOTT*, 88 Va. 958, 14 S. E. 763.

Negligence of passenger.

Cited in *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 170, 59 L. R. A. 122, 42 S. E. 405, holding negligent act of mail car employee, while passing letters out under grab on side of car, proximate cause of resulting injury to hand; *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 228, 57 L. R. A. 641, 91 Am. St. Rep. 345, 90 N. W. 380, holding one thrusting his head beyond line of moving car, whereby his head comes in contact with post, negligent.

Cited in footnotes to *Carrico v. West Virginia C. & P. R. Co.* 24 L. R. A. 50, which holds that negligence in protruding arm from car window will not prevent recovery for injury if danger known to carrier; *Benedict v. Minneapolis & St. L. R. Co.* 57 L. R. A. 639, which holds exposure of body beyond side of moving train, by passenger on platform, negligence; *Clark v. Louisville & N. R. Co.* 36 L. R. A. 123, which holds slight projection of elbow from car window while passing through tunnel, negligence.

Negligence of carrier.

Cited in footnotes to *Kird v. New Orleans & N. W. R. Co.* 60 L. R. A. 727, which holds construction of freight platform so near track that passenger's elbow, protruding slightly, comes in contact, gross negligence; *Elliott v. Newport Street R. Co.* 23 L. R. A. 208, which holds passenger permitted to ride on footboard not bound to anticipate danger from trolley poles.

16 L. R. A. 94, *EDGERTON v. EDGERTON*, 12 Mont. 122, 33 Am. St. Rep. 557, 29 Pac. 966.

Collateral attack on judgments.

Followed in *State ex rel. Giroux v. Giroux*, 19 Mont. 158, 47 Pac. 798, holding decree of divorce by another state voidable only.

Cited in *Johnson v. Puritan Min. Co.* 19 Mont. 47, 47 Pac. 337, denying right to make collateral attack on judgment; *Haupt v. Simington*, 27 Mont. 485, 94 Am. St. Rep. 839, 71 Pac. 672, holding that judgment valid on its face cannot be attacked collaterally, although it may be void for want of service of summons.

Husband's liability for wife's support.

Cited in footnote to *Kirk v. Chinstrand*, 56 L. R. A. 333, which holds husband refusing to permit wife to live with him liable for her support where she chooses to live.

Appeal from orders for payment of alimony.

Cited in *Lesh v. Lesh*, 21 App. D. C. 485, holding order for payment of alimony *pendente lite* appealable.

16 L. R. A. 103, *SPARROW v. POND*, 49 Minn. 412, 32 Am. St. Rep. 571, 52 N. W. 38.

Levy on, and sale of, crops.

Cited in notes (23 L. R. A. 258, 259) on crops as personal property for purpose of levy and sale; (23 L. R. A. 452, 477) on sale or mortgage of future crops.

16 L. R. A. 106, *HERR v. LEBANON*, 149 Pa. 222, 34 Am. St. Rep. 603, 24 Atl. 207.

Proximate cause of injury.

Cited in *Missouri P. R. Co. v. Columbia*, 65 Kan. 400, 58 L. R. A. 404, 69 Pac. 338, holding severe gale proximate cause of grain doors being blown onto tracks, which resulted in derailment of engine, and injury; *Storey v. New York*, 29 App. Div. 321, 51 N. Y. Supp. 580, holding mound in street, caused by excavation of dirt, obstructing view of child and driver of cart approaching, not proximate cause of death of child, run over by cart; *Habecker v. Lancaster Twp.* 16 Lanc. L. Rev. 180, 9 Pa. Super. Ct. 556, 44 W. N. C. 53, holding breaking of hold-back strap proximate cause of horse veering to one side into unguarded quarry hole; *Cage v. Franklin Twp.* 11 Pa. Super. Ct. 538, holding township not liable for injury caused by horse balking and backing 70 feet. over unguarded wing wall of bridge; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 126, holding that jury's finding that proximate cause of horse backing over embankment was narrowness of way and absence of guard rails justified recovery; *Dixon v. Butler Twp.* 4 Pa. Super. Ct. 340, 40 W. N. C. 212, holding township not liable for death caused by frightened horses. owing to absence of rail between highway and railway track; *Swanson v. Crandall*, 2 Pa. Super. Ct. 89, 39 W. N. C. 26, holding keeping of revolver in drawer, where child found and discharged it, not proximate cause of resulting injury; *Boone v. East Norwegian Twp.* 192 Pa. 209, 44 W. N. C. 285, 43 Atl. 1025, holding absence of guard rail at side of road proximate cause of accident, where horse kicked over shaft and went down embankment; *Card v. Columbia Twp.* 191 Pa. 270, 43 Atl. 217, holding township not liable where accident occurred by traces dropping from whiffletree, causing horses to run away and throw vehicle over unguarded bank; *Schaeffer v. Jackson Twp.* 150 Pa. 150, 18 L. R. A. 103, 30 Am. St. Rep. 792, 24 Atl. 629, holding defect in highway not proximate cause of injury to traveler thrown from buggy, where buggy wrecked by running horse before defect reached; *Conner v. Fleer*, 28 Pa. Co. Ct. 503, holding bars on windows, preventing one from escaping after discovery of danger, not proximate cause of injury by explosion; *Pautz v. Plankinton Packing Co.* 118 Wis. 51, 94 N. W. 654, holding defective wooden wheel, causing iron wheel to break, proximate cause of injury resulting therefrom.

Distinguished in *Yoders v. Amwell Twp.* 172 Pa. 456, 37 W. N. C. 513, 51 Am.

St. Rep. 750, 33 Atl. 1017, holding township not relieved for failure to put guard rails on bridge, off which horse backed vehicle, because such accident could not have been foreseen.

Contributory negligence.

Cited in *Kitchen v. Union Twp.* 171 Pa. 157, 33 Atl. 76, holding township not relieved from responsibility by reason of any concurring negligence of injured, when accident caused by frightened horse dashing over unguarded bank; *Thayne v. Scranton Traction Co.* 8 Pa. Super. Ct. 455 (dissenting opinion), majority holding presence of passenger on rear platform contributed to accident by which he was injured.

16 L. R. A. 108, *LANGENBERG v. DECKER*, 131 Ind. 471, 31 N. E. 190.

Limit of legislative, executive, and judicial powers.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 658, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 547, 18 L. R. A. 743, 33 N. E. 421, denying judicial powers to state board of tax commissioners; *Re Sims*, 54 Kan. 6, 25 L. R. A. 112, footnote p. 110, 45 Am. St. Rep. 261, 37 Pac. 135, declaring invalid, statute conferring on county attorney power to imprison for contempt; *Ellis v. Steuben County*, 153 Ind. 92, 54 N. E. 382, upholding, as not imposing judicial power, statute requiring county surveyor to inspect and accept drains; *Purnell v. Mann*, 105 Ky. 116, 50 S. W. 264, sustaining validity of act providing for election of county commissioners by state board of three members; *Vigo County v. Stout*, 136 Ind. 59, 22 L. R. A. 401, 35 N. E. 683, holding that court can, by order, regulate running of elevator in courthouse, and that county officials cannot discontinue its use; *Re Huron*, 58 Kan. 157, 36 L. R. A. 824, 62 Am. St. Rep. 614, 48 Pac. 574 (dissenting opinion), majority holding statute conferring on notary public power to commit witness for contempt, invalid; *People ex rel. MacDonald v. Leubischer*, 34 App. Div. 593, 54 N. Y. Supp. 869 (concurring opinion) holding commissioner appointed by another state to take deposition has no power to commit witness for contempt; *Pratt v. Breckenridge*, 112 Ky. 11, 65 S. W. 136, holding act, so far as providing for appointment of election commissioners by legislature, invalid.

Cited in footnotes to *People ex rel. Kern v. Chase*, 36 L. R. A. 105, which holds Torrens law unconstitutional as attempt to delegate judicial power to registrar of titles; *Re Clark*, 28 L. R. A. 242, which upholds right to summarily enforce answer by imprisoning witness; *State ex rel. Ellis v. Thorne*, 55 L. R. A. 956, which sustains statute for appointing commissioners by circuit judge to review and correct apportionment of state and county taxes.

16 L. R. A. 115, *FRANK v. FRAYLOR*, 130 Ind. 145, 29 N. E. 486.

Surety's right of subrogation and contribution.

Cited in *Zimmerman v. Gaumer*, 152 Ind. 563, 53 N. E. 829, holding that one defendant, assignee of judgment he has paid, cannot have execution until it is judicially settled that he is so entitled as against other defendants; *Peirce v. Garrett*, 65 Ill. App. 687, holding that surety who has paid mortgage can assign his right of subrogation to third party.

Cited in footnotes to *Merchants' Nat. Bank v. Great Falls Opera House Co.* 45 L. R. A. 285, which authorizes surety to take assignment of judgment paid by

him as basis for contribution from cosureties; *Pace v. Pace*, 44 L. R. A. 459, which sustains right of surety paying obligation, to receive dividend on entire debt from cosurety's insolvent estate.

16 L. R. A. 119, *SANBORN v. DETROIT*, B. C. & A. R. CO. 91 Mich. 538, 52 N. W. 153.

Report of second appeal in 99 Mich. 2, 57 N. W. 1047.

Negligence in not giving signals at crossings.

Cited in *Philadelphia & B. C. R. Co. v. Holden*, 93 Md. 423, 49 Atl. 625, holding failure to blow whistle at station 2,000 feet from private crossing not negligence as to one using crossing; *Lonergan v. Illinois C. R. Co.* 87 Iowa, 762, 17 L. R. A. 258, 53 N. W. 236, holding railroad negligent in running train past team unloading on railway land, without ringing bell at crossing near by; *Lau v. Lake Shore & M. S. R. Co.* 120 Mich. 125, 79 N. W. 13 (dissenting opinion), majority holding bicyclist guilty of contributory negligence in not dismounting to look and listen when view obstructed, instead of assuming signals would be given.

Cited in footnotes to *Vandewater v. New York & N. E. R. Co.* 18 L. R. A. 772, which holds that engineer's failure to give statutory signals at crossing will not render company liable *per se*; *Butcher v. West Virginia & P. R. Co.* 18 L. R. A. 519, which holds company not liable for failure to give crossing signal unless injury proximate result; *Czech v. Great Northern R. Co.* 38 L. R. A. 302, which holds company liable for failure to give signals at particularly dangerous farm crossings, when required in exercise of reasonable care; *Wragge v. South Carolina & G. R. Co.* 33 L. R. A. 191, which holds company liable for failure to give crossing signal, contributing to collision; *Lillstrom v. Northern P. R. Co.* 20 L. R. A. 587, which holds, as highway crossing railroad, road openly used and recognized as such; *Stewart v. Cincinnati, W. & M. R. Co.* 17 L. R. A. 539, which holds railroad company continuing farm crossing required to use care to make it safe; *Louisville & N. R. Co. v. Bodine*, 56 L. R. A. 506, which requires signals for peculiarly dangerous special train at private crossing used by public; *Reynolds v. Great Northern R. Co.* 29 L. R. A. 695, which denies duty to signal train's approach at private crossing as to one driving on highway parallel with track.

Cited in note (17 L. R. A. 254, 255) as to whose benefit signals by approaching trains are required by statute at railway crossings.

Admissibility of evidence.

Cited in *Sanborn v. Detroit*, B. C. & A. R. Co. 99 Mich. 2, 57 N. W. 1047, holding evidence that immediately after accident it was talked over by witnesses that statutory signal not given, properly rejected.

16 L. R. A. 130, *STATE v. CUTSHALL*, 110 N. C. 538, 15 S. E. 261.

Jurisdiction of crime.

Cited in *State v. Buchanan*, 130 N. C. 662, 41 S. E. 107, holding prisoner entitled to show crime charged was committed in another state by evidence of prosecution tending to establish such defense; *State v. Hall*, 114 N. C. 912, 28 L. R. A. 59, 41 Am. St. Rep. 822, 19 S. E. 602, holding that one shooting across border and killing person in another state cannot be convicted of murder in state from which shot fired; *State v. Hall*, 115 N. C. 817, 28 L. R. A. 292, 44 Am. St. Rep. 501, 20 S. E. 729, holding that one shooting across border and killing person

in another state cannot be extradited as fugitive from justice from state where shot fired to state where murder committed; *Watson's Petition*, 19 R. I. 345, 33 Atl. 873, holding that bigamy can only be committed in county and state where second marriage takes place.

Cited in note (28 L. R. A. 60) on locality of crime committed by shooting or striking across state boundary.

Distinguished in *State v. Caldwell*, 115 N. C. 803, 20 S. E. 523, holding act valid which provides for punishment in county where death happens as result of violence inflicted, or poison administered, without state.

When person entitled to office.

Cited in *State ex rel. Greene v. Owen*, 125 N. C. 215, 34 S. E. 424, holding elected member of board of education entitled to office until expiration of term, notwithstanding amendments changing board; *Walser ex rel. Wilson v. Jordan*, 124 N. C. 709, 33 S. E. 139, holding clerk of court elected for term not expired entitled to hold his office as property under law of land, notwithstanding amendments abolishing office.

16 L. R. A. 136, *PALMERI v. MANHATTAN R. CO.* 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001.

Liability of principal for torts of agents.

Cited in *Flora v. Russell*, 138 Ind. 161, 37 N. E. 593, holding that acts of railroad's agents in obtaining search warrant for tobacco which defendant accused of taking were acts of principal; *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 723, 29 L. R. A. 467, footnote p. 465, 41 Pac. 952, holding railroad liable for false imprisonment of passengers, caused by conductor acting in line of authority; *Richberger v. American Exp. Co.* 73 Miss. 169, 31 L. R. A. 391, 55 Am. St. Rep. 522, 18 So. 922, holding express company liable for maltreatment and abuse of customer by one of its servants immediately after delivery to him of receipt for amount of overcharge; *West Chicago Street R. Co. v. Luleich*, 85 Ill. App. 652, holding railway liable for false arrest of passenger by request of conductor, for alleged passing of counterfeit money for fare; *Murray v. Lehigh Valley R. Co.* 66 Conn. 519, 32 L. R. A. 539, 34 Atl. 506, holding railroad liable for negligence of servants of another road over which its train is running under contract, causing injury to passenger; *Monnier v. New York C. & H. R. R. Co.* 70 App. Div. 409, 75 N. Y. Supp. 521, holding railroad liable for ejection from train of passenger who refused to pay on train fare to his station, after inability to purchase ticket at station; *McLeod v. New York, C. & St. L. R. Co.* 72 App. Div. 119, 76 N. Y. Supp. 347, holding railroad liable for false arrest of passenger accused of theft by one of its detectives on train; *Hart v. Metropolitan Street R. Co.* 65 App. Div. 495, 72 N. Y. Supp. 797, holding carrier liable for injury to passenger thrown by gripman from front platform of car he had safely boarded; *Nowack v. Metropolitan Street R. Co.* 166 N. Y. 440, 54 L. R. A. 595, 82 Am. St. Rep. 691, 60 N. E. 32, holding evidence admissible against corporation that its agent attempted to bribe witnesses, where it was shown he was engaged to "see to the witnesses" and took this method to get evidence; *Craven v. Bloomington*, 54 App. Div. 269, 66 N. Y. Supp. 525, holding master liable for arrest caused by his driver, of one in whose rightful possession was oven which driver had delivered; *Dupre v. Childs*, 52 App. Div. 309, 65 N. Y. Supp. 179, holding restaurant keeper liable for arrest by its manager of guest leaving restaurant without being served, and not stopping at cashier's desk

in accordance with rule; *Warren v. Dennett*, 17 Misc. 90, 39 N. Y. Supp. 830, holding restaurant keeper liable for false imprisonment of guest, arrested and held by police officer at request of manager; *Van Sielen v. Jamaica Electric Light Co.* 45 App. Div. 4, 61 N. Y. Supp. 210, holding company liable for trespass of its workmen in cutting trees to string wires under direction of its manager; *Scott v. New York*, 27 App. Div. 245, 50 N. Y. Supp. 191, holding city liable for agent's forcibly taking from passing boy, satchel mistakenly supposed to be one of those agent was engaged in removing to place of detention; *Miller v. King*, 21 App. Div. 200, 47 N. Y. Supp. 534 (concurring opinion), majority holding company not liable for expulsion from train of passenger with ticket to station at which train did not stop; *O'Connell v. Samuel*, 81 Hun, 360, 30 N. Y. Supp. 889, holding that agent of credit house, who assaulted woman resisting his entrance to house to retake possession of property, may have been within scope of authority; *Tierney v. Syracuse, B. & N. Y. R. Co.* 85 Hun, 152, 32 N. Y. Supp. 627, holding it question for jury whether switchman acting within scope of duty when, through mistake, he switches train onto siding; *Lang v. New York, L. E. & W. R. Co.* 80 Hun, 277, 30 N. Y. Supp. 137, holding it for jury to determine whether brakeman on coal train, hitting boy in back with piece of coal, was within his duty in removing him from train; *Penny v. New York C. & H. R. R. Co.* 34 App. Div. 13, 53 N. Y. Supp. 1043, holding railroad not liable for arrest and detention of one not passenger, by detectives not in its employ or directed by it to make arrest; *Franklin v. Third Ave. R. Co.* 52 App. Div. 514, 65 N. Y. Supp. 434, holding that carrier was bound to protect passenger from brutal assault by conductor; *Fogarty v. Wanamaker*, 60 App. Div. 437, 69 N. Y. Supp. 883, holding sufficient, complaint for damages for false arrest and detention which alleged that it took place in defendant's store with sanction of superintendent while acting in his employ; *Jenkins v. Brooklyn Heights R. Co.* 29 App. Div. 16, 51 N. Y. Supp. 216, holding evidence of passenger's arrest, transportation in patrol wagon, and subsequent discharge admissible as bearing on damages for ejection from car; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 359, 66 L. R. A. 623, 70 N. E. 857, holding carrier liable for injury suffered by passenger through insulting and abusive language of conductor; *Willis v. Metropolitan Street R. Co.* 76 App. Div. 344, 78 N. Y. Supp. 478, holding railway company liable for injuries due to assault and wrongful ejection of passenger; *Markley v. Snow*, 207 Pa. 452, 64 L. R. A. 687, footnote p. 685, 56 Atl. 999, holding partnership not liable for wrongful arrest of accused at instance of superintendent, three months after alleged crime; *Collins v. Butler*, 83 App. Div. 18, 81 N. Y. Supp. 1074, holding merchant liable for wrongful assault upon customer by clerk.

Cited in footnotes to *Central R. Co. v. Brewer*, 27 L. R. A. 63, which denies implied authority of street railway superintendent to cause arrest for giving counterfeit money; *Eichengreen v. Louisville & N. R. Co.* 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473, which denies carrier's liability for arrest for nonpayment of fare of street car passenger by policeman called by conductor, who was only authorized to put delinquent passengers off car; *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment; *Staples v. Schmid*, 19 L. R. A. 824, which holds salesman within scope of employment in causing arrest and search of person for stolen property; *Baltimore & O. R. Co. v.*

Cain, 28 L. R. A. 688, which holds officer's arrest of disorderly passenger without warrant, in response to telegram by conductor, who pointed out person to be arrested, not unlawful; **Palmer v. Maine C. R. Co.** 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is his own no justification for procuring his arrest.

Distinguished in **Kennedy v. White**, 91 App. Div. 478, 86 N. Y. Supp. 852, holding tenement owner not liable for injury caused by janitor throwing stick of wood at boy in street.

Carrier's liability for wrongful arrest of passenger by third persons.

Cited in footnote to **Brunswick & W. R. Co. v. Ponder**, 60 L. R. A. 714, which denies carrier's liability for failure to prevent illegal arrest by officers, or for stopping train to permit removal.

16 L. R. A. 138, **COOPER v. UNITED STATES MUT. ACCI. ASSO.** 132 N. Y. 334, 44 N. Y. S. R. 553, 28 Am. St. Rep. 581, 30 N. E. 833.

Limitation of action on policy.

Cited in **Provident Fund Soc. v. Howell**, 110 Ala. 510, 18 So. 105, holding that action on policy cannot be brought seven months after receipt of proofs of loss, when policy stipulated limitation of six months; **McFarland v. Railway Officials & E. Acci. Asso.** 5 Wyo. 145, 27 L. R. A. 55, 63 Am. St. Rep. 29, 38 Pac. 347, holding that limitation of action within one year from happening of alleged injury means from death of insured.

Cited in notes (47 L. R. A. 706) on stipulation limiting time for suit on insurance policy, when begins to run; (26 L. R. A. 112) as to when liability on accident insurance policy becomes fixed.

Failure to furnish proofs of loss or notice of accident or death.

Cited in **Meagher v. Life Union**, 65 Hun. 360, 20 N. Y. Supp. 247, holding beneficiary excused from furnishing proofs of loss, where company has refused to furnish blanks on ground policy void.

Cited in footnotes to **Woodmen Acci. Asso. v. Byers**, 55 L. R. A. 291, which holds failure to give notice of injury excused by derangement of insured; **Foster v. Fidelity & C. Co.** 40 L. R. A. 833, which holds twenty-nine days' delay in giving notice of accident fatal under policy requiring immediate notice; **Trippe v. Provident Fund Soc.** 22 L. R. A. 432, which holds time for giving notice of death runs from time when fact of death known.

16 L. R. A. 140, **STATE ex rel. LYSONS v. RUFF**, 4 Wash. 234, 29 Pac. 999.

Forfeiture and vacancies in office.

Cited in **Duffy v. State**, 60 Neb. 825, 84 N. W. 264, holding elected officer taking statutory, but not constitutional, oath in time does not forfeit office.

Cited in footnotes to **State ex rel. Standish v. Boucher**, 21 L. R. A. 539, which holds vacancy not created by senate's adjournment without confirming appointment of successor to officer holding over; **State ex rel. Berge v. Lansing**, 35 L. R. A. 124, which holds vacancy created by failure to file official bond in time; **Re Drury**, 39 Misc. 290, 79 N. Y. Supp. 498, holding office not forfeited by failure of town clerk elect to take and file oath of office within statutory time.

Criticized in **State ex rel. Berge v. Lansing**, 46 Neb. 524, 35 L. R. A. 128, 64 N.

W. 1104, holding office vacant *ipso facto* for failure to file bond within time directed by statute.

Powers of deputies.

Cited in *Tower v. Welker*, 93 Mich. 335, 53 N. W. 527, holding city clerk with power to administer oath may appoint a deputy with full power to perform all of his duties.

16 L. R. A. 143, *REEVE v. FIRST NAT. BANK*, 54 N. J. L. 208, 33 Am. St. Rep. 675, 23 Atl. 853.

When obligation personal or corporate.

Cited in *Terhune v. Parrott*, 59 N. J. L. 17, 35 Atl. 4, holding indorsement by party, "President of" etc., *prima facie* denotes personal liability; *Simanton v. Vliet*, 61 N. J. L. 597, 40 Atl. 595, holding parol evidence admissible to determine whether note signed by trustees was corporate or personal; *Vliet v. Simanton*, 63 N. J. L. 463, 43 Atl. 738, refusing to disturb verdict that note made and signed by trustees of grange was their personal obligation where note was ambiguous, and parol evidence was admitted to show intent of makers.

Cited in footnote to *Kline v. Bank of Tescott*, 18 L. R. A. 533, which holds extrinsic evidence admissible that indorsers described as directors and officers signed solely as corporate officers.

Cited in notes (19 L. R. A. 676) on personal liability of officers on note made for corporation; (20 L. R. A. 705) on admissibility of extrinsic evidence to show who is liable as maker of note.

16 L. R. A. 145, *ARCHER v. SALINAS CITY*, 93 Cal. 43, 28 Pac. 839.

Land dedicated to public.

Cited in *Los Angeles v. Kysor*, 125 Cal. 467, 58 Pac. 90, denying dedication of park to public when owners continued to deal with it, and no act of acceptance by city shown; *Conkling v. Mackinaw City*, 120 Mich. 77, 79 N. W. 6, holding dedication shown when owner of wild land plats it with lots and streets, indicating park, and sells lots with reference thereto, although formal acceptance not indicated; *London & S. F. Bank v. Oakland*, 33 C. C. A. 246, 61 U. S. App. 224, 90 Fed. 700, holding map duly filed and recorded, showing street, sufficient dedication to public when deeds refer to it and owners adopt it.

— Acceptance and reverter.

Cited in *Anaheim v. Langenberger*, 134 Cal. 610, 66 Pac. 855, holding action by city to quiet title to tract of land as public park twenty years after offer of dedication not evidence of acceptance; *London & S. F. Bank v. Oakland*, 33 C. C. A. 248, 61 U. S. App. 224, 90 Fed. 702, holding street accepted, when ordinance adopted setting forth stipulation which included part of it; *Dallas v. Gibbs*, 27 Tex. Civ. App. 278, 65 S. W. 81, holding that land dedicated for street vests in public upon acceptance by city; *McAlpine v. Chicago G. W. R. Co.* (Kan.) 64 L. R. A. 88, 75 Pac. 73, holding that land dedicated to public use does not revert because of mere misuse or nonuse.

Title by adverse possession and prescription.

Cited in *Proctor v. San Francisco*, 40 C. C. A. 401, 100 Fed. 351, holding evidence of title by adverse possession of land dedicated to public use does not sustain allegation of ownership in fee simple in ejectment; *Southern P. Co. v. Hyatt*,

132 Cal. 244, 54 L. R. A. 525, 64 Pac. 272, holding individuals cannot acquire prescriptive rights over railroad right of way.

16 L. R. A. 148, *COM. v. ALLEN*, 148 Pa. 358, 33 Am. St. Rep. 830, 23 Atl. 1115.

Unusual use of highways.

Cited in *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 102, 76 S. W. 736, holding one driving unusually heavy load over street liable for breaking manholes owned by private corporations.

Care of highways and bridges.

Explained in *Coulter v. Pine Twp.* 164 Pa. 547, 35 W. N. C. 399, 30 Atl. 490, holding instruction proper that liability for collapse of bridge turns upon question whether traction engine, breaking through, had become the usual and ordinary mode of travel when bridge reconstructed.

Cited in *Hardin County v. Coffman*, 60 Ohio St. 534, 48 L. R. A. 458, 54 N. E. 1054, holding liability of highway commissioners for death of persons running traction engine over bridge depends upon whether they used ordinary care of reasonably prudent persons in their position, as to repair of bridge.

Cited in footnotes to *Clulow v. McClelland*, 17 L. R. A. 650, which holds township officer's ignorance of defect of bridge, not disclosed by examination by one intending to take traction engine over, not negligence; *Hall v. Concord*, 58 L. R. A. 455, which denies city's liability for negligent management of steam roller in repairing city street under supervision of state superintendent; *Stewart v. California Improv. Co.* 52 L. R. A. 205, which holds owner of steam roller liable for engineer's neglect to warn travelers, though roller hired by city.

Cited in note (39 L. R. A. 621) on municipal control over public nuisances upon public streets and highways created by street railroad and other electrical companies.

16 L. R. A. 150, *STATE v. HASLEDAHL*, 2 N. D. 521, 52 N. W. 315.

Report of second appeal in 3 N. D. 36, 53 N. W. 430, holding that new information can be filed to cure defect hitherto adjudged, without preliminary examination of accused.

Challenges to jury.

Cited in *People v. Zeigler*, 135 Cal. 464, 56 L. R. A. 883, footnote p. 882, 67 Pac. 754, holding defendant in murder trial entitled to full number of peremptory challenges where juror excused for sickness before jury fully impaneled.

When cause on trial.

Cited in *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 55, 76 N. W. 504, which holds case was "tried" before statute went into effect, where testimony all in, although findings not signed until subsequently; *State v. Kent*, 5 N. D. 531, *sub nom.* *State v. Pancoast*, 35 L. R. A. 524, 67 N. W. 1052, construing statute to mean that trial had not begun when application was made for change of venue before jury impaneled; *State v. Bronkol*, 5 N. D. 513, 67 N. W. 680, which holds plea of jeopardy not sustained where jury discharged on motion of state's attorney before accused had pleaded to information.

Sufficiency of indictment.

Distinguished in *State v. Thompson*, 4 S. D. 99, 55 N. W. 725, sustaining indictment.

ment entitled in name of state against defendant, and found by grand jury under sanction of state's attorney; *State v. Kerr*, 3 N. D. 525, 58 N. W. 27, which holds indictment need not specifically set forth that prosecution is carried on in name and by authority of state, if fact appears indirectly, but certainly.

16 L. R. A. 154, *BAKER v. FLINT & P. M. R. CO.* 91 Mich. 298, 30 Am. St. Rep. 471, 51 N. W. 897.

Earnings of married women and minors.

Cited in *Nieboer v. Detroit Electric R. Co.* 128 Mich. 495, 87 N. W. 626 (dissenting opinion), as to correctness of receiving testimony as to wages earned by minor suing by next friend; *Kucera v. Merrill Lumber Co.* 91 Wis. 645, 65 N. W. 374, raising without deciding, question of estoppel on father by reason of waiver of right of action for loss of services of minor child; *Chicago Screw Co. v. Weiss*, 203 Ill. 542, 68 N. E. 54, Affirming 107 Ill. App. 46, holding right to earnings of minor relinquished by father suing for damages as next friend; *Galveston, H. & S. A. R. Co. v. Jackson*, 31 Tex. Civ. App. 343, 71 S. W. 991, holding that action for recovery by parent as next friend for loss of services during minority must clearly seek such recovery, to bar recovery therefor by parent; *Daly v. Everett Pulp & Paper Co.* 31 Wash. 259, 71 Pac. 1014, holding father participating in suit by son estopped from maintaining action for loss of services by reason of injury to latter.

Cited in footnote to *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal, after attaining majority, to submit to physical examination.

Distinguished in *Tunncliffe v. Bay Cities Consol. R. Co.* 102 Mich. 628, 32 L. R. A. 145, 61 N. W. 11, which holds evidence by plaintiff, a married woman, of impairment of her earning capacity inadmissible because husband *prima facie* entitled to her earnings.

16 L. R. A. 159, *LOWENBERG v. LEVINE*, 93 Cal. 215, 28 Pac. 941.

16 L. R. A. 161, *DOUGHERTY v. AUSTIN*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092.
Limitation upon powers of supervisors.

Cited in *Agard v. Shaffer*, 141 Cal. 727, 75 Pac. 343, holding unconstitutional, statute directing supervisors, when necessary, to provide additions to clerical force for specified work; *Butte County v. Merrill*, 141 Cal. 397, 74 Pac. 1036, holding county ordinance permitting tax collector to retain commission for collection of license taxes void.

Compensation of deputies.

Cited in *San Francisco v. Broderick*, 125 Cal. 193, 57 Pac. 887, denying right of county clerk to have audited, wages paid to additional copyists appointed by him under statute.

Delegation of power.

Cited in *People ex rel. Atty. Gen. v. Wheeler*, 136 Cal. 655, 69 Pac. 435, which holds legislative duty of providing for election and fixing term of officers cannot be delegated to board of supervisors.

Cited in footnotes to *Haigh v. Bell*, 31 L. R. A. 131, which authorizes delegation to county court of exercise of police power of county; *Pueblo County v. Smith*, 33

L. R. A. 465, which sustains statute authorizing county commissioners to provide additional justices of peace when necessary.

Special legislation.

Cited in *Tulare v. Hevren*, 126 Cal. 232, 58 Pac. 530, denying validity of section of general statute confined to one of six classes of municipal corporations.

16 L. R. A. 174, *COLEMAN v. NEW ORLEANS INS. CO.* 49 Ohio St. 310, 34 Am. St. Rep. 565, 31 N. E. 279.

Severability of insurance contract.

Followed without discussion in *Insurance Co. v. Cohn*, 63 Ohio St. 597, 60 N. E. 1131.

Cited in *Trabue v. Dwelling House Ins. Co.* 121 Mo. 86, 23 L. R. A. 722, 42 Am. St. Rep. 523, 25 S. W. 848, holding severable policy not avoided as to personal property, because of additional word "entire" before policy; *Phillips v. Ohio Farmer's Ins. Co.* 13 Ohio C. C. 686, holding policy on real and personal property severable for breach of condition subsequent—as, by change of title; *Phillips v. Ohio Farmer's Ins. Co.* 13 Ohio C. C. 682, 683, holding policy covering both real and personal property severable, entitling insured to recover on personal; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 11, 37 S. W. 606, holding policy covering storehouse and merchandise severable.

Distinguished in *Home Ins. Co. v. Connelly*, 104 Tenn. 98, 56 S. W. 828, denying right to recover for loss of real property in severable policy, when insured fraudulently increased loss for personal property; *Germania F. Ins. Co. v. Schild*, 69 Ohio St. 140, 100 Am. St. Rep. 663, 68 N. E. 706, holding risk not severable where stipulation for forfeiture provided: "This entire policy shall be void."

16 L. R. A. 178, *PEOPLE ex rel. COLFAX v. MAXTON*, 139 Ill. 306, 28 N. E. 1074.

Estoppel.

Cited in *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 232, 35 L. R. A. 285, 45 N. E. 430, holding city estopped to deny that railroad acquired consent to lay tracks across street, after twenty years' use and expenditure in improvements at crossings; *Maltman v. Chicago, M. & St. P. R. Co.* 72 Ill. App. 388, holding railroad estopped to allege that land it had applied for as street, for right of way, was not street; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 524, 36 L. R. A. 104, 56 Am. St. Rep. 265, 46 N. E. 520, holding that elevated railroad having availed itself of right to use street would be estopped from claiming structure unlawful.

Parties in mandamus proceedings.

Cited in *People ex rel. Rinne v. Blocki*, 203 Ill. 368, 67 N. E. 809, holding third party, interested in maintenance of switch tracks sought to be removed, properly made defendant in mandamus proceeding.

16 L. R. A. 180, *Re STREET OPENING*, 133 N. Y. 329, 45 N. Y. S. R. 213, 28 Am. St. Rep. 640, 31 N. E. 102.

Liability for disinterment of bodies.

Cited in note (42 L. R. A. 731) on liability for disinterment of dead bodies, and actions relating thereto.

16 L. R. A. 183, *PEOPLE ex rel. WINCHESTER v. COLEMAN*, 133 N. Y. 279, 45 N. Y. S. R. 217, 31 N. E. 96.

Joint stock associations and limited partnerships.

Cited in *State ex rel. Railroad & Warehouse Commission v. United States Exp. Co.* 81 Minn. 90, 50 L. R. A. 668, footnote p. 667, 83 Am. St. Rep. 366, 83 N. W. 465, denying right of state to compel foreign joint stock association to answer questions as to its interstate business; *Messler v. Schwarzkopf*, 35 Misc. 73, 71 N. Y. Supp. 241, granting plaintiff right to amend complaint by designating officer of joint stock association by proper title; *Francis v. Taylor*, 31 Misc. 188, 65 N. Y. Supp. 28, upholding right of joint stock association to dissolve by consent of its stockholders; *Raymond v. Colton*, 43 C. C. A. 508, 104 Fed. 226, upholding right of officers of joint stock association to sell its assets with approval of all interested; *Cotton v. Raymond*, 41 Misc. 583, 85 N. Y. Supp. 210, holding joint stock association dissolvable by court only for fraud in management, or for good cause shown; *Blue Mountain Forest Asso. v. Borrowe*, 71 N. H. 73, 51 Atl. 670, holding by-law of private corporations providing for assessments on capital stock to make up deficiency in income binding upon shareholders; *Snyder v. Lindsey*, 92 Hun, 433, 36 N. Y. Supp. 1037, holding action maintainable by member for dissolution of joint stock association.

Cited in footnotes to *Rouse, H. & Co. v. Donovan*, 27 L. R. A. 577, which holds valid, provision for execution against limited partners for unpaid subscriptions after return of execution against partnership; *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded as partnership instead of corporation in Massachusetts; *State ex rel. Railroad & W. Commission v. Adams Exp. Co.* 38 L. R. A. 225, which holds service on nonresident joint stock association properly made on local agent; *State, Tide Water Pipe Co., Prosecutor, v. State Assessors*, 27 L. R. A. 684, which holds limited partnership a corporation for purpose of taxation.

Cited in note (22 L. R. A. 478) on tax on partnership property.

Limited in *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 295, 58 U. S. App. 444, 86 Fed. 587, retaining jurisdiction of Federal court over joint stock association, because of diversity of citizenship.

Shares in joint stock associations.

Cited in *Re Jones*, 172 N. Y. 579, 60 L. R. A. 477, footnote p. 476, 65 N. E. 570, Reversing 69 App. Div. 241, 74 N. Y. Supp. 702, sustaining transfer tax on shares of joint stock association as personalty, though invested in real estate; *Lane v. Albertson*, 78 App. Div. 616, 79 N. Y. Supp. 947, sustaining right of residuary legatee to shares of joint stock association willed to him, notwithstanding provision in articles as to sale or transfer by member; *Gregg v. Sanford*, 12 C. C. A. 526, 28 U. S. App. 313, 65 Fed. 153, denying right to tax shares of joint stock association under statute imposing tax on capital stock of "incorporated" companies.

Rights and liabilities of corporation and its members.

Cited in *Niles v. New York C. & H. R. R. Co.* 69 App. Div. 148, 74 N. Y. Supp. 617, denying to stockholder right to bring action individually for wrong done corporation; *Camp Mfg. Co. v. Harriman*, 18 Misc. 724, 43 N. Y. Supp. 673, and *National Bank v. Dillingham*, 147 N. Y. 611, 49 Am. St. Rep. 602, 42 N. E. 338, holding that liability of trustees of corporation for failure to file report is secondary.

Cited in notes (57 L. R. A. 75) on taxation of corporate franchise in United States; (58 L. R. A. 526) on taxation of capital stock of corporations in United States.

16 L. R. A. 186, *RYDER v. HORSTING*, 130 Ind. 104, 29 N. E. 567.

Right to notice in condemnation proceedings.

Cited in *Aldredge v. School Dist. No. 16*, 10 Okla. 698, 65 Pac. 96, holding owner of property to be taken for public use entitled to notice.

16 L. R. A. 188, *FAY v. PACIFIC IMPROV. CO.* 93 Cal. 253, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943.

Liability for loss of personal property.

Cited in *Pope v. Farmers' Union & Mill. Co.* 130 Cal. 141, 53 L. R. A. 677, 80 Am. St. Rep. 87, 62 Pac. 384, sustaining right to recover value of wheat lost by fire. under contract with warehouseman to restore it, damage by elements excepted.

Cited in footnotes to *Libby v. Maine C. R. Co.* 20 L. R. A. 812, which holds unprecedented flood, causing washout of railroad culvert. act of God; *Lang v. Pennsylvania R. Co.* 20 L. R. A. 360, which holds theft or destruction of whiskey after train wrecked by flood not due to inevitable accident; *Bradley Livery Co. v. Snook*. 55 L. R. A. 208, which denies innkeeper's liability for team tied under shed without his attention being called to fact.

16 L. R. A. 189, *GRATIOT v. MISSOURI P. R. CO.* 116 Mo. 450, 21 S. W. 1094.

Liability for violating ordinance.

Cited in *Hutchinson v. Missouri P. R. Co.* 161 Mo. 253, 84 Am. St. Rep 710, 61 S. W. 635, holding that traveler has right to rely on obedience of railroad to ordinance regulating speed of train in city; *Sullivan v. Missouri P. R. Co.* 117 Mo. 245, 23 S. W. 149, holding that traveler may assume railroad employees are observing provisions of ordinance regulating speed of trains; *Becker v. Schutte*, 85 Mo. App. 63, holding action based on ordinance forbidding horse to be left unfastened in public street is one founded in common law; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 641, 80 Am. St. Rep. 650, 58 S. W. 32, upholding right to bring action for damages for death of husband, which resulted from running train at greater speed than ordinance provided; *Ashby v. Elsberry & N. H. Gravel Road Co.* 99 Mo. App. 185, 73 S. W. 229, holding failure to perform statutory duty as to construction of road, negligence, affording right of action for resulting injury.

Validity of ordinances.

Cited in *Plattsburg v. Hagenbush*, 98 Mo. App. 671, 73 S. W. 725, holding ordinance limiting speed of trains to 6 miles an hour in city unreasonable as to outskirts; *Springfield v. Jacobs*, 101 Mo. App. 342, 73 S. W. 1097, holding ordinance imposing tax of \$50 per day on transient stores void.

When negligence question for jury.

Cited in *Eberly v. Chicago, B. & Q. R. Co.* 96 Mo. App. 369, 70 S. W. 381, leaving it to jury to determine question of contributory negligence of day laborer whose foot was crushed by iron dropped on it without warning or orders of foreman; *Levin v. Metropolitan Street R. Co.* 140 Mo. 631, 41 S. W. 968, holding for

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jury question of contributory negligence in permitting child to escape for five minutes from mother's care; *Kreis v. Missouri P. R. Co.* 131 Mo. 545, 30 S. W. 310, holding that jury should determine liability of railroad upon conflicting evidence that employees saw woman negligently walking near track in time to have prevented accident; *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 648, 23 S. W. 1061, leaving to jury question of contributory negligence of traveler as to looking before driving over track, when headlight of locomotive might have been seen; *Lamb v. Missouri P. R. Co.* 147 Mo. 186, 48 S. W. 659, holding it for jury to determine question of contributory negligence of traveler who testified she stopped, looked, and listened before crossing track; *Steube v. Christopher & S. Architectural Iron & Foundry Co.* 85 Mo. App. 650, which holds for jury, question of contributory negligence of workman knocked from scaffold by iron strap dropped by fellow workman; *Baird v. Citizens' R. Co.* 146 Mo. 282, 48 S. W. 78, holding for jury, questions of negligence of gripman and contributory negligence of child crossing track; *Kansas City-Leavenworth R. Co. v. Gallagher (Kan.)* 64 L. R. A. 348, 75 Pac. 469, holding it question for jury whether traveler negligent in crossing street car track in front of approaching car; *Campbell v. St. Louis & Suburban R. Co.* 175 Mo. 172, 75 S. W. 86, holding question as to contributory negligence of one killed at crossing, properly submitted to jury; *Paden v. Van Blarcom*, 100 Mo. App. 194, 74 S. W. 124, holding negligence of one turning on gas in stove, from which explosion resulted, question for jury.

Cited in footnotes to *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow, in not looking and listening before crossing railroad track, for jury; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds recovery not prevented by failure to look when within 30 feet of track; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

Admissibility of and demurrer to evidence.

Cited in *Paul v. Omaha & St. L. R. Co.* 82 Mo. App. 505, admitting evidence of average earnings of traveling salesman selling on commission, as element of damage for injury.

Cited in footnote to *Hopkins v. Nashville, C. & St. L. R. Co.* 32 L. R. A. 354, which sustains practice of demurring to evidence.

16 L. R. A. 198, *RICE v. MOORE*, 48 Kan. 590, 30 Am. St. Rep. 318, 30 Pac. 10.
Revivor of judgment.

Cited in *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 173, 80 N. W. 484, permitting revivor of judgment more than five years after issuance of execution, because special limitation not applicable.

What law governs actions on judgments.

Cited in note (48 L. R. A. 633) as to when statute of limitations will govern action in another state or country.

16 L. R. A. 200, *WILSON v. TRENTON*, 53 N. J. L. 645, 23 Atl. 278.

Notice.

Cited in *Blanchard v. Ely*, 179 Mass. 588, 61 N. E. 218, holding service of demand by mail before enforcing lien for keeping horse, sufficient; *Lehigh Valley R. Co. v. Snyder*, 56 N. J. L. 331, 28 Atl. 376, holding it error to exclude evidence of

posting on bulletin notice of new regulation as affecting right to discharge employee of railroad; *Bank of Columbia v. Portland*, 41 Or. 7, 67 Pac. 1112, holding sufficient, notice of street improvement substantially complying with requirement of charter.

Cited in footnotes to *Savings Bank v. Authier*, 18 L. R. A. 498, which holds summons mailed defendant by third person, served by mistake, insufficient; *Treftz v. Stahl*, 18 L. R. A. 500, which holds defective service of notice of motion to place case on short-cause calendar, by leaving with occupant of office, waived by permitting trial without objection.

Validity of assessment.

Cited in *State, Roebling, Prosecutor, v. Trenton*, 58 N. J. L. 42, 32 Atl. 685, vacating assessment for benefits because not made in relation to increase in market value of property.

16 L. R. A. 203, *PURCELL v. ST. PAUL CITY R. CO.* 48 Minn. 134, 50 N. W. 1034.

Liability for injury due to mental shock.

Cited in *Mitchell v. Rochester R. Co.* 4 Misc. 581, 25 N. Y. Supp. 744, upholding liability for miscarriage as direct result of fright of woman nearly run down by horses of street railway while waiting to board another car; *Mack v. South Bound R. Co.* 52 S. C. 334, 40 L. R. A. 684, 68 Am. St. Rep. 913, 29 S. E. 905, which holds railroad liable for physical injuries, sustained by lad in jumping from track in fright at sudden approach of train; *Sloane v. Southern California R. Co.* 111 Cal. 682, 32 L. R. A. 197, 44 Pac. 320, sustaining judgment for damages to woman for nervous shock, superinduced by mental excitement due to being compelled to leave car on which rightfully a passenger; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 542, 60 L. R. A. 620, 42 S. E. 983, sustaining right of action by woman for physical injury caused by fright due to throwing rock upon her house while blasting; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 85, 41 C. C. A. 34, 100 Fed. 750, upholding instruction that recovery may be had for nervous shock caused by fright in railway collision; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 242, 47 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, sustaining judgment for damages from neurasthenia as result of mental shock to passenger in derailed car; *Watson v. Dilts*, 116 Iowa, 252, 57 L. R. A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, sustaining right of woman to recover for nervous prostration caused by fright at stealthy approach of defendant on husband's property; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 85, 41 C. C. A. 40, 100 Fed. 755, upholding admissibility on question of fright or nervous shock of evidence of what was seen and heard by plaintiff after leaving car in railway wreck.

Cited in note (32 L. R. A. 143) on recovery of damages for miscarriage.

Distinguished in *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, denying right of recovery for miscarriage superinduced by fright at man dressed in woman's clothes; *Bucknam v. Great Northern R. Co.* 76 Minn. 378, 79 N. W. 98, denying right of action for sickness of wife, caused by abusive and violent language to husband by railway employee; *Sanderson v. Northern P. R. Co.* 88 Minn. 166, 60 L. R. A. 405, 97 Am. St. Rep. 509, 92 N. W. 542, holding damages not recoverable for fright of mother, due to attempt of conductor to put child off train.

Disapproved in *Spade v. Lynn & B. R. Co.* 168 Mass. 290, 38 L. R. A. 514, 60

Am. St. Rep. 393, 47 N. E. 88, denying right of action for physical injuries due solely to fright and mental disturbance caused by negligence; *Braun v. Craven*, 175 Ill. 417, 42 L. R. A. 205, 51 N. E. 657, denying liability consequent on mere fright, superinducing nervous shock, if it could not be reasonably anticipated to result from action or language producing it.

Previous condition of health as affecting right of recovery for injury.

Cited in *Watson v. Rinderknecht*, 82 Minn. 239, 84 N. W. 798, holding victim of assault entitled to damages directly resulting from it, though more liable to suffer damage because of previous injury; *Turner v. Nassau Electric R. Co.* 41 App. Div. 217, 58 N. Y. Supp. 490, sustaining liability of railroad for death of traveler whose skull was fractured, precipitating delirium tremens, which was the direct cause of death.

Liability for mental suffering.

Cited in *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 207, 63 Am. St. Rep. 343, 47 N. E. 694, denying liability for mental anguish unaccompanied by physical suffering; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 442, denying right to recover for mental anxiety induced by nondelivery of telegram; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, holding damages for mental anguish, resulting from negligent transmission of telegram, recoverable.

Cited in footnote to *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, which denies liability for insanity resulting from shock and excitement, without bodily injury.

Distinguished in *Chapman v. Western U. Teleg. Co.* 88 Ga. 771, 17 L. R. A. 433, 30 Am. St. Rep. 183, 15 S. E. 901, denying damages for mental anguish to receiver of delayed telegram announcing mortal illness of brother.

16 L. R. A. 205, *BUTLER v. JOYCE*, 9 Mackey, 191.

Right of recovery on lost instrument.

Cited in footnotes to *Kirkwood v. First Nat. Bank*, 24 L. R. A. 444, which holds indemnity bond required as condition for recovery on negotiable instrument lost before maturity; *Haug v. Riley*, 40 L. R. A. 244, which holds right to prove lost note by copy not taken away by statute; *Bank of Gilby v. Farnsworth*, 38 L. R. A. 843, which holds drawer of draft lost in mails during transportation from payee for collection discharged by delay in discovering loss.

16 L. R. A. 209, *WRONKOW v. OAKLEY*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521.

Release of dower.

Distinguished in *Security Sav. Bank v. Smith*, 38 Or. 77, 84 Am. St. Rep. 756, 62 Pac. 794, denying power to release inchoate right of dower under power of attorney to sell and mortgage "my lands."

16 L. R. A. 214, *STATE ex rel. WIESENTHAL v. DENNY*, 4 Wash. 135, 29 Pac. 991.

Municipal charters.

Cited in *Reeves v. Anderson*, 13 Wash. 22, 42 Pac. 625, holding right to make new charter included in right to "frame charter," though act concerning amendments invalid.

16 L. R. A. 220, HAEUSSLER v. MISSOURI IRON CO. 110 Mo. 188, 33 Am. St. Rep. 431, 19 S. W. 75.

Adverse possession.

Cited in footnote to Davis v. Williams, 54 L. R. A. 749, which sustains agent's right to acquire adverse title to principal's property occupied as part of contract of service.

Partition.

Cited in footnotes to Caldwell v. Snyder, 35 L. R. A. 198, which holds right of devisee to partition precluded by provision of will; Crocker v. Cotting, 39 L. R. A. 215, which holds agreement against partitioning land not implied on purchase in common of land subject to easement belonging to purchaser.

16 L. R. A. 223, NICHOLSON v. NATIONAL BANK, 92 Ky. 251, 17 S. W. 627.

When negotiable paper purchased.

Cited in footnote to Warman v. First Nat. Bank, 49 L. R. A. 412, which holds bank discounting negotiable paper and placing amount to holder's credit as deposit not purchaser.

Usury.

Cited in footnote to Danforth v. National State Bank, 17 L. R. A. 622, which holds national bank prohibited from discounting paper at more than lawful rate of interest.

Cited in note (56 L. R. A. 679) on forfeiture or other effect of taking or reserving illegal interest by national bank.

16 L. R. A. 225, SHIDELER v. STATE, 129 Ind. 523, 28 Am. St. Rep. 206, 28 N. E. 537, 29 N. E. 36.

Bar of former conviction.

Cited in DeBord v. People, 27 Colo. 380, 83 Am. St. Rep. 89, 61 Pac. 599, which holds person accusing himself of assault before justice, and being fined, not in jeopardy so as to successfully defend against prosecution for same offense.

Cited in footnote to Cooper v. Com. 45 L. R. A. 216, which holds acquittal on criminal charge bar to prosecution for perjury in denying commission of offense.

16 L. R. A. 228, VERMILLION COUNTY v. CHIPPS, 131 Ind. 56, 29 N. E. 1060.
County liability for negligence.

Cited in note (39 L. R. A. 39) on liability of counties in actions for torts and negligence.

— Defective bridges.

Cited in Parke County v. Wagner, 138 Ind. 611, 38 N. E. 171, holding that county's liability for injury to horse because of negligence in keeping bridge in repair has become law of land; Jasper County v. Allman, 142 Ind. 577, 39 L. R. A. 62, 42 N. E. 206, denying implied liability of counties for damages for failure to keep bridges in repair; Bailey v. Lawrence County, 5 S. D. 398, 49 Am. St. Rep. 881, 59 N. W. 219, denying liability of county for failure to keep bridge in repair, although made its duty to repair; Johnson County v. Reinier, 18 Ind. App. 121, 47 N. E. 642, sustaining demurrer to complaint for want of facts when negligence in construction of bridge was failure to maintain railing; Reinhart v. Martin

County, 9 Ind. App. 573, 37 N. E. 38, denying liability of county for failure to keep in repair bridge over ditch, which complaint showed not to be county bridge; Shelby County v. Blair, 8 Ind. App. 579, 36 N. E. 216, denying county's liability for acts of agents unless imposed by statute, but sustaining judgment for accident of bridge over mill race out of repair; Parke County v. Sappenfield, 6 Ind. App. 579, 33 N. E. 1012, affirming county's liability for failure to keep bridge and approaches in repair; Allen County v. Creviston, 133 Ind. 43, 32 N. E. 735, holding county liable in damages for causing by death, due to bridge, constructed of defective material, being allowed to become rotten; Bonebrake v. Huntington County, 141 Ind. 67, 40 N. E. 141, holding that bridge must have been constructed in anticipation of its use by traction engines to render county liable; Hardin County v. Coffman, 60 Ohio St. 535, 48 L. R. A. 458, footnote p. 455, 54 N. E. 1054, holding it question for jury whether use of bridge by traction engine should have been anticipated by commissioners.

— **Defective roads.**

Cited in Cones v. Benton County, 137 Ind. 406, 37 N. E. 272, holding county not liable for injuries due to defects in construction of free gravel roads.

— **Defective buildings.**

Cited in Vigo County v. Daily, 132 Ind. 74, 31 N. E. 531, which holds county not liable for negligence in care and control of courthouse; Morris v. Switzerland County, 131 Ind. 286, 31 N. E. 77, denying liability of county to a prisoner, for failure to keep jail in wholesome condition.

Contributory negligence.

Cited in Korrady v. Lake Shore & M. S. R. Co. 131 Ind. 263, 29 N. E. 1069, holding contributory negligence shown by traveler attempting to cross track in front of rapidly approaching train, which he saw; Cincinnati, I. St. L. & C. R. Co. v. Grames, 8 Ind. App. 136, 34 N. E. 613, holding contributory negligence not shown where traveler at crossing was struck by train he could not have seen or heard on account of obstructions; Oleson v. Lake Shore & M. S. R. Co. 143 Ind. 408, 32 L. R. A. 150, 42 N. E. 736, upholding direction of verdict against traveler who, with unobstructed view, tried to drive across track in front of engine; Chicago v. Kohlhof, 64 Ill. App. 353, refusing to sustain judgment against city for injury due to breaking of board walk over which safe weighing 1,400 pounds was being moved.

Demurrer.

Cited in Cleveland, C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 56, 53 N. E. 198, holding sustaining of demurrer to paragraph of answer harmless error, where all material facts provable under general denial.

Evidence of similar facts.

Cited in footnote to Bemis v. Temple, 26 L. R. A. 254, which upholds right to show effect on different horses of suspended flag.

Property in highways.

Cited in Missouri-Edison Electric Co. v. Weber, 102 Mo. App. 105, 76 S. W. 736, holding action maintainable by owner of manhole covers for their injury by unusually heavy load driven upon them.

16 L. R. A. 231, *MOYER v. BUCKS*, 2 Ind. App. 571, 50 Am. St. Rep. 251, 28 N. E. 992.

When personal judgment allowable.

Cited in *Beckett v. State*, 4 Ind. App. 137, 30 N. E. 536, declaring void, judgment in bastardy proceedings upon constructive notice not authorized by statute; *Louisville, N. A. & C. R. Co. v. State*, 8 Ind. App. 387, 35 N. E. 916 (dissenting opinion), majority holding personal judgment proper against railroad in action to foreclose drainage lien; *Jessup v. Jessup*, 7 Ind. App. 577, 34 N. E. 1017, which holds guardian cannot be appointed for insane person without process served upon him or his production in court.

Cited in footnotes to *Greenstreet v. Thornton*, 27 L. R. A. 735, which holds void, decree based on summons against dead man; *Cabanne v. Graf*, 59 L. R. A. 735, which holds void, act authorizing service, in personal action against non-resident, on agent in charge of business in state without seizure of property.

Substituted service.

Cited in footnotes to *Tillinghast v. Boston & P. R. Lumber Co.* 22 L. R. A. 49, which holds insufficient, service in other state on foreign corporation after order of publication; *Murray v. Murray*, 37 L. R. A. 626, which holds jurisdiction to subject property within territorial jurisdiction of court acquired by service by publication and appointment of receiver; *National Teleph. Mfg. Co. v. Du Bois*, 30 L. R. A. 628, which declines jurisdiction on service by publication in suit by foreign corporation against nonresident; *De La Montanya v. De La Montanya*, 32 L. R. A. 82, which denies jurisdiction to award alimony and custody of children in divorce suit on constructive service; *Bickerdike v. Allen*, 29 L. R. A. 782, which holds mailing and publishing notice of proceeding to revive judgment sufficient as against resident who cannot be found; *Kemper-Thomas Paper Co. v. Shyer*, 58 L. R. A. 173, which denies right to execution against other property in state for unpaid part of judgment against nonresident served by attachment and publication; *Capital City Bank v. Parent*, 18 L. R. A. 240, which holds creditor's bill cannot be based on judgment for money only, in attachment suit against non-resident served by publication; *Bernhardt v. Brown*, 36 L. R. A. 402, which holds execution sale under judgment on service by publication invalid as to property not attached in action; *Hartzell v. Vigen*, 35 L. R. A. 451, which holds requirement, in cases of service by publication, that affidavit be made of jurisdiction of "subject of the action," relates to the controversy between the parties.

Cited in note (50 L. R. A. 577, 578) on what service of process is sufficient to constitute due process of law.

16 L. R. A. 236, *DALY v. WISE*, 132 N. Y. 306, 44 N. Y. S. R. 422, 30 N. E. 837.

False representations.

Cited in *Stein v. Rice*, 23 Misc. 350, 51 N. Y. Supp. 320, holding there was no fraudulent concealment of usual decrease in water supply justifying rescission of lease; *Frank v. Bradley & C. Co.* 42 App. Div. 181, 58 N. Y. Supp. 1032, sustaining right of action for deceit in representing cellar of house being sold "as dry as a nut," when in fact it was wet; *Ryder v. Wall*, 29 Misc. 381, 60 N. Y. Supp. 535, sustaining right to recover disbursements in repair of house purchased under contract by one relying on false statement of facts made innocently; *Meserole v. Hoyt*, 161 N. Y. 62, 55 N. E. 274, holding that leased premises may

be abandoned, where cellar floor covered with water after rain and walls always damp; *Mitchell v. Stewart*, 187 Pa. 220, 40 Atl. 799, denying liability of lessor for explosion of gas in leased house, where secret defects or deficiency in gas apparatus not known; *Beers v. Hamburg-American Packet Co.* 62 Fed. 472, sustaining right to recover for false answer by agent of steamship company, upon which he knew booked passenger would rely; *Kountze v. Kennedy*, 72 Hun, 315, 25 N. Y. Supp. 682, which holds knowledge of falsity of representations by person making them, necessary element in action founded thereon; *Meyers v. Rosenback*, 5 Misc. 347, 25 N. Y. Supp. 521, holding evidence of false representations as to strength of building leased admissible in action for rent; *Myers v. Rosenback*, 13 Misc. 147, 34 N. Y. Supp. 63, upholding liability for false representations as to facts not known to be true; *Prahar v. Tousey*, 93 App. Div. 510, 87 N. Y. Supp. 845, holding lessee not relieved from contract where representations as to weight floors would bear were untrue.

Cited in footnote to *Angevine v. Knox-Goodrich*, 18 L. R. A. 264 which denies implied warranty that house leased for dwelling, habitable.

Cited in note (33 L. R. A. 453) on implied covenant in lease as to fitness of property for purpose intended.

Appeal when verdict directed.

Cited in *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 561, 39 N. Y. Supp. 432, holding finding conclusive on appeal when all contested facts submitted to court; *Howland v. Bates*, 3 Misc. 610, 22 N. Y. Supp. 557, holding that on appeal from judgment directed without request to go to jury, only inquiry is whether evidence sufficient to sustain verdict; *Mosher v. Providence Washington Ins. Co.* 12 Misc. 106, 33 N. Y. Supp. 85, holding that on appeal from judgment directed, essential facts assumed to have been found for successful party.

Distinguished in *Sigua Iron Co. v. Greene*, 31 C. C. A. 480, 59 U. S. App. 555, 88 Fed. 210, holding that plaintiff can contend that material facts are withdrawn from jury when court announces that only one question will be left to it, after denying motion to direct verdict.

Landlord's duty to disclose latent defects.

Cited in *Smith v. Donnelly*, 93 App. Div. 573, 87 N. Y. Supp. 893, holding landlord not absolutely liable for injury resulting from failure to call tenant's attention to latent defect in premises.

16 L. R. A. 239, *HOYT v. PEOPLE*, 140 Ill. 588, 30 N. E. 315.

Continuance in criminal cases.

Cited in *Keating v. People*, 160 Ill. 482, 43 N. E. 724, upholding validity of act regulating granting of continuances in criminal cases.

Cited in footnotes to *Fanton v. State*, 36 L. R. A. 158, which holds denial of continuance authorized by agreement for reading of statement as to what absent witnesses would testify to; *Atkins v. Com.* 32 L. R. A. 108, which authorizes denial of continuance on admission that absent witnesses will testify as alleged.

Conviction on uncorroborated evidence of accomplice.

Cited in *Cohn v. People*, 197 Ill. 484, 64 N. E. 306, refusing to sustain conviction for receiving stolen goods on uncorroborated evidence of the confessed thief; *Conley v. People*, 170 Ill. 593, 48 N. E. 911, refusing to sustain conviction for murder of illegitimate child on unsupported evidence of codefendant unable

to distinguish between right and wrong; *Campbell v. People*, 159 Ill. 26, 50 Am. St. Rep. 134, 42 N. E. 123, holding guilt of murder of infant not established upon uncorroborated evidence of depraved woman accusing herself as accomplice, in connection with other circumstances.

Sufficiency of indictment.

Cited in *Cochran v. People*, 175 Ill. 31, 51 N. E. 845, holding indictment for procuring miscarriage insufficient where it alleges "certain instrument" was administered.

Distinguished in *Graff v. People*, 208 Ill. 324, 70 N. E. 299, upholding conviction for conspiracy to defraud insurance company, although arson charged as overt act.

16 L. R. A. 243, *FLINT v. HUTCHINSON SMOKE BURNER CO.* 110 Mo. 492, 33 Am. St. Rep. 476, 19 S. W. 804.

Slander of title.

Cited in *Linville v. Rhoades*, 73 Mo. App. 222, which holds malice charged in slander of title to land where allegation is that defendant "wrongfully, intentionally, and without just cause" made the statements; *Thummel v. Holden*, 149 Mo. 685, 51 S. W. 404, holding that court of equity has not power, as a rule, to restrain libel on title.

What questions for equity.

Cited in *Chicago City R. Co. v. General Electric Co.* 74 Ill. App. 474, refusing to enjoin alleged libelous and derogatory statements claimed to be circulated to destroy property rights of corporation; *Walker v. Backus Heating Co.* 97 Wis. 163, 72 N. W. 230, holding court of equity should not interfere in case which involves infringement of patents, until controverted questions settled at law.

Cited in footnotes to *Shoemaker v. South Bend Spark Arrester Co.* 22 L. R. A. 332, which authorizes injunction against false claim of title to patent; *Dailey v. Superior Court*, 32 L. R. A. 273, which denies right to enjoin play in theater, based on facts of criminal case on trial; *Marlin Firearms Co. v. Shields*, 59 L. R. A. 310, which denies right to injunction against publishing unjust and malicious criticism of manufactured article; *Grand Rapids School Furniture Co. v. Haney School Furniture Co.* 16 L. R. A. 721, which authorizes injunction against using decree in patent case, obtained by fraud and collusion; *A. B. Farquhar Co. v. National Harrow Co.* 49 L. R. A. 755, which sustains right to enjoin letters or notices by owner of patent to destroy another's business by threatening suit for infringement.

Cited in notes (28 L. R. A. 466) on injunction against strikes; (32 L. R. A. 833, 834) on constitutional freedom of speech and of the press.

16 L. R. A. 247, *SEAGER v. McCABE*, 92 Mich. 186, 52 N. W. 299.

Rights of dowress in oil and gas wells.

Cited in *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 273, 113 Fed. 439, holding dowress of $\frac{1}{8}$ of land entitled to accounting for oil taken from oil field by remaindermen to prejudice of her life estate; *Stewart v. Tennant*, 52 W. Va. 580, 44 S. E. 223 (dissenting opinion), majority holding widow has interest in oil taken from land before assignment of dower.

Cited in footnotes to *Marshall v. Mellon*, 35 L. R. A. 816, which holds life tenant's right to operate for oil and gas limited to operations begun before life tenancy accrued; *Koen v. Bartlett*, 31 L. R. A. 128, which holds royalty on oil and gas lease incident of life estate; *Williamson v. Jones*, 38 L. R. A. 694, which holds life tenant, who is also cotenant of reversion, liable to account for oil extracted under belief of sole ownership.

16 L. R. A. 251, *LOUISVILLE, N. O. & T. R. CO. v. JORDAN*, 69 Miss. 939, 34 Am. St. Rep. 599, 11 So. 111.

Service of process on infant.

Cited in footnote to *Sloane v. Martin*, 28 L. R. A. 347, which denies necessity of actual service on infants in suit for sale of land in which they have interest.

Limit of legislative power.

Cited in footnotes to *People ex rel. Kern v. Chase*, 36 L. R. A. 105, which holds Torrens law unconstitutional as attempt to delegate judicial power to registrar of titles; *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional, act authorizing board of education to levy tax to pay claim for which no obligation exists.

16 L. R. A. 256, *COM. v. GRAVES*, 155 Mass. 163, 29 N. E. 579.

Habitual criminal statutes and ex post facto laws.

Followed in *Sturtevant v. Com.* 158 Mass. 599, 33 N. E. 648; *Com. v. Cody*, 165 Mass. 138, 42 N. E. 575, upholding validity of statute punishing habitual criminals, when date of larcenies in indictment subsequent to time statute went into effect; *Com. v. Walker*, 163 Mass. 228, 39 N. E. 1014, sustaining necessity of allegations of former convictions and sentences in indictment charging prisoner with being habitual criminal; *McDonald v. Massachusetts*, 180 U. S. 313, 45 L. ed. 547, 21 Sup. Ct. Rep. 389, Affirming 173 Mass. 326, 73 Am. St. Rep. 293, 53 N. E. 874, upholding statute punishing habitual criminal; *Re Miller*, 110 Mich. 678, 34 L. R. A. 408, 64 Am. St. Rep. 376, 68 N. W. 990, upholding statute as not *ex post facto*, passed while prisoner serving one sentence, which deprived him of time allowance for second conviction after passage of act; *Blackburn v. State*, 50 Ohio St. 438, 36 N. E. 18, sustaining sentence for life under statute providing for punishment of habitual criminal, passed after two convictions; *Iowa ex rel. Gregory v. Jones*, 128 Fed. 628, holding law providing term of imprisonment for one twice convicted of larceny constitutional, although applying to former convictions before passage of act.

Cited in footnotes to *People ex rel. Chandler v. McDonald*, 29 L. R. A. 834, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice; *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed; *People v. Hayes*, 23 L. R. A. 830, which holds change in statute authorizing slighter punishment not *ex post facto* law; *French v. Deane*, 24 L. R. A. 388, which holds void, act giving right to punitive damages as to existing cause of action.

Cited in note (34 L. R. A. 399, 403) on enhancing penalty of crime when committed by habitual criminals or prior offenders.

16 L. R. A. 257, *SHELDEN v. FOX*, 48 Kan. 356, 29 Pac. 759.

Contracts by public officials beyond term of office.

Cited in *Coffey County v. Smith*, 50 Kan. 354, 32 Pac. 30, holding county board about to be dissolved by operation of law cannot contract for official newspaper for following year.

Cited in footnotes to *Vincennes v. Citizens' Gaslight & Coke Co.* 16 L. R. A. 485, which holds city empowered to contract for gas or water supply beyond term of office of members of council; *McBean v. Fresno*, 31 L. R. A. 794, which upholds contract for term beyond limit of municipal board making same; *Gillan v. Normal School*, 24 L. R. A. 336, which holds power of board of regents to remove normal school teacher at pleasure cannot be limited by by-law or contract of board; *Millikin v. Edgar County*, 18 L. R. A. 447, which holds contract to employ powerhouse keeper for term beyond term of supervisors unauthorized; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, which holds that city may contract for water for period beyond terms of office of members of its legislative board.

16 L. R. A. 261, *HENDRICKSON v. GREAT NORTHERN R. CO.* 49 Minn. 245, 32 Am. St. Rep. 540, 51 N. W. 1044.

Negligence and presumptions as to.

Cited in *Hendrickson v. Great Northern R. Co.* 52 Minn. 341, 54 N. W. 189, holding contributory negligence of intestate question for jury, when only evidence of it is that he could have seen train on hill nearly 400 feet from crossing; *Hooper v. Great Northern R. Co.* 80 Minn. 401, 83 N. W. 440, sustaining verdict where brakeman was killed while uncoupling cars by negligence of engineer in failing to give signals before backing; *Lane v. Missouri P. R. Co.* 132 Mo. 31, 33 S. W. 1128 (dissenting opinion), majority holding that running away of team which bolted into train could not be laid to negligence of railroad.

Cited in footnotes to *Ward v. Southern P. Co.* 23 L. R. A. 715, which holds no presumption of company's negligence from finding of child's body on track; *Parish v. Western & A. R. Co.* 40 L. R. A. 364, which holds presumption of negligence from killing person on track overcome by showing that person sitting or lying on track at night; *Donald v. Chicago, B. & Q. R. Co.* 33 L. R. A. 492, which holds no presumption against railroad raised by failure to prove height of cars from which employee knocked by bridge; *Dixon v. Pluns*, 20 L. R. A. 699, which upholds presumption of negligence arising from fall of chisel on sidewalk from scaffold; *McLane v. Perkins*, 43 L. R. A. 487, which denies presumption of freedom from contributory negligence of employee drowned while using leaky punt.

Duty to look and listen at crossing.

Cited in *Woehrl v. Minnesota Transfer R. Co.* 82 Minn. 169, 52 L. R. A. 352, footnote p. 349, 84 N. W. 791, relieving traveler of necessity of stopping to look and listen, when he knew it was customary to have flagman out of sight when track clear; *Schneider v. Northern P. R. Co.* 81 Minn. 386, 84 N. W. 124, refusing to hold one relieved from duty of looking at crossing, though he was relieved from listening, on account of noise; *Klotz v. Winona & St. P. R. Co.* 68 Minn. 349, 71 N. W. 257, holding traveler not necessarily negligent at crossing when noises of mill close by, and whistling of engine, might have distracted attention; *Struck v. Chicago, M. & St. P. R. Co.* 58 Minn. 300, 59 N. W. 1022, which holds failure of deceased to look and listen cannot be assumed when he was obliged to approach

crossing through hollow, close to track; *Tuthill v. Northern P. R. Co.* 50 Minn. 115, 52 N. W. 384, leaving to jury question of contributory negligence of girl in charge of cattle not riding forward to crossing before cattle driven over; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 655, 95 N. W. 161 (dissenting opinion), majority holding that presumption of exercise of instinct of self preservation not affirmative evidence of due care at crossing.

Cited in footnotes to *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow, in not looking and listening before crossing railroad track, for jury; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds recovery not prevented by failure to look when within 30 feet of track; *Van Anken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds that failure to look and listen on dark night will not prevent recovery for injury by engine running backward; *Betts v. Lehigh Valley R. Co.* 45 L. R. A. 261, which sustains right of person approaching crossing where train is receiving or discharging passengers, to rely on rule requiring other train to stop.

Burden of proof as to cause of death.

Cited in footnote to *Anthony v. Mercantile Mut. Acci. Asso.* 26 L. R. A. 406, which throws on insurance company burden of proving that accidental death was from excepted cause.

16 L. R. A. 268, *LOUISVILLE & N. R. CO. v. NORTHINGTON*, 91 Tenn. 56, 17 S. W. 880.

Safety of appliances.

Cited in *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493, holding railroad liable for injury to employee from failure to provide safe appliances.

Assumption of risk.

Distinguished in *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 387, 70 Am. St. Rep. 687, 47 S. W. 493, which holds section hand assumed risk of defective brake, of which defects he had previous knowledge.

Elements of damage.

Cited in footnote to *Butler v. Manhattan R. Co.* 26 L. R. A. 46, which holds miscarriage not element of recovery in action for personal injuries to wife.

Injuries accelerating death.

Cited in *Meekins v. Norfolk & S. R. Co.* 134 N. C. 219, 46 S. E. 493, holding injury hastening death from disease, actionable.

16 L. R. A. 271, *MANNING v. CHESAPEAKE & O. R. CO.* 36 W. Va. 329, 32 Am. St. Rep. 859, 15 S. E. 81.

Liability for injury to licensee.

Followed in *Holland v. Sparks*, 92 Ga. 759, 18 S. E. 990, sustaining nonsuit where boy standing some distance from track was killed by derailment of train.

Cited in *Ritz v. Wheeling*, 45 W. Va. 266, 43 L. R. A. 151, 31 S. E. 993, sustaining verdict directed for defendant, where child was drowned in city reservoir while trespassing; *Illinois C. R. Co. v. Hopkins*, 200 Ill. 124, 65 N. E. 656, Affirming 100 Ill. App. 596, holding party injured by falling over skid on unlighted platform, while on way to furnish meals to mail clerks, not mere licensee;

Poling v. Ohio River R. Co. 38 W. Va. 660, 24 L. R. A. 222, 18 S. E. 782, setting aside verdict where decedent was a mere looker-on when struck by arm of mail crane broken off from moving train when postal clerk caught mail sack; Manlove v. Cleveland, C. C. & St. L. R. Co. 29 Ind. App. 699, 65 N. E. 212, holding carrier not liable for accidental killing of one using footpath with implied license; Snyder v. Philadelphia Co. (W. Va.) 63 L. R. A. 898, 46 S. E. 368, holding owner of oil well liable for injury to one using highway close by, through negligent blowing off of well.

Cited in footnotes to Benson v. Baltimore Traction Co. 20 L. R. A. 714, which denies right of recovery to student falling into uncovered vat while class inspecting power house under permission; Gibson v. Leonard, 17 L. R. A. 588, which holds owner not liable for injury to fire insurance patrolman entering burning building to save property; Ryerson v. Bathgate, 57 L. R. A. 303, which denies liability of owner for injury to one using premises for purpose not authorized by invitation.

Distinguished in Sesler v. Rolfe Coal & Coke Co. 51 W. Va. 321, 41 S. E. 216, holding owner liable for negligent injury to contractor repairing coal tippie.

Injury to employees.

Cited in Ketterman v. Dry Fork R. Co. 48 W. Va. 612, 37 S. E. 683, sustaining direction of verdict for defendant where loaded car, left on track, ran away and into hand car on which section hand was injured; Hopkins v. Nashville, C. & St. L. R. Co. 96 Tenn. 436, 32 L. R. A. 362, 34 S. W. 1029, sustaining demurrer to evidence and dismissal of suit where deceased brakeman, after giving danger signal, fell from car upon sudden shutting off of steam by engineer.

16 L. R. A. 277, GANDOLFO v. HARTMAN, 49 Fed. 181.

Illegality of contracts.

Cited in footnote to Brooks v. Cooper, 21 L. R. A. 617, which holds void, contract between newspapers for alternate selection and division of profits of public printing.

Rights of aliens.

Cited in notes (31 L. R. A. 177) on alien's right to inherit; (31 L. R. A. 85) on effect of state Constitutions and statutes on question of inheritance by or from alien; (32 L. R. A. 177) on effect of treaties on alien's right to inherit.

16 L. R. A. 278, STATE *ex rel.* MIZE v. McELROY, 44 La. Ann. 796, 32 Am. St. Rep. 355, 11 So. 133.

Election acts and defective ballots.

Cited in Morris v. Board of Canvassers, 49 W. Va. 257, 38 S. E. 500, which holds provisions requiring names of candidates to be voted for to be in one column, mandatory.

Cited in footnotes to State *ex rel.* McCarthy v. Moore, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election; Lindstrom v. Manistee County, 19 L. R. A. 172, which refuses to exclude ballot with unauthorized vignette; State *ex rel.* Phelan v. Walsh, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; State *ex rel.* Baxter v. Ellis, 17 L. R. A. 382, which requires rejection in municipal election of ballots with device upon them; Eaton v. Brown,

17 L. R. A. 697, which holds void, ballot law prohibiting marking elsewhere of ballot marked opposite name of political party.

Cited in note (25 L. R. A. 484) on how far right to vote is absolute.

Criticized in *State ex rel. Orr v. Fawcett*, 17 Wash. 205, 49 Pac. 346, holding ballots marked on wrong side of name, or with waving lines, or where mistakes evidently intended to be corrected, should not be rejected.

16 L. R. A. 281, *WILLIS v. ST. PAUL SANITATION CO.* 48 Minn. 140, 31 Am. St. Rep. 626, 50 N. W. 1110.

Stockholder's liability.

Cited in *Eau Claire Nat. Bank v. Benson*, 106 Wis. 630, 82 N. W. 604, declaring stockholder's liability joint and to be decided for benefit of all creditors in action in equity; *Hanson v. Davison*, 73 Minn. 461, 76 N. W. 254, permitting ancillary action by creditor of corporation to collect corporate debt out of property of nonresident stockholder; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 138, 83 N. W. 36, upholding power of legislation to modify or change existing remedy against stockholders; *Re Marshall Paper Co.* 95 Fed. 423, holding that creditors may obtain judgment against bankrupt corporation as prerequisite to enforcing statutory liability of directors; *Parker v. Carolina Sav. Bank*, 53 S. C. 591, 69 Am. St. Rep. 888, 31 S. E. 673, holding liability of stockholders not dependent on their stock, but amount of their stock; *Finney v. Guy*, 106 Wis. 278, 49 L. R. A. 495, 82 N. W. 595 (dissenting opinion), majority refusing to enforce in ancillary action, liability of stockholder under laws of sister state with same provisions.

Title of act expressing subject.

Cited in *State v. Courtney*, 27 Mont. 385, 71 Pac. 308, upholding act as expressing its subject in title, where it amended sections of Political Code relating to liquor, and added a section "regarding licenses;" *Kelly v. Minneapolis City*, 57 Minn. 300, 26 L. R. A. 97, 47 Am. St. Rep. 605, 59 N. W. 304, holding subject relating to damages for changing grade of street and providing assessment, expressed in act "amending" section of city charter; *Winters v. Duluth*, 82 Minn. 130, 84 N. W. 788, holding words "other public grounds," following word "streets" in title of act, not indication that statute limited to public grounds of same kind as streets; *South St. Paul v. Lamprecht Bros. Co.* 31 C. C. A. 587, 60 U. S. App. 78, 88 Fed. 451, upholding act, as expressing but one subject in its title, "to Amend 'an Act to Incorporate' " city "and to Authorize said City to Issue Bonds;" *Meul v. People*, 198 Ill. 260, 64 N. E. 1106, declaring amendment including "wild fowl and birds" in game laws intended to protect birds other than game birds.

Effect of Constitution or statute on prior obligations.

Cited in *Minneapolis & St. L. R. Co. v. Gardner*, 177 U. S. 341, 44 L. ed. 798, 20 Sup. Ct. Rep. 656, holding self-executing provision of Constitution imposing liability on stockholders does not exempt stockholders of new corporation formed by consolidation of old ones.

Cited in footnotes to *Kirkman v. Bird*, 58 L. R. A. 670, which sustains as to prior obligations, statute exempting wages for sixty days preceding levy, *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power

to change remedy for enforcing trust deed; *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit, without extending period of limitations; *Criswell v. Montana C. R. Co.* 33 L. R. A. 554, which holds act imposing liability on domestic railroad companies for fellow servant's negligence abrogated by adopting Constitution against special privileges to foreign corporations.

When Constitution self-executing.

Cited in *State v. Kyle*, 166 Mo. 302, 56 L. R. A. 120, footnote p. 115, 65 S. W. 763, declaring amendment that "no person shall be prosecuted criminally. . . otherwise than by indictment or information" self-executing; *McKusick v. Seymour, S. & Co.* 48 Minn. 167, 50 N. W. 1114, declaring section creating liability of stockholders for corporate debts self-executing, and such debts recoverable in sequestration proceeding; *Nickerson v. Crawford*, 74 Minn. 369, 73 Am. St. Rep. 354, 77 N. W. 292, holding provisions declaring property exempted from debt shall be liable for certain classes of debts, self-executing; *Illinois C. R. Co. v. Ihlenberg*, 34 L. R. A. 397, footnote p. 393, 21 C. C. A. 552, 43 U. S. App. 726, 75 Fed. 879, holding clause, that knowledge by employee injured of unsafe condition of machinery and appliances is no defense, self-executing; *Anderson v. Whatcom County*, 15 Wash. 53, 33 L. R. A. 140, footnote p. 137, 45 Pac. 665, holding provision that cities of certain population entitled to salaried justices of peace, self-executing; *Whitman v. National Bank*, 176 U. S. 562, 44 L. ed. 590, 20 Sup. Ct. Rep. 477, holding that words "shall be secured" declare liability of stockholders, and to that extent is self-executing; *Lamborn v. Bell*, 18 Colo. 349, 20 L. R. A. 242, 32 Pac. 989, upholding right to condemn right of way for ditch to convey water for private use under self-executing Constitution granting such right of way to all persons; *Russell v. Ayer*, 120 N. C. 196, 37 L. R. A. 251, 27 S. E. 133 (dissenting opinion), majority holding provisions that Assembly shall levy capitation tax not self-executing so as to overrule different ratio in statute; *Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co.* 62 C. C. A. 87, 127 Fed. 87, certifying questions to Supreme Court whether provision in state Constitution self-executing, there being no decision of state supreme court on question.

Cited in footnotes to *Washingtonian Home v. Chicago*, 29 L. R. A. 798, which holds constitutional prohibition of municipalities from making donation to private corporations, self-executing; *People ex rel. McClelland v. Roberts*, 31 L. R. A. 399, which holds unnecessary, re-enactment of civil service law after adoption of Constitution containing self-executing provisions.

16 L. R. A. 288, *MILLER v. STODDARD*, 50 Minn. 272, 52 N. W. 895.

Priority of liens.

Cited in *Miller v. Stoddard*, 54 Minn. 489, 56 N. W. 131, holding first mortgage superior to mechanics' liens, though unrecorded, but inferior to second mortgage, recorded, which is subordinate to mechanics' liens for work begun before made; *Fletcher v. Kelly*, 88 Iowa, 492, 21 L. R. A. 353, 55 N. W. 474, giving priority to unrecorded mortgage over mechanic's lien; *Peninsular General Electric Co. v. Norris*, 100 Mich. 505, 59 N. W. 151, holding mechanic's lien inferior to unrecorded lease; *Noerenberg v. Johnson*, 51 Minn. 79, 52 N. W. 1069, which holds unrecorded mortgage superior to mechanic's lien.

16 L. R. A. 291, GERMAN AMERICAN INS. CO. v. COMMERCIAL F. INS. CO. 95 Ala. 469, 11 So. 117.

Contracting with reference to custom.

Cited in *Anderson v. Whittaker*, 97 Ala. 692, 11 So. 919, which holds alleged custom in building houses in locality which permits all kinds of defects, unreasonable; *Simon v. Johnson*, 101 Ala. 373, 13 So. 491, holding that custom of paying traveling salesmen for goods ordered does not authorize payment to such agent unless principal shown to have had notice of it; *Buyck v. Schwing*, 100 Ala. 359, 14 So. 48, refusing to uphold instruction that parties contracted with reference to custom of insuring, when nothing shown as to length of time of custom or knowledge of one party as to its existence; *Redwine v. Sides*, 95 Ala. 369, 11 So. 210, which holds that parties contracted with reference to well-known custom in serving mare.

Reinsurance.

Cited in footnotes to *Chalaron v. Insurance Co. of N. A.* 36 L. R. A. 742, which holds that failure of original insurer to bear any part of risk, because entire cargo not put on board as expected, will not avoid reinsurance for fraud; *Hunt v. New Hampshire Fire Underwriters' Asso.* 38 L. R. A. 514, which holds reinsurer liable for whole amount of loss on insolvency of prior insurer.

16 L. R. A. 295, *MT. MANSFIELD HOTEL CO. v. BAILEY*, 64 Vt. 151, 24 Atl. 136.

Indorser's liability.

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

16 L. R. A. 299, *HENDERSON v. PHILADELPHIA & R. R. CO.* 144 Pa. 461, 27 Am. St. Rep. 652, 22 Atl. 851.

Proof of similar acts of negligence.

Followed in *Hygienic Plate Ice Mfg. Co. v. Raleigh & A. Air-Line R. Co.* 126 N. C. 800, 36 S. E. 279, holding it error to admit evidence of other fires set by other engines before and after fire in question, where evidence clearly pointed to particular engine.

Approved in *Alabama G. S. R. Co. v. Johnson*, 128 Ala. 295, 29 So. 771, holding evidence admissible that engines of defendant's road habitually threw large amount of sparks going up grade, where offending engine unidentified.

Cited in *Thomas v. New York C. & St. L. R. Co.* 182 Pa. 543, 41 W. N. C. 146, 38 Atl. 413, holding evidence admissible of fires set by certain engine on same day fire occurred on plaintiff's land; *Van Steuben v. Central R. Co.* 178 Pa. 377, 34 L. R. A. 580, 39 W. N. C. 221, 35 Atl. 992, holding admissible, evidence that sparks were thrown to considerable distance by certain engine, though provided with spark arrester; *Matthews v. Pittsburg & L. E. R. Co.* 18 Pa. Super. Ct. 15, admitting evidence that sparks causing fire were emitted from particular locomotive, notwithstanding testimony to sufficiency of spark arrester; *Brown v. Benson*, 101 Ga. 758, 29 S. E. 215, holding admissible, evidence of defective condition of locomotive in setting out fires two months, and also ten days, before fire in question; *Thatcher v. Maine C. R. Co.* 85 Me. 510, 27 Atl. 519, which holds evidence of fires set by several locomotives about time of fire in question admissible, before engine

setting fire identified; *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 41, 50 N. E. 1023, declaring inadmissible, evidence of fires set by other engines than that identified at other places on the line; *Chicago, I. & L. R. Co. v. Gilmore*, 22 Ind. App. 469, 53 N. E. 1078, holding it error to refuse instruction that, if evidence disclosed fire set by particular engine, testimony of other fires not set by that engine should be disregarded; *Dunning v. Maine C. R. Co.* 91 Me. 99, 64 Am. St. Rep. 208, 39 Atl. 352, which holds that when engine setting fire not fully identified, evidence that fires were set in vicinity by other locomotives admissible to show that fires may be set by locomotives; *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 226, 56 N. E. 451, excluding evidence of other fires set by particular engine at other places, when it was not identified as engine setting this fire; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 463, 65 N. W. 176, which holds inadmissible, evidence of fire set to pine stump by particular engine, prior to fire in question, where sparks not shown to be of unusual size or thrown to unusual distance; *Lake Street Elev. R. Co. v. Peterson*, 93 Ill. App. 121, holding admissible, evidence that engines of defendant's road habitually threw large amount of sparks going up grade, when offending engine unidentified; *Van Steuben v. Central R. Co.* 178 Pa. 377, 34 L. R. A. 580, 39 W. N. C. 221, 35 Atl. 992, holding inadmissible, evidence of cinders falling from engines of elevated road fourteen months to two years before injury; *Baker v. Hagey*, 177 Pa. 140, 42 W. N. C. 302, 55 Am. St. Rep. 712, 35 Atl. 705, permitting evidence in action for injury, of prior discharges of steel from building where ingot steel broken by dynamite; *Stephenson v. Pennsylvania R. Co.* 20 Pa. Super. Ct. 164, holding negligence of railway in causing loss by fire provable by circumstantial evidence; *Galveston, H. & S. A. R. Co. v. Chittim*, 31 Tex. Civ. App. 45, 71 S. W. 294, holding evidence of dropping of sparks by passing engines competent on question of cause of fire.

Cited in footnote to *Bemis v. Temple*, 26 L. R. A. 254, which upholds right to show effect on different horses of suspended flag.

Cited in note (17 L. R. A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury.

Rule as to appliances for safety.

Cited in *Buente v. Pittsburg, A. & M. Traction Co.* 2 Pa. Super. Ct. 190, stating rule as to pilots, fenders, and like appliances for safety to be adoption of best precautions in general use, and which experience has shown to be effectual; *Fritsch v. New York & I. C. R. Co.* 93 App. Div. 558, 87 N. Y. Supp. 942, holding that absence of fenders may be considered upon question of negligence in running over boy.

16 L. R. A. 305, *LEONARD v. CLOUGH*, 133 N. Y. 292, 31 N. E. 93.

What passes with conveyance.

Cited in *Banta v. Merchant*, 45 App. Div. 143, 61 N. Y. Supp. 218, holding that tenant in common can recover value of interest in crop growing on land of another, sold in partition with notice to purchaser that interest in crop reserved; *Kirchman v. Lapp*, 46 N. Y. S. R. 689, 19 N. Y. Supp. 831, which holds that play house constructed by boys upon no foundation and nailed to fence does not pass with deed of real estate; *Hawver v. Wright*, 21 Misc. 213, 79 N. Y. S. R. 659, 45 N. Y. Supp. 659, holding evidence of parol reservation of life interest in real estate conveyed by absolute deed inadmissible.

Cited in footnotes to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Peaks v. Hutchinson*, 59 L. R. A. 279, which holds that building on stone posts, erected under parol agreement that it shall remain builder's, does not pass to bona fide purchaser of land; *Beeler v. C. C. Mercantile Co.* 60 L. R. A. 283, which holds that hotel building affixed to and conveyed with land cannot afterward become chattel by mere agreement of parties.

16 L. R. A. 308, *HULL v. STATE*, 29 Fla. 79, 30 Am. St. Rep. 95, 11 So. 97.

Legislative power over vested rights.

Followed in *State ex rel. Stieff v. Bradshaw*, 39 Fla. 141, 22 So. 296, holding purchaser at tax sale entitled to deed at expiration of redemption period, notwithstanding statute extending period.

Cited in *State ex rel. Lewis v. Bradshaw*, 35 Fla. 314, 17 So. 642, allowing mandamus to compel issuance of tax deed to which tax purchaser entitled prior to passage of act extending period of redemption; *State ex rel. Waldo v. Fylpaa*, 3 S. D. 588, 54 N. W. 599, holding act extending time for redemption of lands sold for taxes inapplicable to prior sales.

Cited in footnotes to *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit, without extending period of limitations; *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy.

16 L. R. A. 313, *LOVETT v. STATE*, 29 Fla. 384, 11 So. 176.

Jurisdiction of appellate court.

Cited in *Underhill v. Jericho*, 66 Vt. 186, 23 Atl. 879, holding that appellate court, having heard cause and remanded it to lower court, exhausted its jurisdiction; *Brown v. State*, 29 Fla. 498, 11 So. 181, which holds that appellate court has lost jurisdiction of cause after remittitur issued and filed in inferior court; *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 396, 22 So. 685, holding that application to correct record on certiorari must be made in time or it will be denied; *French v. State*, 85 Wis. 409, 21 L. R. A. 405, 39 Am. St. Rep. 855, 55 N. W. 566, holding record must show that one convicted of crime was present at trial and in court when verdict rendered or sentence pronounced; *State v. Marsh*, 134 N. C. 185, 47 S. E. 6, restoring criminal case to docket upon discovery that it was decided upon false record.

Distinguished in *Glaser v. Hackett*, 38 Fla. 89, 20 So. 820, which holds corrections to bill of exceptions must be made in lower court, and amended record brought up by certiorari.

16 L. R. A. 318, *GULF, C. & S. F. R. CO. v. HENRY*, 84 Tex. 678, 19 S. W. 870.

Passenger's rights on ticket.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Kinsley*, 27 Ind. App. 147, 87 Am. St. Rep. 245, 60 N. E. 169, holding passenger purchasing ticket good for return on certain date, having begun return in time, cannot be refused carriage through fault of railroad employee, where compelled to change cars; *International & G. N. R.*

Co. v. Best, 93 Tex. 348, 55 S. W. 315, holding passenger not entitled to stop over on continuous passage ticket, notwithstanding statement to that effect by conductor.

Cited in footnote to Pennsylvania R. Co. v. Parry, 22 L. R. A. 251, which holds round-trip ticket by specified "branch," good on main line only on trains connecting with branch trains.

Cited in note (28 L. R. A. 776) on right of passenger to stop over.

16 L. R. A. 321, BINGEL v. VOLZ, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13.
Construction of wills.

Cited in Eckford v. Eckford, 91 Iowa, 62, 26 L. R. A. 373, footnote p. 270, 58 N. W. 1093 (dissenting opinion), majority holding that quarter section of land passes under devise erroneously describing quarter, but correctly describing section; Fox v. Fox, 102 Tenn. 85, 50 S. W. 765, holding surplus under will falling to improvident son not intended to be impressed with trusts and limitations defined in prior specific bequest to him; Re Young, 123 Cal. 344, 55 Pac. 1011, holding clause directing that two deeds be handed to husband of testatrix, and, on his death, to another person, does not devise land owned by her; Williams v. Williams, 189 Ill. 509, 59 N. E. 966, refusing to reform will by bringing together descriptions of three parcels of land in order to give effect to devise of land wrongly described; Henderson v. Harness, 176 Ill. 306, 52 N. E. 68, which holds devise to one for life, without intervention of trustee, subjects interest to lien of judgments against life tenant prior to death of testator; Perry v. Bowman, 151 Ill. 33, 37 N. E. 680, permitting evidence of what "certain real estate advanced" by testator was, to give effect to his intention; Schlottman v. Hoffman, 73 Miss. 198, 55 Am. St. Rep. 527, 18 So. 893, holding evidence admissible to explain whether figures used designated legacy of \$5 or \$500, and referring particularly to annotation in 16 L. R. A. 321; Vestal v. Garrett, 197 Ill. 405, 64 N. E. 345, holding evidence of extraneous facts inadmissible to vary unambiguous words of will; Re Lynch, 142 Cal. 377, 75 Pac. 1086, holding devise of land rendered ineffective by false description.

Cited in footnote to Whitcomb v. Rodman, 28 L. R. A. 149, which holds extrinsic evidence admissible to identify land devised by incorrect description.

Distinguished in Huffman v. Young, 170 Ill. 297, 49 N. E. 570, striking out of will certain false words in description of premises, in order to arrive at intention of testator.

16 L. R. A. 326, SONTAG v. BIGELOW, 142 Ill. 143, 31 N. E. 674.

Rights of cotenants.

Cited in Berry v. Seawall, 13 C. C. A. 110, 31 U. S. App. 30, 65 Fed. 751, holding that parol partition, acquiesced in for any considerable time, estops anyone joining in it and accepting exclusive possession, from asserting right in violation thereof; Brumback v. Brumback, 198 Ill. 76, 64 N. E. 741, holding that purchaser of interest of tenant in common acquires no rights against cotenant by possession, without actual notice that it is adverse; Converse v. Calumet River R. Co. 195 Ill. 207, 62 N. E. 887, which holds judgment in condemnation, followed by payment, is not color of title within statute of limitations; Rann v. McTiernan, 187 Ill. 197, 58 N. E. 390, which holds that parol partition to vest legal title in severalty must be accompanied by deed; Boyd v. Boyd, 176 Ill. 45, 68 Am. St. Rep.

169, 51 N. E. 782, holding possession not adverse where cotenant, a minor, had no knowledge of his rights, and assertion of title was not absolutely hostile to him; McMahon v. Torrence, 163 Ill. 282, 45 N. E. 269, refusing to recognize statute of limitations as bar to action for partition, where cotenant's interest was recognized within period; Van Buskirk v. Van Buskirk, 148 Ill. 24, 35 N. E. 383, which holds that trust results in favor of one of two brothers living on same property, who contributed half of purchase money toward purchase, where title taken in name of other brother, whether parol partition or not.

Cited in note (18 L. R. A. 789) on what title or interest will support action of ejectment.

16 L. R. A. 330, LARSON v. METROPOLITAN STREET R. CO. 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. 416.

Liability for damage to landowner.

Cited in Mosier v. Oregon Nav. Co. 39 Or. 261, 87 Am. St. Rep. 652, 64 Pac. 453, holding railroad liable for sliding of earth of adjoining owner into excavation made by it while repairing right of way; Springfield Waterworks Co. v. Jenkins. 62 Mo. App. 82, holding that owner of land cannot affect natural flow of stream percolating into subterranean channel, so as to injure one whose springs are fed therefrom.

Duty to support building.

Cited in Delaney v. Bowman, 82 Mo. App. 256, holding that owner of building has right to rely on voluntary promise by adjoining owner that he will protect wall while excavating on own premises; Gildersleeve v. Hammond, 109 Mich. 439, 33 L. R. A. 52, 67 N. W. 519, holding owner of building relieved of necessity of shoring it up when adjoining owner promised to support it while excavating; Walters v. Hamilton, 75 Mo. App. 247, holding that owner of land has no natural easement for support of his building upon land of his neighbor; Eads v. Gains, 58 Mo. App. 501, upholding right of one excavating own land, to recover expenses of shoring up adjoining owner's wall after timely notice of intention to excavate; Gildersleeve v. Hammond, 109 Mich. 436, 33 L. R. A. 49, 67 N. W. 519, sustaining right of action for damages caused by fall of building standing nearly 5 feet from boundary in sandy soil, undermined by excavating on adjoining lot without supporting side of excavation; Davis v. Summerfield, 131 N. C. 353, 63 L. R. A. 493, footnote p. 493, 92 Am. St. Rep. 781, 42 S. E. 818, 45 S. E. 654, holding it to be duty of one about to excavate to notify adjoining owner of proposed extent thereof; Carpenter v. Reliance Realty Co. 103 Mo. App. 490, 77 S. W. 1004, holding duty devolves upon owner, upon notice of another's intention to excavate, to protect buildings.

Cited in footnote to Clemens v. Speed, 19 L. R. A. 240, which denies to party-wall owners, reciprocal easement from support of buildings.

Independent contractor.

Cited in Scott v. Springfield, 81 Mo. App. 325, holding city liable for negligent injury to contractor's servant when city's engineer had supervision, which included even discharge of employees; Independence v. Slack, 134 Mo. 78, 34 S. W. 1094, holding lot owner not liable for negligence of independent contractor laying sidewalk, because engaging person to supervise the work; Gayle v. Missouri Car &

Foundry Co. 177 Mo. 448, 76 S. W. 987, holding independent contractor not rendered servant by fact that work is supervised by employer.

Cited in footnotes to Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former, though building heated by independent contractor; Boomer v. Wilbur, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; Peerless Mfg. Co. v. Bagley, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; Hoff v. Shockley, 64 L. R. A. 538, which holds property owner not liable for injuries to traveler by negligent obstruction of street by independent contractor.

Res gestæ.

Cited in Eagle Constr. Co. v. Wabash R. Co. 71 Mo. App. 631, holding statements of one's servants while in act of conversion admissible.

16 L. R. A. 335, GLASS v. FREEBURG, 50 Minn. 386, 52 N. W. 900:

Priority of liens.

Cited in Wentworth v. Tubbs, 53 Minn. 395, 55 N. W. 543, declaring mechanic's lien for making plans in architect's office not superior to mortgage given before work on ground begun; Miller v. Stoddard, 54 Minn. 489, 56 N. W. 131, granting preference to mechanics' liens over mortgage executed after work begun.

Cited in footnotes to Smith v. Neubauer, 33 L. R. A. 685, which authorizes lien for materials furnished to subcontractors as well as to contractors; Hightower v. Bailey, 49 L. R. A. 255, which sustains lien to subcontractors or material men, irrespective of notice of claim or state of account between owner and principal contractor; Green v. Williams, 19 L. R. A. 478, which holds subcontractor's right to lien not lost by contractor's waiver or estoppel.

Distinguished in Gardner v. Leck, 52 Minn. 525, 54 N. W. 746, subordinating to all mechanics' liens mortgages made subsequent to work begun or material furnished on ground.

16 L. R. A. 337, JACKSONVILLE, T. & K. W. R. CO. v. GALVIN, 29 Fla. 636, 11 So. 231.

Liability of railroad for negligence.

Cited in Wilkinson v. Pensacola & A. R. Co. 35 Fla. 87, 17 So. 71, sustaining judgment for defendant where evidence failed to prove allegation that fireman threw piece of wood from passing train, by which traveler injured; Walsh v. Western R. Co. 34 Fla. 11, 15 So. 686, sustaining allegations of neglect in constructing track and in constructing cars so that plaintiff's intestate was thrown from his engine by train breaking apart.

Cited in footnote to Dewey v. Detroit, G. H. & M. R. Co. 22 L. R. A. 292, which holds railroad company not liable for injury to brakeman by load projecting beyond end of flat car.

Who are fellow servants.

Cited in footnote to Dewey v. Detroit, G. H. & M. R. Co. 16 L. R. A. 342, which holds car inspector and brakeman not fellow servants.

Cited in note (18 L. R. A. 794) on what constitutes common employment.

16 L. R. A. 342, *DEWEY v. DETROIT, G. H. & M. R. CO.* 97 Mich. 343, 52 N. W. 942.

Negligence of fellow servants.

Cited on rehearing in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 329, 22 L. R. A. 293, footnote p. 292, 37 Am. St. Rep. 348, 56 N. W. 750, holding company not liable for injury to brakeman from load projecting beyond end of flat car, due to negligence of inspector.

Cited in *Beesley v. F. W. Wheeler & Co.* 103 Mich. 212, 27 L. R. A. 271, 61 N. W. 658, holding that ship riveter cannot recover for injuries caused by negligence of carpenters in constructing scaffold.

Who are fellow servants.

Cited in footnotes to *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Buck v. New Jersey Zinc Co.* 60 L. R. A. 453, which holds blacksmith in factory working link for chain to keep box of dump car in position, fellow servant of one using car.

Knowledge of danger as affecting liability.

Cited in notes (41 L. R. A. 123) on knowledge as element of employer's liability to injured servant.

Distinguished in *Brennan v. Michigan C. R. Co.* 93 Mich. 159, 53 N. W. 358, denying right of recovery for death of brakeman coupling cars loaded with logs, with knowledge of rule calling attention to method of transporting same, and requiring him to use stick.

Vice principalship.

Cited in note (54 L. R. A. 161) on vice principalship as determined with reference to character of act which caused injury.

16 L. R. A. 345, *HEFFRON v. DETROIT CITY R. CO.* 92 Mich. 406, 31 Am. St. Rep. 601, 52 N. W. 802.

Passenger's right of transportation.

Cited in *Van Dusan v. Grand Trunk R. Co.* 97 Mich. 442, 37 Am. St. Rep. 354, 56 N. W. 848, limiting recovery for peaceable ejection from train to value of return ticket passenger was deprived of by mistake of conductor; *Jenkins v. Brooklyn Heights R. Co.* 29 App. Div. 12, 51 N. Y. Supp. 216, holding acceptance of transfer ticket from one line of street to another does not alter rights of passenger who has paid his fare; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 187, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), majority holding ejection of passenger tendering transfer on wrong line, given through negligence of another conductor, unjustifiable; *Brown v. Rapid R. Co.* 130 Mich. 486, 90 N. W. 290, holding only extra fare paid after ejection recoverable by passenger tendering wrong coupon tickets on return trip, through mistake of first conductor.

Cited in footnotes to *Pine v. St. Paul City R. Co.* 16 L. R. A. 347, which holds passenger entitled to transportation over any line to which transfer ticket applicable; *Nashville Street R. Co. v. Griffin*, 49 L. R. A. 451, which denies authority to eject passenger who, after paying fare inside station, enters car which has stopped just outside station; *Curtis v. Louisville City R. Co.* 21 L. R. A. 649, which denies right to eject for nonpayment of fare, passenger receiving 45 cents as change for 50-cent piece; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes

ejection of one refusing to pay fare, and claiming right of carriage on transfer, without transfer ticket; *O'Rourke v. Citizens' Street R. Co.* 46 L. R. A. 614, which holds void, conditions on transfer check requiring passengers to ascertain correctness of date, time, and direction.

Wrongful disposition of street railway transfers.

Cited in footnote to *Ex parte Lorenzen*, 50 L. R. A. 55, which sustains penal ordinance against passenger selling or giving away street railway transfer.

16 L. R. A. 347, *PINE v. ST. PAUL CITY R. CO.* 50 Minn. 144, 52 N. W. 392.

Passenger's right of transportation.

Cited in *Vicksburg R. Power & Mfg. Co. v. Marlett*, 78 Miss. 874, 29 So. 62, refusing exemplary damages for ejecting passenger presenting unpunched transfer ticket; *Percy v. Metropolitan Street R. Co.* 58 Mo. App. 79, upholding right of railway to expel passenger for failure to pay fare, when he boarded car at point not indicated on ticket; *Appleby v. St. Paul City R. Co.* 54 Minn. 171, 40 Am. St. Rep. 308, 55 N. W. 1117, holding passenger entitled to recover for expulsion from car which he had taken after one he had boarded with transfer had been withdrawn; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 181, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), majority holding ejection of passenger tendering transfer on wrong line, given through negligence of another conductor, unjustifiable.

Cited in footnotes to *O'Rourke v. Citizens' Street R. Co.* 46 L. R. A. 614, which holds void, conditions on transfer check requiring passengers to ascertain correctness of date, time, and direction; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes ejection of one refusing to pay fare, and claiming right to carriage on transfer, without transfer ticket; *Curtis v. Louisville City R. Co.* 21 L. R. A. 649, which denies right to eject for nonpayment of fare, passenger receiving 45 cents as change for 50-cent piece; *Nashville Street R. Co. v. Griffin*, 49 L. R. A. 451, which denies authority to eject passenger who, after paying fare inside station, enters car which has stopped just outside station.

Restrictions as to use of street car transfers.

Cited in footnotes to *Ex parte Lorenzen*, 50 L. R. A. 55, which sustains penal ordinance against passenger selling or giving away street railway transfer; *Heffron v. Detroit City R. Co.* 16 L. R. A. 345, which holds restriction for use of street car transfer within fifteen minutes valid.

16 L. R. A. 349, *GILLESPIE v. LINCOLN*, 35 Neb. 34, 52 N. W. 811.

Liability of municipality in governmental capacity.

Cited in *Ulrich v. St. Louis*, 112 Mo. 148, 34 Am. St. Rep. 372, 20 S. W. 466, holding that workhouse inmate, kicked by mule which he was directed by superintendent to harness, cannot recover of city, though mule known by superintendent to be vicious; *Shanewerk v. Ft. Worth*, 11 Tex. Civ. App. 272, 32 S. W. 918, denying city's liability for injuries to engineer of fire engine negligently driven by its driver into hose cart while in discharge of duty; *Saunders v. Ft. Madison*, 111 Iowa, 105, 82 N. W. 428, holding city not liable for injury due to runaway horse frightened at wanton ringing of bell by fireman while passing engine house; *Nicholson v. Detroit*, 129 Mich. 256, 56 L. R. A. 605, 88 N. W. 695, denying liability of city for death of employee from smallpox contracted while tearing down small-

pox hospital to erect another under statute requiring it; *Esberg Cigar Co. v. Portland*, 34 Or. 289, 43 L. R. A. 440, 75 Am. St. Rep. 651, 55 Pac. 961, holding city responsible for goods destroyed by bursting of water main in system from which it derives profit; *Workman v. New York*, 179 U. S. 580, 45 L. ed. 328, 21 Sup. Ct. Rep. 212 (dissenting opinion), majority holding city liable for damages to owner of vessel run into by fire tug hastening to put out fire on vessel in harbor.

Management and control of police and fire departments.

Distinguished in *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 519, 41 L. R. A. 637, 76 N. W. 175, declaring invalid, act authorizing governor to appoint police and fire commissioners in metropolitan cities.

When city estopped.

Cited in *Philadelphia Mortg. & T. Co. v. Omaha*, 63 Neb. 286, 57 L. R. A. 153, 89 Am. St. Rep. 442, 88 N. W. 523, refusing to estop municipality from collecting taxes due and unpaid, because by mistake they were marked paid on records.

16 L. R. A. 353, *TAPPAN v. BOSTON WATER POWER CO.* 157 Mass. 24, 31 N. E. 703.

Land under navigable stream.

Cited in *People ex rel. Cornwall v. Woodruff*, 30 App. Div. 47, 51 N. Y. Supp. 515, holding riparian owner taking grant from state of land under water in navigable river takes it subject to right of adjacent owner to receive grant of land under water adjacent to his upland; *Forest River Lead Co. v. Salem*, 165 Mass. 200, 42 N. E. 802, establishing boundary between towns for purpose of taxation at high-water mark of river, on one side thereof, in accordance with general repute and acquiescence.

Cited in notes (45 L. R. A. 239) on title to land between high and low water marks; (21 L. R. A. 777, 778) on division of water front, alluvion, and flats between adjoining riparian owners.

16 L. R. A. 358, *CRAIG v. STATE*, 49 Ohio St. 415, 30 N. E. 1120.

Form of indictment for murder.

Cited in *State v. Almy*, 67 N. H. 275, 22 L. R. A. 748, 28 Atl. 372, which holds that indictment alleging murder in same form as at common law will support verdict of guilty under act dividing it into degrees.

16 L. R. A. 361, *DUNLAP v. STEERE*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563.

When judgment conclusive.

Cited in *Sullivan v. Lumsden*, 118 Cal. 668, 50 Pac. 777, granting repartition of lands where, by mistake of referee in former partition, there was division of lands to which there was no title.

Constructive service of process.

Cited in footnote to *Capital City Bank v. Parent*, 18 L. R. A. 240, which holds creditor's bill cannot be based on judgment for money only, when jurisdiction only obtained by attachment against nonresident.

Distinguished in *Mulleahey v. Dow*, 131 Cal. 77, 63 Pac. 158, which holds decree

distributing estate of decedent a proceeding *in rem* and conclusive, unless appealed from, upon those with only constructive notice of hearing.

16 L. R. A. 367, *COTTING v. DeSARTIGES*, 17 R. I. 668, 24 Atl. 530.

Execution of power under will.

Cited in *Morffew v. San Francisco & S. R. R. Co.* 107 Cal. 597, 40 Pac. 810, holding extrinsic evidence admissible to determine whether deed executed by donee of power, who had also an interest in fee; *Mason v. Wheeler*, 19 R. I. 23, 61 Am. St. Rep. 734, 31 Atl. 426, holding that testatrix did not intend to execute by will, power of disposition of real estate given to her in will of her mother, by use of words "real estate" in devise of residue; *Lane v. Lane* (Del.) 64 L. R. A. 865, 55 Atl. 184, holding that questions as to execution of power of appointment of personal property are to be decided by law of domicile of donor.

Cited in note (64 L. R. A. 865, 892) on what is sufficient execution by will of power of appointment.

Law governing beneficiary of gift or trust.

Cited in footnotes to *First Nat. Bank v. National Broadway Bank*, 42 L. R. A. 140, which holds interests of beneficiary governed by laws of state where trust created, trustee appointed, and parties interested reside; *Hope v. Brewer*, 18 L. R. A. 458, which holds valid, gift to charity in foreign country if valid therein.

16 L. R. A. 371, *NICHOLS v. ANN ARBOR & Y. STREET R. CO.* 87 Mich. 361, 49 N. W. 538.

Abutting owner's right in street.

Cited in *Howe v. West End Street R. Co.* 167 Mass. 50, 44 N. E. 386, holding construction of surface street railways under proper regulations not new undertaking entitling abutters to damages; *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 94, 41 L. R. A. 579, 67 Am. St. Rep. 844, 74 N. W. 538, holding street railway cannot change grade of highway to suit itself and cut off owner's right of access to property, through merely nominal act of town board; *La Crosse City R. Co. v. Higbee*, 107 Wis. 395, 51 L. R. A. 927, 83 N. W. 701, permitting trolley pole to be set in front of sidewalk without permission of owner of lot, where not materially interfering with convenience; *Rische v. Texas Transp. Co.* 27 Tex. Civ. App. 37, 66 S. W. 324, holding abutting owner entitled to damages occasioned property by use of street by railway for transporting freight.

Cited in footnote to *Montgomery v. Santa Ana & W. R. Co.* 25 L. R. A. 654, which holds railroad on street not additional burden.

Cited in note (17 L. R. A. 475, 478) on what use of street or highway constitutes additional burden.

Use of streets by railway.

Distinguished in *Nieman v. Detroit Suburban Street R. Co.* 103 Mich. 260, 61 N. W. 519, holding commercial character of electric street railway not determined merely by use of T-rail; *Detroit, Ft. W. & B. I. R. Co. v. Railroad Comrs.* 127 Mich. 230, 62 L. R. A. 154, 86 N. W. 842, holding that street railway can be compelled to bear portion of expense necessary to maintain safeguards at crossing of its line by railroad.

16 L. R. A. 376, *JOANNIN v. OGILVIE*, 49 Minn. 564, 32 Am. St. Rep. 581, 52 N. W. 217.

What amounts to duress.

Cited in *Minneapolis Land Co. v. McMillan*, 79 Minn. 290, 82 N. W. 591, holding duress in making and indorsing notes not shown where bond against company, not due, was presented and payment demanded, with threat of having receiver appointed; *American Baptist Missionary Union v. Hastings*, 67 Minn. 308, 69 N. W. 1078, holding money paid to redeem property from tax sale involuntary, where there was no time to prove it invalid before tax title would become absolute; *Minneapolis Stock-Yards & Packing Co. v. Cunningham*, 59 Minn. 329, 61 N. W. 329, holding duress not shown in allegations that owner of building charged office rent after agreement to allow room rent free, when no threats of any kind alleged; *Panton v. Duluth Gas & Water Co.* 50 Minn. 177, 36 Am. St. Rep. 635, 52 N. W. 527, holding duress shown in act of water company threatening to shut off water supply of building unless amount demanded was paid, although owner claimed water meter defective; *Vereycken v. Vanden Brooks*, 102 Mich. 121, 60 N. W. 687, holding no duress shown where maker of note paid excess of interest demanded over agreed reduction for extension after foreclosure begun, because he could on hearing have shown amount due; *Wells v. Adams*, 88 Mo. App. 225, declaring it moral duress to compel one who has made a note secured by mortgage on real estate, to give large bonus to discharge debt before due, where, through fraud of mortgagee, privilege to pay after short period was not included; *Pembroke v. Hayes*, 114 Iowa, 578, 87 N. W. 492, refusing to interfere with verdict of jury that note was not paid under duress, when supported by evidence; *Manning v. Poling*, 114 Iowa, 23, 83 N. W. 895, holding payment of judgment to redeem land sold under it not involuntary when restraining order could have been obtained; *First Nat. Bank v. Sargeant*, 65 Neb. 604, 59 L. R. A. 300, footnote p. 296, 91 N. W. 595, holding refusal of grantee in deed given to secure debt, to reconvey to debtor to enable him to complete sale to purchaser, except upon payment in excess of amount due, duress.

Cited in footnotes to *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum, accepted under threats of groundless prosecution; *Flack v. National Bank of Commerce*, 17 L. R. A. 583, which holds threat by bank to institute proceedings to collect unmatured note not duress.

Distinguished in *Vessel v. D. S. B. Johnston Land & Mortg. Co.* 3 N. D. 163, 44 Am. St. Rep. 529, 54 N. W. 922, which holds protest unavailing to make payment, not under duress in fact or in law, involuntary.

16 L. R. A. 379, *STEEG v. ST. PAUL CITY R. CO.* 50 Minn. 149, 52 N. W. 393.

Negligence in starting car.

Cited in *Miller v. St. Paul City R. Co.* 66 Minn. 193, 68 N. W. 862, sustaining verdict for plaintiff for injury from starting car and then stopping suddenly, so as to throw passenger on arm of seat, from which septicemia was induced; *Citizens Street R. Co. v. Merl*, 26 Ind. App. 291, 59 N. E. 491, holding carriers required to give passengers ample time to get on and off cars.

Cited in note (42 L. R. A. 294, 296) on starting car before passenger is seated.

16 L. R. A. 380, PITTSBURGH, C. & ST. L. R. CO. v. STATE, 49 Ohio St. 189, 30 N. E. 435.

Corporate taxation.

Cited in *Ashley v. Ryan*, 49 Ohio St. 525, 31 N. E. 721, which holds fee for filing articles of incorporation, based on percentage of capitalization, valid; *Southern Gum Co. v. Laylin*, 66 Ohio St. 597, 64 N. E. 564, holding tax based on percentage of capital stock a franchise tax, and not tax on property.

Cited in footnote to *Knoxville & O. R. Co. v. Harris*, 53 L. R. A. 921, which holds exemption from privilege tax not included in exemption from *ad valorem* tax.

Cited in note (60 L. R. A. 359) on constitutional equality in United States in relation to corporate taxation.

Governmental interference with private property.

Cited in *Ellis v. Frazier*, 38 Or. 471, 53 L. R. A. 458, 63 Pac. 642, declaring invalid, fixed tax on all bicycles, regardless of their value; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 335, 30 L. R. A. 223, 41 N. E. 579, declaring invalid, act to impose direct inheritance tax by taxing, at higher rate, right to succeed to estates of larger than those of smaller value; *State v. Kleetzen*, 8 N. D. 291, 78 N. W. 984, declaring invalid, act taxing occupation of hawking and peddling because not stating object of tax.

Cited in footnotes to *Health Department v. Trinity Church*, 27 L. R. A. 710, which upholds act compelling tenement-house owners to provide water on every floor; *Sioux Falls v. Kirby*, 25 L. R. A. 621, which holds void, ordinance making owner's right to improve and use property depend on decision of city inspector.

Distinguished in *Mitchell v. Champaign County*, 5 Ohio N. P. 159, upholding act providing for taxation for the suppression of mob violence.

16 L. R. A. 383, DANIEL v. CHESAPEAKE & O. R. CO. 36 W. Va. 397, 32 Am. St. Rep. 870, 15 S. E. 162.

Who are fellow servants.

Cited in *Young v. West Virginia C. & P. R. Co.* 42 W. Va. 125, 24 S. E. 615, holding brakeman on same freight train fellow servants; *Haney v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 578, 18 S. E. 748, holding telegraph operator of block system and conductor of extra train not fellow servants with workman on work train; *Turner v. Norfolk & W. R. Co.* 40 W. Va. 690, 22 S. E. 83, which holds engineer and fireman of "wild" or special engine not fellow servants of section hand on track; *Flannegan v. Chesapeake & O. R. Co.* 40 W. Va. 440, 52 Am. St. Rep. 896, 21 S. E. 1028, holding telegraph operator controlling movements of trains in block not fellow servant of brakeman injured on one of such trains; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 392, 46 L. R. A. 348, 27 S. E. 278, holding conductor and brakeman on freight train fellow servants.

Cited in footnotes to *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant roadmaster not fellow servant of gang of men working under him; *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants.

Cited in note (46 L. R. A. 355, 361) as to when conductor is deemed to be co-servant of other railroad employees.

Distinguished in *Ward v. Chesapeake & O. R. Co.* 39 W. Va. 50, 19 S. E. 389, holding brakeman and conductor co-employees as to matter of keeping lookout for signals, as required by rules of carrier.

Vice principalship.

Cited in note (51 L. R. A. 515, 516, 591, 621) on vice principalship considered with reference to superior rank of negligent servant.

Duty of master to provide for servants' safety.

Cited in *Beall v. Pittsburgh C. & St. L. R. Co.* 38 W. Va. 529, 18 S. E. 729, holding carrier not liable for injury to brakeman using brake without nut on standard to keep it down, where he could have observed defect; *Core v. Ohio River R. Co.* 38 W. Va. 469, 18 S. E. 596, holding carrier liable for injuries to brakeman, if due to engineer placing incompetent fireman in charge of engine.

16 L. R. A. 392, *LAVALLE v. SOCIÉTÉ ST. JEAN BAPTISTE*, 17 R. I. 680, 24 Atl. 467.

Fraternal benefit associations.

Cited in *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 551, 60 L. R. A. 628, 54 Atl. 147, holding member of benefit society, duly notified of hearing of charges against him, and making no defense, properly expelled.

Cited in footnote to *Wellenvoss v. Grand Lodge, K. of P.* 40 L. R. A. 488, which denies power "of equity" to compel giving of secret password of grand lodge to delegate of subordinate lodge.

Cited in note (25 L. R. A. 150) on effect of expulsion from society to destroy right to insurance connected therewith.

Distinguished in *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 127, 83 N. W. 506, holding association with large reserve, accumulating property, and with implied power to meet its obligations, more than fraternal benefit association.

16 L. R. A. 395, *SCANLON v. WEDGER*, 156 Mass. 462, 31 N. E. 642.

Dangerous agencies.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas company which will insure reasonable promptness in detecting leaks; *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort where used liable for coaster owner's negligence.

Liability for injuries from fireworks.

Followed in *Frost v. Josselyn*, 180 Mass. 392, 62 N. E. 469, denying right of recovery of voluntary spectator injured at unauthorized display of fireworks in street.

Cited in footnotes to *Aron v. Wausau*, 40 L. R. A. 733, which denies city's liability for injury by explosion of cannon cracker on Fourth of July, in violation of ordinance; *Fifield v. Phoenix*, 24 L. R. A. 430, which denies city's liability for explosion of fireworks in street, under permit by city officer; *Speir v. Brooklyn*. 21 L. R. A. 641, which holds city liable for injury by explosion of fireworks during display made under mayor's permit; *Bartlett v. Clarksburg*, 43 L. R. A. 295, which denies liability of town for injuries from fireworks, etc., fired on streets with consent of town authorities; *Wyllie v. Palmer*, 19 L. R. A. 285, which holds dealer in fireworks furnishing assistant in discharging same not liable for negligence in discharge; *Love v. Raleigh*, 28 L. R. A. 192, which denies city's liability for acts of servants in managing fireworks; *Madisonville v. Bishop*, 57 L. R. A. 130, which holds city liable for injuries from fireworks by unorganized crowd of merry-makers.

16 L. R. A. 398, *ATTY. GEN. ex rel. GAS & ELECTRIC LIGHT COMRS. v. WALTHAM LIGHT & POWER CO.* 157 Mass. 86, 31 N. E. 482.

Power of legislature over public streets.

Cited in *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 400, 65 N. E. 835, refusing land damages for terminating right to use street, by its discontinuance, for electric wire conduits.

16 L. R. A. 400, *COM. v. ROBERTS*, 155 Mass. 281, 29 N. E. 522.

Police power.

Cited in *Health Department v. Trinity Church*, 145 N. Y. 46, 27 L. R. A. 715, 45 Am. St. Rep. 579, 39 N. E. 833, upholding requirement that tenements previously erected be supplied with Croton water at owner's expense when health board so directed; *Harrington v. Providence*, 20 R. I. 239, 240, 38 L. R. A. 313, 38 Atl. 1, upholding act requiring drainage into sewer and discontinuance of cesspools and privy vaults; *Cartwright v. Cohoes*, 39 App. Div. 72, 56 N. Y. Supp. 731, holding regulation of board of health in relation to privy vaults reasonable; *Com. v. Abbott*, 160 Mass. 284, 35 N. E. 782, holding act forbidding maintenance of building not connected with public sewer, constitutional; *Com. v. Danziger*, 176 Mass. 291, 57 N. E. 461, declaring it to be within police power to regulate loaning of money on pledges of personal property; *Sprigg v. Garrett Park*, 89 Md. 413, 43 Atl. 813, holding that owner has no such vested right in cesspool that municipality cannot order its discontinuance; *Newton v. Joyce*, 166 Mass. 84, 55 Am. St. Rep. 385, 44 N. E. 116, holding that licensing stables is within police power; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 571, 41 L. R. A. 485, 53 Am. St. Rep. 557, 66 N. W. 624, holding ordinance directing railroad to repair portion of viaduct, valid exercise of police power; *Tenement House Department v. Moeschen*, 89 App. Div. 532, 85 N. Y. Supp. 704, upholding act requiring school sinks in New York city to be replaced by individual waterclosets.

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

16 L. R. A. 402, *GIDDINGS v. BLACKER*, 93 Mich. 1, 52 N. W. 944.

Review of legislative and executive acts.

Cited in *Denney v. State*, 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929, assuming jurisdiction to determine validity of apportionment acts; *Parker v. State*, 133 Ind. 186, 18 L. R. A. 571, footnote p. 567, 32 N. E. 838, upholding jurisdiction to determine validity of apportionment act; *Fesler v. Brayton*, 145 Ind. 92, 32 L. R. A. 584, 44 N. E. 37 (dissenting opinion), majority upholding former apportionment act, although legislature failed to perform duty by passing unconstitutional acts on several occasions; *Re Gunn*, 50 Kan. 196, 19 L. R. A. 529, 32 Pac. 470, upholding jurisdiction to determine whether member of state legislature rightly under arrest of sergeant-at-arms; *State ex rel. Morris v. Wrightson*, 56 N. J. L. 188, 22 L. R. A. 550, 28 Atl. 56, upholding jurisdiction to determine constitutionality of act to regulate elections; *State ex rel. Lamb v. Cunningham*, 83 Wis. 130, 17 L. R. A. 164, 35 Am. St. Rep. 27, 53 N. W. 35, upholding jurisdiction of court on relation of private citizen to restrain secretary of state from publishing notices of election, when attorney general refused to act; *Parmeter v. Bourne*, 8

Wash. 63, 35 Pac. 757 (dissenting opinion), majority holding court without jurisdiction to enjoin removal of county seat because of fraud in election therefor; *People v. McClees*, 20 Colo. 410, 26 L. R. A. 648, 38 Pac. 468, upholding jurisdiction of proceeding on relation of private citizen for injunction to restrain secretary of state from issuing certificate of election to district judges; *People ex rel. Carter v. Rice*, 135 N. Y. 521, 16 L. R. A. 857, footnote p. 836, 31 N. E. 921 (dissenting opinion), majority upholding apportionment act where, on account of invalidity of former acts, it might require election under act quarter of century old; *People ex rel. Pond v. Monroe County*, 65 Hun, 276, 19 N. Y. Supp. 978, sustaining right to review acts of apportionment; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 475, 483, 40 N. E. 307, holding that legislature cannot be compelled to pass an apportionment act.

Cited in footnotes to *Houghton County v. Blacker*, 16 L. R. A. 432, which holds apportionment act unlawfully dividing county wholly void; *State ex rel. Morris v. Wrightson*, 22 L. R. A. 548, which holds constitutionality of apportionment act subject to judicial inquiry.

Distinguished in *People ex rel. Woodyatt v. Thompson*, 155 Ill. 475, 40 N. E. 307, sustaining formation of senatorial districts although they might have been made more nearly equal in number of inhabitants, and more compact.

Mandamus.

Cited in *State ex rel. Winnie v. Stoddard*, 25 Nev. 457, 51 L. R. A. 231, footnote p. 229, 62 Pac. 237, denying mandamus to compel county commissioners to issue notice of election for legislature where apportionment act subject to same objection as prior act; *People ex rel. Pond v. Monroe County*, 65 Hun, 265, 19 N. Y. Supp. 978, upholding, as proper remedy, writ of mandamus on relation of citizen and elector to compel supervisors to divide county into proper assembly districts; *Brophy v. Schindler*, 126 Mich. 348, 85 N. W. 1114, holding that relators had special interest in asking for mandamus to have bridge built, where boat had to be used to get children to school; *People ex rel. Hillel Lodge*, No. 72, I. O. B. B. v. Rose, 207 Ill. 375, 69 N. E. 762 (dissenting opinion), as to testing by mandamus, validity of act requiring annual reports from corporations.

16 L. R. A. 410, *TITTMAN v. THORNTON*, 107 Mo. 500, 17 S. W. 979.

Second appeal in 53 Mo. App. 513.

Suit in representative character.

Cited in *Knoche v. Perry*, 90 Mo. App. 485, holding that representative character of plaintiff need not be proved in action before justice of peace, merely because in his complaint he alleges he holds property in representative character.

16 L. R. A. 413. *STATE ex rel. HITCHCOCK v. HEWITT*, 3 S. D. 187, 44 Am. St. Rep. 788, 52 N. W. 875.

Rights of public officers.

Cited in *State ex rel. Ayers v. Kipp*, 10 S. D. 502, 74 N. W. 440, holding that tenure of office referred to in Constitution applies only to offices provided for, not to offices thereafter to be created by legislature; *State ex rel. Moore v. Archibald*, 5 N. D. 377, 66 N. W. 234, upholding jurisdiction of court to compel by mandamus, on relation of citizen, superintendent of public office to vacate office when attorney general has refused to apply for it; *Pratt v. Police & Fire Comrs.* 15

Utah, 12, 49 Pac. 747, holding that police board cannot arbitrarily remove chief of police without hearing; *Snyder v. Emerson*, 19 Utah, 325, 57 Pac. 300, denying right of compensation to one who is not shown to be *de jure* officer, although performing services for public board; *McCully v. State*, 102 Tenn. 521, 46 L. R. A. 571, 53 S. W. 134, holding that removal for "cause" contemplates charge, trial, and judgment.

Cited in footnote as to *Re Advisory Opinion*, 18 L. R. A. 594, which holds right to hold office not affected by suspension from same office during preceding term.

Cited in note (29 L. R. A. 384) on nature of directors, trustees, and officers of incorporated institutions belonging to state.

Mandamus.

Cited in note (58 L. R. A. 850) on original jurisdiction of court of last resort in mandamus cases.

16 L. R. A. 418, *BOARD OF IMPROVEMENT v. SCHOOL DISTRICT*, 56 Ark. 354, 35 Am. St. Rep. 108, 19 S. W. 969.

When public property assessable.

Cited in *Pittsburg v. Sterrett Subdist. School*, 204 Pa. 642, 61 L. R. A. 186, 54 Atl. 463, holding school district property exempt from local improvement assessment; *Stiewel v. Fencing Dist. No. 6*, 71 Ark. 21, 70 S. W. 308, holding county pauper farm exempt from local improvement assessment.

Cited in note (35 L. R. A. 39) on liability to local assessments for benefit, of property exempt from general taxation.

Distinguished in *School District v. Board of Improvement*, 65 Ark. 349, 46 S. W. 418, declaring school property, not actually and exclusively used for public purposes, not exempt from liability for improvement assessments; *Edwards v. W. Constr. Co. v. Jasper Co.* 117 Iowa, 374, 94 Am. St. Rep. 301, 90 N. W. 1006, holding, under statute, county property not exempt from local improvement assessments.

16 L. R. A. 423, *BUCKLEY v. HUMASON*, 50 Minn. 195, 36 Am. St. Rep. 637, 52 N. W. 385.

Validity of unlicensed contracts.

Cited in *Fairly v. Wappoo Mills*, 44 S. C. 253, 29 L. R. A. 225, footnote p. 215, 22 S. E. 108, sustaining right of unlicensed broker to recover commissions, when object of statute requiring license is to enforce payment of license tax by imposing penalty on person engaging in business. *Richardson v. Brix*, 94 Iowa, 629, 63 N. W. 325, refusing to unlicensed broker recovery of commission; *Smith v. Robertson*, 106 Ky. 474, 45 L. R. A. 511, footnote p. 510, 50 S. W. 852, denying right of recovery of owner of unlicensed stallion for service of same.

Cited in footnotes to *Denning v. Yount*, 50 L. R. A. 103, which denies right of unlicensed brokers to recover commissions; *Randall v. Tuell*, 38 L. R. A. 143, which denies right of unlicensed innholder to recover for board and lodging; *Vermont Loan & T. Co. v. Hoffman*, 37 L. R. A. 509, which holds loan of money without license valid, though misdemeanor under statute; *Citizens' State Bank v. Nore*, 60 L. R. A. 737, which authorizes recovery by bona fide purchaser of note for medical services by unlicensed practitioner; *Black v. Security Mut. Life Asso.*

54 L. R. A. 939, which denies right to commissions of one securing applications for insurance before license, although same granted before policies issued.

Recovery of price of property sold for illegal use.

Cited in footnote to *Wind v. Iler*, 27 L. R. A. 219, which holds statutory right to recover money paid on unlawful purchase not applicable to purchase valid in state where made.

16 L. R. A. 426, *BROWN v. REPUBLICAN MOUNTAIN SILVER MINES*, 17 Colo. 421, 30 Pac. 66.

Recovery for services of special character.

Cited in *Taussig v. St. Louis & K. R. Co.* 166 Mo. 35, 89 Am. St. Rep. 674, 65 S. W. 969, permitting recovery by director of railroad company for services as attorney at law, upon employment by general manager; *Symmes v. Union Trust Co.* 60 Fed. 867, holding that board of trustees of corporation can employ officer of company to get it out of financial straits, and agree to pay him for services; *McCarthy v. Mt. Tecarte Land & Water Co.* 111 Cal. 341, 43 Pac. 956, admitting evidence tending to show whether director was to receive compensation as superintendent or manager of corporation; *Wagner v. Edison Electric Illuminating Co.* 177 Mo. 62, 75 S. W. 966, upholding right of engineer of one corporation, to recover reasonable value of services rendered another corporation engaged in joint enterprise.

Cited in footnote to *Eaton v. Robinson*, 29 L. R. A. 100, which requires officers to account for salaries voted and paid to deprive stockholders of rights.

Distinguished in *Ruby Chief Min. & Mill. Co. v. Prentice*, 25 Colo. 6, 52 Pac. 210, sustaining recovery for services by general manager or superintendent of mining company, who is also director.

16 L. R. A. 429, *ILLINOIS WATCH CASE CO. v. PEARSON*, 140 Ill. 423, 31 N. E. 400.

When mandamus will issue.

Cited in *People ex rel. Dickinson v. Board of Trade*, 193 Ill. 591, 62 N. E. 196, refusing mandamus to compel reinstating of member of board of trade; *Harrison v. People*, 97 Ill. App. 433 (dissenting opinion), majority granting writ to compel mayor of city to issue license for dramshop, where applicant complied with pre-requisites.

Right to corporate name.

Cited in footnote to *Paulino v. Portuguese Beneficial Asso.* 20 L. R. A. 272, which holds corporate right to use of name cannot be annulled at suit of private person.

Distinguished in *People ex rel. Traders' Ins. Co. v. Van Cleave*, 183 Ill. 334, 47 L. R. A. 798, 55 N. E. 678, granting mandamus to compel issuance of license to foreign insurance company to do business with name similar to one in use.

16 L. R. A. 432, *HOUGHTON COUNTY v. BLACKER*, 92 Mich. 638, 52 N. W. 951.
Apportionment acts.

Cited in *Denney v. State*, 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929, holding that court has jurisdiction to decide validity of apportionment act; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 483, 40 N. E. 307, holding legislature cannot be

compelled to pass apportionment act; *People ex rel. Carter v. Rice*, 135 N. Y. 521, 16 L. R. A. 857, footnote p. 856, 31 N. E. 921 (dissenting opinion), majority upholding apportionment act when, otherwise it might require election to be held under act twenty-five years old; *State ex rel. Winnie v. Stoddard*, 25 Nev. 461, 51 L. R. A. 233, footnote p. 229, 62 Pac. 237, refusing mandamus to compel county commissioners to issue notice of election, where apportionment act subject to same objection as in prior act; *Parmeter v. Bourne*, 8 Wash. 63, 35 Pac. 757 (dissenting opinion), as to jurisdiction of court to determine validity of apportionment act.

Cited in footnotes to *Parker v. State*, 18 L. R. A. 567, which holds invalid, scheme for allowing county with less than unit of population to vote for two senators; *State ex rel. Morris v. Wrightson*, 22 L. R. A. 548, which holds constitutionality of apportionment act subject to judicial inquiry.

16 L. R. A. 437, *JONES v. PORTLAND*, 88 Mich. 598, 50 N. W. 731.

Compensation of witness as bearing upon competency.

Cited in *Allen B. Wrisley Co. v. Burke*, 203 Ill. 258, 67 N. E. 818, holding fact that examining physician was paid by party calling him as witness, competent.

Testimony of physicians.

Cited in *McKormick v. West Bay City*, 110 Mich. 271, 68 N. W. 148, denying admissibility of testimony of physician called to examine injured person just before trial, as to exclamations and conduct indicating suffering; *Chicago, R. I. & P. R. Co. v. Sheldon*, 6 Kan. App. 350, 51 Pac. 808, holding it error to admit evidence of physician whether condition of plaintiff was direct result of collision; *Davidson v. Cornell*, 132 N. Y. 237, 30 N. E. 573; *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 454, 38 Atl. 683; *Abbot v. Heath*, 84 Wis. 321, 54 N. W. 574,—holding that physician called to examine injured person, to qualify as witness for him, cannot testify to statements made to him as to symptoms and condition.

Distinguished in *Strudgeon v. Sand Beach*, 107 Mich. 500, 65 N. W. 616, admitting testimony of exclamations of pain made by child of tender years, though after controversy begun; *Heddlie v. City Electric R. Co.* 112 Mich. 550, 70 N. W. 1096, holding testimony of physician admissible as to exclamations of pain uttered while treating injured person; *Lucas v. Detroit City R. Co.* 92 Mich. 417, 52 N. W. 745, admitting testimony of physician as to displacement of womb, as tending to show character of cause which might have produced injury; *Missouri, K. & T. R. Co. v. Johnson*, 95 Tex. 412, 67 S. W. 768, holding instinctive expressions of party, evidencing pain during examination by his own medical expert, admissible.

16 L. R. A. 443, *PEOPLE'S GAS CO. v. TYNER*, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59.

Right to increase flow of gas.

Followed in *Greenfield Gas Co. v. People's Gas Co.* 131 Ind. 599, 31 N. E. 61, and *Tyner v. People's Gas Co.* 131 Ind. 412, 31 N. E. 61, upholding right to explode nitro-glycerin in well to increase flow of gas.

Cited in footnote to *Jones v. Forest Oil Co.* 48 L. R. A. 748, which authorizes use of gas pump to increase production of oil well though production of adjoining wells diminished.

Ownership of oil and gas.

Cited in *Williamson v. Jones*, 39 W. Va. 258, 25 L. R. A. 233, 19 S. E. 436, holding petroleum in strata part of inheritance and that unlawful taking of it will be lasting damage to remainderman; *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 429, 121 Fed. 675, holding oil lease to be mere grant of use for purpose of prospecting.

Criticized in *State v. Ohio Oil Co.* 150 Ind. 30, 47 L. R. A. 632, 49 N. E. 809, holding that title to natural gas does not vest in any private owner until it is reduced to actual possession.

Wasting natural gas.

Cited in *Ohio Oil Co. v. Indiana*, 177 U. S. 206, 44 L. ed. 738, 20 Sup. Ct. Rep. 576, sustaining act to prevent waste of natural gas; *Townsend v. State*, 147 Ind. 628, 37 L. R. A. 298, 62 Am. St. Rep. 477, 47 N. E. 19, sustaining conviction under statute prohibiting waste of natural gas.

Cited in note (29 L. R. A. 337) on liability for negligence in escape and explosion of gas.

Right of action dependent upon special damage.

Cited in *Copper King v. Wabash Min. Co.* 114 Fed. 993, granting temporary injunction restraining diversion of water, exclusive right to use of which belongs to another; *Simpson v. Pittsburgh Plate Glass Co.* 28 Ind. App. 352, 62 N. E. 753, granting injunction to restrain cutting off of lessor's supply of natural gas under lease; *Ewing v. Webster City*, 103 Iowa, 231, 72 N. W. 511, denying injunction to restrain city from enforcing ordinance compelling corn to be weighed on city scales, because it interferes somewhat with plaintiff's business; *Pittsburgh, C. C. & St. L. R. Co. v. Noftsgier*, 148 Ind. 104, 47 N. E. 332, sustaining right of action for special damage to lot owner for building switch in highway; *Pennsylvania Co. v. Stanley*, 10 Ind. App. 424, 37 N. E. 288, awarding damages against railroad for closing one end of alley, by which access to rear of lots diminished.

Cited in note (37 L. R. A. 784) on whether court of equity can protect personal rights.

Injunction against acts punishable as crimes.

Cited in *Columbian Athletic Club v. State*, 143 Ind. 107, 28 L. R. A. 731, 52 Am. St. Rep. 407, 40 N. E. 914, granting injunction to prevent prize fighting, although act constitutes crime.

Cited in footnote to *State v. O'Leary*, 52 L. R. A. 299, which denies state's right to injunction to suppress gambling house.

Negligence in manufacture of explosives.

Cited in note (29 L. R. A. 721) on negligence in manufacture and storage of gun powder, nitro-glycerin, and other explosives.

16 L. R. A. 446, *STEVEY v. PEOPLE'S MUT. ACCL. INS. ASSO.* 150 Pa. 132, 24 Atl. 662.

When full accident insurance allowed.

Cited in *Fuller v. Locomotive Engineers' Mut. L. & Acci. Ins. Asso.* 122 Mich. 551, 48 L. R. A. 87, footnote p. 86, 80 Am. St. Rep. 598, 81 N. W. 326, refusing full amount of insurance for amputation of only part of foot, though use lost, when policy reads for amputation "(whole hand or foot)."

Cited in footnotes to *Lord v. American Mut. Acci. Asso.* 26 L. R. A. 741, which holds it question for jury whether entire loss of hand caused by injury, without amputation above wrist; *Mogé v. Société De Bienfaisance St. Jean Baptiste*, 35 L. R. A. 736, which holds total blindness resulting from accident covered by policy.

Cited in note (38 L. R. A. 537) on what constitutes total disability of insured.

16 L. R. A. 449, *NORTHERN C. R. CO. v. O'CONNER*, 76 Md. 207, 35 Am. St. Rep. 422, 24 Atl. 449.

Carrier's duty of transportation.

Cited in footnote to *United R. & Electric Co. v. Hardesty*, 57 L. R. A. 276, which denies carrier's duty to accept coupon detached from commutation book.

16 L. R. A. 451, *WOODRUFF v. PAINTER*, 150 Pa. 91, 30 Am. St. Rep. 786, 24 Atl. 621.

Rights of parties to bailment.

Cited in *McAllister v. Simon*, 27 Misc. 217, 57 N. Y. Supp. 733, holding store-keeper not liable for loss of purse which does not actually or constructively come into his possession; *Higman v. Camody*, 112 Ala. 272, 57 Am. St. Rep. 33, 20 So. 480, holding bailee for hire liable for damages to barge which he continued to use after discovering serious leak.

Cited in footnotes to *Sattler v. Hallock*, 46 L. R. A. 679, which holds bailment, not sale, created by contract by which farmers deliver produce at their own factory for manufacture, and divide proceeds; *Tombler v. Koelling*, 27 L. R. A. 502, which holds check given to customer of bath house for valuables insufficient to show right thereto.

Distinguished in *Hunter v. Reed*, 12 Pa. Super. Ct. 114, holding rule that retail clothiers responsible for property of customer left in booth does not apply to diamond ring carried in fob pocket.

Storekeeper's duty to customer.

Cited in *Polenske v. Lit Bros.* 18 Pa. Super. Ct. 476, affirming judgment for personal injuries incurred by customer tripping over covered pipes extending about 2 inches above floor of department store.

16 L. R. A. 453, *FISH BROS. WAGON CO. v. FISH*, 82 Wis. 546, 33 Am. St. Rep. 72, 52 N. W. 595.

Trade-name, trade-mark, and good will.

Reaffirmed in Federal court in *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 37 C. C. A. 146, 95 Fed. 458, holding prior judgment on merits as to right to use name conclusive as to all matters that might have been litigated.

Cited in *Listman Mill Co. v. William Listman Mill. Co.* 88 Wis. 340, 43 Am. St. Rep. 907, 60 N. W. 261, granting injunction to restrain use of word "Marvel" for flour brand, which passed with good will in conveyance of business; *Bank of Tomah v. Warren*, 94 Wis. 160, 68 N. W. 549, enjoining use of name "Bank of Tomah" by rival bank after failure of other bank and sale by assignee of building, good will, and "name of Bank of Tomah;" *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 132, 52 N. E. 487, Affirming 76 Ill. App. 588, holding transfer of business from firm to corporation composed largely of former owners carried with it

trade-name "Allegretti," without formal transfer; *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 87 Fed. 205, enjoining use of word "genuine" by one of two firms entitled to manufacture wagons, as indicating that it alone is manufacturing the original wagons; *Richmond Nerve Co. v. Richmond*, 159 U. S. 302, 40 L. ed. 161, 16 Sup. Ct. Rep. 30, holding portrait of one's self, used as trade-mark, assignable with business; *Grand Lodge, A. O. U. W. v. Graham*, 96 Iowa, 610, 31 L. R. A. 139, 65 N. W. 837, holding fraternal insurance society seceding from lodge and becoming incorporated under name it formerly had, not entitled to exclusive use of that name; *Robinson v. Storm*, 103 Tenn. 55, 52 S. W. 880, enjoining use of man's own name in connection with liver regulator, which had become trade-name of another; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 368, denying right of corporation to use trade-name "Bissell," before employed by another corporation to designate certain plow; *Millsbaugh Laundry v. First Nat. Bank*, 120 Iowa, 5, 94 N. W. 262, holding use of name "National Laundry, formerly owned by Millsbaugh," not conversion of name "Millsbaugh Laundry;" *Slater v. Slater*, 61 L. R. A. 796, which holds firm name not sole property of surviving partner.

Cited in footnotes to *Brass & Iron Works Co. v. Payne*, 19 L. R. A. 82, which holds good will of partnership transferred on dissolution, by one partner's transfer of interest to other partners; *Watkins v. Landon*, 19 L. R. A. 236, which holds purchaser of formula of unpatented medicine has no right to exclusively appropriate name of original manufacturer; *Bagby & R. Co. v. Rivers*, 40 L. R. A. 632, which denies assignability of continuing partner's right to use retiring partner's name; *Slater v. Slater*, 61 L. R. A. 796, which holds firm name an asset of partnership which executor of deceased partner has right to have sold; *Millbrae Co. v. Taylor*, 25 L. R. A. 193, which holds exclusive right to use name "Millbrae" not pass on division of milk business with partner; *Knoedler v. Glaenger*, 20 L. R. A. 733, which upholds right of vendor of good will to establish similar business in same place under own name; *Chas. S. Higgins Co. v. Higgins Soap Co.* 27 L. R. A. 42, which denies right to use name "Higgins Soap Co." where name "Chas. S. Higgins Co." previously used by manufacturers of soap; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 44 L. R. A. 841, which denies right to use own name so as to deceive public as to business rightfully engaged in by another.

Cited in note (46 L. R. A. 546) on transfer of trade-mark by bankruptcy or insolvency assignment.

16 L. R. A. 461, *SPOONER v. PHILLIPS*, 62 Conn. 62, 24 Atl. 524.

Rights of life tenants and remaindermen to accumulations of estate.

Cited in *Mills v. Britton*, 64 Conn. 12, 24 L. R. A. 537, footnote p. 536, 29 Atl. 231, holding forty shares of 4 per cent stock issued in place of twenty shares of 8 per cent stock, stock dividend belonging to capital going to remainderman; *Greene v. Huntington*, 73 Conn. 115, 46 Atl. 883, holding that rent and dividends from savings banks since death of life tenant, as income of trust, do not belong to estate of life tenant; *Pritchitt v. Nashville Trust Co.* 96 Tenn. 486, 33 L. R. A. 862, footnote p. 856, 36 S. W. 1064, holding life tenant entitled to stock dividends from net earnings of stock, after respective rights of life tenant and remainderman have attached.

Cited in footnotes to *Quinn v. Safe Deposit & T. Co.* 53 L. R. A. 169, which holds life tenant entitled to stock dividends made from sinking fund largely ac-

cumulated during testator's life; *McLouth v. Hunt*, 39 L. R. A. 230, which holds life tenants entitled to stock certificates for accumulated earnings of corporation; *Hite v. Hite*, 19 L. R. A. 173, which holds privilege of taking additional stock part of capital belonging to remainderman; *Greene v. Greene*, 35 L. R. A. 790, which requires apportionment between life tenants and remaindermen of portion of trust fund recovered from insolvent's estate; Distinguished in *Re Rogers*, 22 App. Div. 432, 48 N. Y. Supp. 175, holding that as between life tenant and remaindermen, stock of new company, apportioned among shareholders of old corporation, represents capital, and cash and securities of old company divided among stockholders represent profits or income.

Disapproved in *De Koven v. Alsop*, 205 Ill. 313, 63 L. R. A. 590, 68 N. E. 930, Affirming 107 Ill. App. 208, holding that declared stock dividends go to remainderman.

Title to stock dividends.

Cited in footnote to *Clark v. Campbell*, 54 L. R. A. 508, which holds purchaser of stock by writing, providing for delivery on payment by certain date, not entitled to dividends till payment.

What constitutes income.

Cited in *Re Murphy*, 80 App. App. 242, 80 N. Y. Supp. 530, construing word "interest" as used in bequest, to mean "income;" *Smith v. Hooper*, 95 Md. 26, 51 Atl. 844, holding life tenant, bequeathed income from sum of money, not entitled to profits arising from sale of trust property.

16 L. R. A. 468, *WALTON PLOW CO. v. CAMPBELL*, 35 Neb. 173, 52 N. W. 883.

Alteration of instruments.

Cited in *Courcamp v. Weber*, 39 Neb. 539, 58 N. W. 187, holding evidence of material alteration of note admissible to show it was made after execution, without authority; *Fisherdict v. Hutton*, 44 Neb. 127, 62 N. W. 488, holding that immaterial alteration in written instrument does not invalidate it; *Foxworthy v. Colby*, 64 Neb. 219, 62 L. R. A. 394, footnote p. 393, 89 N. W. 800, holding unauthorized insertion of word "gold" before dollars, material alteration of instrument; *First Nat. Bank v. Laughlin*, 4 N. D. 397, 61 N. W. 473, holding erasure of words to make non-negotiable note negotiable, material alteration; *Richardson v. Fellner*, 9 Okla. 521, 60 Pac. 270, holding change of word "on" to "and," where original instrument reads, "purchase price of the buildings on lot 1," material alteration.

Cited in footnotes to *Simmons v. Atkinson & L. Co.* 23 L. R. A. 599, which holds insertion of words "or bearer" and place of payment, material alteration; *Brown v. Johnson Bros.* 51 L. R. A. 403, which holds maker released by payee's addition of name of other person as comaker; *Gleason v. Hamilton*, 21 L. R. A. 210, which holds mortgage not invalidated by alteration by attorney drawing same, without mortgagee's knowledge; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note at foot of application for insurance, material alteration.

General denial.

Cited in *Graves v. Norfolk Nat. Bank*, 49 Neb. 438, 68 N. W. 612, holding general denial puts in issue genuineness of indorsement in action against indorsers.

16 L. R. R. 471, *GULF, C. & S. F. R. CO. v. LOONEY*, 85 Tex. 158, 34 Am. St. Rep. 787, 19 S. W. 1039.

Passenger's right of transportation.

Cited in *Gulf, C. & S. F. R. Co. v. St. John*, 13 Tex. Civ. App. 263, 35 S. W. 501, sustaining right of railway to limit its liability for transportation to its own line on excursion ticket; *Texas & P. R. Co. v. Dennis*, 4 Tex. Civ. App. 94, 23 S. W. 400, holding person induced to attend sale of lots by advertisement of reduced railroad rates should have reasonable time after sale to use limited ticket; *Gulf, C. & S. F. R. Co. v. Wright*, 2 Tex. Civ. App. 470, 21 S. W. 399, holding journey must be completed within time limited, unless it be unreasonable; *Cleveland, C. C. & St. L. R. Co. v. Kinsley*, 27 Ind. App. 146, 87 Am. St. Rep. 245, 60 N. E. 169, holding one with ticket for continuous passage, and obliged to change cars, a passenger when presenting same at gateway of railroad, notwithstanding doubt as to right of transportation on ticket; *St. Louis, I. M. & S. R. Co. v. Ewing*, 51 C. C. A. 687, 114 Fed. 1021 (dissenting opinion), as to obligation of carrier, and liability for damage to passenger, extending only to its own line.

Cited in footnotes to *Chicago & A. R. Co. v. Mulford*, 35 L. R. A. 599, which denies liability of company selling tickets for failure of connecting roads to honor same; *Pennsylvania R. Co. v. Parry*, 22 L. R. A. 251, which holds round-trip ticket by specified "branch," good on main line only on trains connecting with branch trains.

Distinguished in *Rutherford v. St. Louis S. W. R. Co.* 28 Tex. Civ. App. 628, 67 S. W. 161, holding purchaser of excursion ticket beginning return trip within time limited entitled to ride thereon, although not reaching destination until after expiration thereof.

16 L. R. A. 475. *McPHERSON v. BLACKER*, 92 Mich. 377, 31 Am. St. Rep. 587, 51 N. W. 469.

Affirmed in 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

Presidential electors state officers.

Cited in footnotes to *Todd v. Johnson*, 33 L. R. A. 399, which holds presidential electors state officers within provision for filling vacancies.

Validity of apportionment acts.

Cited in footnotes to *State ex rel. Morris v. Wrightson*, 22 L. R. A. 548, which holds that constitutionality of apportionment act is subject to judicial inquiry, and not mere political question; *Houghton County v. Blacker*, 16 L. R. A. 432, which holds apportionment act unlawfully dividing county wholly void; *People ex rel. Carter v. Rice*, 16 L. R. A. 836, which upholds apportionment of members of Assembly as against inequalities in distributing members, after each county given member for every full ratio of representation.

Contemporaneous construction.

Cited in *Pfeiffer v. Board of Education*, 118 Mich. 564, 42 L. R. A. 537, 77 N. W. 250, upholding reading of extracts from Bible in public schools as within contemplation of framers of Constitution; *Pingree v. Auditor General*, 120 Mich. 104, 44 L. R. A. 685, 78 N. W. 1025, refusing contemporaneous construction of statute relating to taxation, where taxation not uniform.

Statutes and ordinances valid in part.

Cited in *Scott v. Flowers*, 61 Neb. 623, 85 N. W. 857, upholding that part of statute committing children to industrial school which is not repugnant to Constitution; *Morgan v. State*, 64 Neb. 370, 90 N. W. 108, holding billiard ordinance valid as to license feature, although imposing small license fee not clearly expressed in title.

When statute takes effect.

Cited in *Detroit v. Chapin*, 108 Mich. 151, 37 L. R. A. 401, 66 N. W. 587 (dissenting opinion), majority holding act passed previous to last five days of session, and approved after adjournment and within ten days after passage, became law under Constitution.

Power to acquire railways.

Cited in *Atty. Gen. ex rel. Barbour v. Pingree*, 120 Mich. 571, 46 L. R. A. 417, 79 N. W. 814, declaring void, act permitting city council to appoint railway commission to acquire street railways.

Compensation of state officers.

Cited in *Warner v. Auditor General*, 129 Mich. 658, 89 N. W. 591, holding act providing additional compensation for certain state officers, acting as board of auditors, unconstitutional.

16 L. R. A. 482, *TUFTS v. TUFTS*, 8 Utah, 142, 30 Pac. 309.

Effect of repeal of statute on pending actions.

Cited in footnote to *Cleveland, C. C. & St. L. R. Co. v. Wells*, 58 L. R. A. 651, which sustains statute repealing act allowing penalties, made applicable to pending actions.

16 L. R. A. 485, *VINCENNES v. CITIZENS' GASLIGHT & COKE CO.* 132 Ind. 114, 31 N. E. 573.

Time contract with city.

Cited in *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 525, 22 C. C. A. 183, 40 U. S. App. 257, 76 Fed. 283, holding twenty-one-year contract by city with water company for use of streets for mains, and for water rentals, reasonable; *Michigan City v. Leeda*, 24 Ind. App. 273, 55 N. E. 799, sustaining right of city to lease rooms for city offices for period of ten years.

Cited in footnote to *Westminster Water Co. v. Westminster*, 64 L. R. A. 630, which holds municipal corporation without power to enter into perpetual contract with water company for water supply.

Construction of contracts.

Cited in *Gardner v. Caylor*, 24 Ind. App. 525, 56 N. E. 134, and *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 138, 52 N. E. 168, holding construction put upon lease by parties to it not binding where no ambiguity; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 343, 105 Fed. 11, and *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 525, 22 C. C. A. 182, 40 U. S. App. 257, 76 Fed. 282, holding city in its proprietary character governed by same rules in its contracts as individual or private corporation; *Fidelity & C. Co. v. Teter*, 136 Ind. 677, 36 N. E. 283, denying recovery for injury in falling from hay loft, under policy insuring against hazard of travel as passenger of common carrier; *Rosen-*

berry v. Fidelity & C. Co. 14 Ind. App. 630, 43 N. E. 317, denying recovery of "indemnity" to representatives of insured dying some time after, but as result of, injury; Ragsdale v. Barnett, 10 Ind. App. 492, 37 N. E. 1109, construing antenuptial contract to give surviving husband life interest in personal property, with remainder to heirs of wife; Kennedy v. Kennedy, 150 Ind. 644, 50 N. E. 756, holding antenuptial agreement may determine rights of wife in land of husband without alluding to her rights under law; Cambria Iron Co. v. Union Trust Co. 154 Ind. 301, 48 L. R. A. 46, 55 N. E. 745, holding that conditions in franchise ordinance relating to paving between tracks of street railway cannot be read as covenants on part of city.

Distinguished in Ralya v. Atkins, 157 Ind. 335, 61 N. E. 726, holding that unambiguous written contract cannot be altered by allegations of different construction put on it by parties.

Power of courts to review discretionary action of board.

Cited in Fidelity Trust & G. Co. v. Fowler Water Co. 113 Fed. 567, holding action of board of trustees in making contracts for water supply of city cannot be reviewed by courts, in absence of fraud or abuse of discretion.

16 L. R. A. 490, CREAMER v. WEST END STREET R. CO. 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391.

Who are passengers.

Cited in Mitchell v. Rochester R. Co. 4 Misc. 576, 25 N. Y. Supp. 744, holding one about to board car, and injured by fright at approaching car on same line, not passenger; Donovan v. Hartford Street R. Co. 65 Conn. 214, 29 L. R. A. 300, 32 Atl. 350, holding relation of carrier and passenger does not exist where woman was run into on crossing as car was slowing up to take her aboard; Baltimore Traction Co. v. State, 78 Md. 427, 28 Atl. 397, holding one attempting to board rapidly moving street car not a passenger; Bigelow v. West End Street R. Co. 161 Mass. 395, 37 N. E. 367, holding one alighting from car stopped at crossing on her signal, and injured by stepping off into excavation, not passenger; Smith v. City & Suburban R. Co. 29 Or. 546, 46 Pac. 136; Gargan v. West End Street R. Co. 176 Mass. 107, 49 L. R. A. 422, footnote p. 421, 79 Am. St. Rep. 298, 57 N. E. 217; West Chicago Street R. Co. v. Walsh, 78 Ill. App. 599,—holding relation of carrier and passenger ceases as soon as passenger alights from car stopped at safe place; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 670, 51 L. R. A. 886, footnote p. 885, 58 S. W. 646, holding relation of carrier and passenger terminates when passenger steps from car to ground at street crossing.

Distinguished in Augusta R. Co. v. Glover, 92 Ga. 148, 18 S. E. 406, sustaining verdict for death of boy killed while alighting upon parallel track, by another car; Keator v. Scranton Traction Co. 191 Pa. 108, 71 Am. St. Rep. 758, 43 Atl. 86, holding one passing in highway from one street car to another with transfer, a passenger.

Duty of street railway as to safety of passengers.

Cited in Palmer v. Winston-Salem R. & Elec. Co. 131 N. C. 251, 42 S. E. 604, holding street railway not liable for assault by motorman after injured man had ceased to be passenger; Conway v. Lewiston & A. H. R. Co. 87 Me. 287, 32 Atl. 901, holding erroneous instruction that street railway company must in any event provide safe place for passenger to alight; Finseth v. Suburban R.

Co. 32 Or. 4, 39 L. R. A. 518, 51 Pac. 84, holding that jury should determine whether temporary passageway built by street railway company from walk over submerged street to track was reasonably safe.

Contributory negligence.

Cited in *Kelly v. Wakefield & S. Street R. Co.* 175 Mass. 333, 56 N. E. 285, holding it contributory negligence to drive onto track without looking for car which might have passed behind impenetrable line of trees; *Robbins v. Springfield Street R. Co.* 165 Mass. 37, 42 N. E. 334, holding rule of looking and listening before crossing track of street railway not necessarily applicable because electricity is used; *Mathes v. Lowell, L. & H. Street R. Co.* 177 Mass. 420, 59 N. E. 77, sustaining direction of verdict for defendant where deceased attempted to cross street ahead of street car plainly seen approaching at rapid rate; *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 125, 34 L. R. A. 356, 43 Pac. 209, denying right of recovery for death of bicyclist riding in street car track, and killed by following car; *Laufer v. Bridgeport Traction Co.* 68 Conn. 493, 37 L. R. A. 539, 37 Atl. 379, sustaining judgment for injury by street car to man compelled to drive onto one track from another on narrow drawbridge; *Sewell v. New York, N. H. & H. R. Co.* 171 Mass. 303, 50 N. E. 541, denying right of recovery to boy of thirteen riding headlong, without looking, into passing train at crossing; *McGee v. Consolidated Street R. Co.* 102 Mich. 115, 26 L. R. A. 304, 47 Am. St. Rep. 507, 60 N. W. 293, denying right of recovery for injury where traveler failed to look before crossing in front of lighted street car; *Atlanta Consol. Street R. Co. v. Bates*, 103 Ga. 352, 30 S. E. 41, holding it for jury to determine contributory negligence of deaf man struck by car on parallel track while in act of alighting; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa. 643, 95 N. W. 161, holding one killed in crossing track with unobstructed view conclusively presumed negligent; *Gleason v. Worcester Consol. Street R. Co.* 184 Mass. 291, 68 N. E. 225, holding affirmative proof that one killed by stepping in front of car used due care, requisite to recovery.

Cited in note (38 L. R. A. 787) on negligence in getting on or off moving street car.

16 L. R. A. 492, *FRORER v. PEOPLE*. 141 Ill. 171, 31 N. E. 395.

Police power and right of contract.

Cited in *Bailey v. People*, 190 Ill. 33, 54 L. R. A. 840, 83 Am. St. Rep. 116, 60 N. E. 98, holding privilege to contract for right to use property is a liberty and property right; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 543, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, declaring statute invalid which forbids employer to discharge employee because member of labor organization; *Adams v. Brennan*, 177 Ill. 200, 42 L. R. A. 720, 69 Am. St. Rep. 222, 52 N. E. 314, holding invalid, attempted contract for employment of union workmen only by public school board, entered into under agreement with trades union; *Comm. v. Vrooman*, 164 Pa. 309, 35 W. N. C. 98, 44 Am. St. Rep. 603, 30 Atl. 217, Reversing 15 Pa. Co. Ct. 95, 3 Pa. Dist. R. 342, declaring valid, act prohibiting issue of policies for fire and lightning insurance except by corporations; *Ruhstrat v. People*, 185 Ill. 140, 49 L. R. A. 183, 76 Am. St. Rep. 30, 57 N. E. 41, holding invalid, act prohibiting use of national flag for advertising purposes; *People ex rel. Mellhany v. Chicago Live Stock Exchange*, 170 Ill. 567, 39 L. R. A. 376, 62 Am. St. Rep. 104, 48 N. E. 1062, holding invalid, by-law of commercial exchange attempting to

restrict employment of solicitors, as restriction on freedom of trade and business; *Chicago v. Netcher*, 183 Ill. 110, 48 L. R. A. 264, 75 Am. St. Rep. 93, 55 N. E. 707, holding ordinances prohibiting sale of certain foodstuffs by department stores not regulation of sale as health measure; *State v. Dalton*, 22 R. I. 86, 48 L. R. A. 780, 84 Am. St. Rep. 818, 46 Atl. 234, refusing to sustain act prohibiting giving of trading stamps as under police power; *Eden v. People*, 161 Ill. 303, 32 L. R. A. 662, 52 Am. St. Rep. 365, 43 N. E. 1108, holding act to close barber shops on Sunday not within police power; *Booth v. People*, 186 Ill. 48, 50 L. R. A. 763, 78 Am. St. Rep. 229, 57 N. E. 798, upholding statute against gambling options, although it includes kinds of property not before subject to options; *Swigart v. People*, 50 Ill. App. 187, holding section of criminal act prohibiting gaming within 2 miles of certain fairs not repealed by act to prohibit bookmaking and pool-selling; *State v. Smiley*, 65 Kan. 284, 69 Pac. 199, holding "anti-trust" laws valid.

Distinguished in *Meadowcroft v. People*, 163 Ill. 63, 35 L. R. A. 179, 54 Am. St. Rep. 447, 45 N. E. 303, sustaining conviction under act forbidding taking of deposits by insolvent bank; *State v. Nelson*, 52 Ohio St. 103, 26 L. R. A. 320, 39 N. E. 22, upholding act requiring owners and operators of street cars to provide for well-being of employees.

— As to hours.

Cited in *Low v. Rees Printing Co.* 41 Neb. 141, 24 L. R. A. 708, 43 Am. St. Rep. 670, 59 N. W. 362, declaring unconstitutional, sections of act limiting hours of work except of farm and domestic laborers; *Ritchie v. People*, 155 Ill. 104, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, declaring void, section of act providing that women shall work only eight hours a day; *State v. Holden*, 14 Utah, 93, 37 L. R. A. 107, 46 Pac. 756, holding valid, act limiting hours of laborers in underground mines; *Re Morgan*, 26 Colo. 443, 47 L. R. A. 64, 77 Am. St. Rep. 269, 58 Pac. 1071, holding act limiting working hours in underground mines invalid.

— As to wages.

Cited in *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 341, 37 Am. St. Rep. 206, 35 N. E. 62, holding invalid, act which requires monthly payment of wages by certain kinds of corporations; *State v. Loomis*, 115 Mo. 319, 21 L. R. A. 805, 22 S. W. 350, and *State v. Haun*, 61 Kan. 158, 47 L. R. A. 374, 59 Pac. 340, holding invalid, act requiring payment to laborers in money only; *State v. Peel Splint Coal Co.* 36 W. Va. 851, 17 L. R. A. 401, 15 S. E. 1000 (dissenting opinions), majority sustaining acts providing for payment of wages in money only, and requiring payment for mining coal before screening; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, holding invalid, act making it unlawful for owners and operators of mines to screen coal before weighing and crediting amount to miner; *Ramsey v. People*, 142 Ill. 384, 17 L. R. A. 854, 32 N. E. 364, and *Re House Bill No. 203*, 21 Colo. 28, 39 Pac. 431, declaring invalid, act compelling payment at pit mouth for all coal unscreened; *Harding v. People*, 160 Ill. 464, 32 L. R. A. 447, 52 Am. St. Rep. 344, 43 N. E. 624, holding unconstitutional, act requiring weighing of coal before screening, where coal is to be shipped by rail or water; *People ex rel. Rodgers v. Coler*, 166 N. Y. 19, 52 L. R. A. 822, 82 Am. St. Rep. 605, 59 N. E. 716, holding void, act fixing compensation city must pay for labor or other services; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 420, 23 L. R. A. 269, 41 Am. St. Rep. 109, 25 S. W. 75.

holding act requiring payment of wages due employee upon discharge, and providing, as penalty for default, for continuance of wages until paid, unconstitutional as to private persons, but valid as to corporations; *Luman v. Hitchens Bros. Co.* 90 Md. 26, 46 L. R. A. 396, 44 Atl. 1051, holding invalid, act prohibiting mining and railroad corporations from selling goods and merchandise to their employees; *Whitebreast Fuel Co. v. People*, 175 Ill. 54, 51 N. E. 853, holding that provisions of act for payment of coal miners "at such prices as may be agreed upon by respective parties" do not apply to contract for payment on different basis than specified in act; *Leischke v. Miller*, 100 Ill. App. 141, holding act requiring all claims in suit before justice to be brought forward by each party, or be debarred, not applicable to suit for wages; *Mallin v. Wenham*, 209 Ill. 256, 65 L. R. A. 605, 101 Am. St. Rep. 233, 70 N. E. 564, and *Brewer v. Griesheimer*, 104 Ill. App. 331, holding assignment by workman of unearned wages not contrary to public policy; *Dixon v. Poe*, 159 Ind. 497, 60 L. R. A. 310, 95 Am. St. Rep. 309, 65 N. E. 518, holding act prohibiting payment of miners in trade checks unconstitutional; *Kellyville Coal Co. v. Harrier*, 207 Ill. 627, 99 Am. St. Rep. 240, 69 N. E. 927, holding unconstitutional, act prohibiting employers from setting off debts against claims for wages.

Cited in note (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money.

Discrimination.

Cited in *Bailey v. People*, 190 Ill. 33, 54 L. R. A. 840, 83 Am. St. Rep. 116, 60 N. E. 98, holding invalid, provisions in act restricting number of persons sleeping in same room of lodging house, because aimed at lodging houses only; *Johnson v. Goodyear Min. Co.* 127 Cal. 15, 47 L. R. A. 343, 78 Am. St. Rep. 17, 59 Pac. 304, holding invalid, act giving preference to liens of laborers for corporation over all other liens; *Waters v. Wolf*, 162 Pa. 168, 42 Am. St. Rep. 815, 29 Atl. 646, which holds invalid, act giving lien for work and material contracted for by subcontractor, notwithstanding agreement between owner and contractor; *Palmer v. Tingle*, 55 Ohio St. 445, 45 N. E. 313, holding invalid, mechanic's lien act giving lien for labor and materials under contract with contractor; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 164, 41 L. ed. 671, 17 Sup. Ct. Rep. 255, holding invalid, act giving attorney's fees in successful suits against railroad companies.

Distinguished in *Vogel v. Pekoc*, 157 Ill. 344, 30 L. R. A. 494, 42 N. E. 386, declaring valid, act providing for attorney's fee in successful suits by workmen for wages.

16 L. R. A. 497, *LOKER v. GERALD*, 157 Mass. 42, 34 Am. St. Rep. 252, 31 N. E. 709.

Jurisdiction.

Cited in *Chase v. Henry*, 166 Mass. 581, 55 Am. St. Rep. 423, 44 N. E. 989 (dissenting opinion), majority holding discharge in insolvency no bar to action on debt due partnership, one member of which never resided in state where discharge granted.

— Of action for divorce.

Cited in footnotes to *Miller v. Miller*, 24 L. R. A. 137, which holds requirement of two years' residence to give jurisdiction of suit for divorce not applicable to suit for alimony; *Kempson v. Kempson*, 58 L. R. A. 484, which sustains juris-

diction in state where parties married and wife resides, of suit to enjoin fraudulent divorce suit by husband in other state.

Cited in notes (59 L. R. A. 164) on conflict of laws on subject of divorce; (19 L. R. A. 815) on validity of decree of divorce obtained on publication or service out of state, where defendant did not appear; (19 L. R. A. 518) on validity of divorce decree granted by court of foreign country.

Distinguished in *Dickinson v. Dickinson*, 167 Mass. 476, 45 N. E. 1091, sustaining divorce by woman from husband who went to another state, obtained divorce, and returned to state to reside.

Criticized in *Hekking v. Pfaff*, 82 Fed. 405, holding subsequent marriage of one divorced by court of another state having no jurisdiction over him does not operate in any way to prevent his denying jurisdiction of suit to award alimony.

Domicil of married woman.

Cited in footnotes to *Re Wickes*, 49 L. R. A. 138, which denies right of woman placing husband in home for incurables, to acquire separate domicil; *Atherton v. Atherton*, 40 L. R. A. 291, which holds matrimonial domicil of wife leaving husband for cruelty may be changed by removal to other state.

16 L. R. A. 500, *DELAFOILE v. STATE*, 54 N. J. L. 381, 24 Atl. 557.

Right of arrest.

Cited in *Com. v. Krubeck*, 8 Pa. Dist. R. 523, 23 Pa. Co. Ct. 38, 5 Lack. Legal News, 345, holding that peace officer cannot enter private inclosure and arrest person making noise, unless affray occurring or imminent.

Cited in footnotes to *Cabell v. Arnold*, 22 L. R. A. 87, which holds deputy marshal not justified in making arrest on warrant in marshal's hands; *State v. Lewis*, 19 L. R. A. 449, which denies officer's right to arrest for breach of peace not committed in his presence.

Cited in note (51 L. R. A. 216) on liability of officer for making arrest.

16 L. R. A. 505, *SHELBYVILLE WATER CO. v. PEOPLE*, 140 Ill. 545, 30 N. E. 678.

Waterworks as personal property.

Cited in *Smith v. Chicago*, 107 Ill. App. 278, holding that private system of waterworks in dedicated streets did not pass to city upon annexation of territory containing same.

When and where property taxable.

Cited in *Knopf v. Lake Street Elev. R. Co.* 197 Ill. 214, 64 N. E. 340, holding elevated railroads are railroads for purposes of taxation, to be assessed by state board and not locally.

Cited in footnotes to *Paris v. Norway Water Co.* 21 L. R. A. 525, which holds water mains, pipes, etc., taxable where located; *Fond du Lac Water Co. v. Fond du Lac*, 16 L. R. A. 581, which holds assessment of pumping station and works, apart from water mains, franchises, and other property constituting water plant, erroneous.

Cited in note (60 L. R. A. 855) on taxation of municipal waterworks.

Presumption of performance of public duty.

Cited in *Cairo, V. & C. R. Co. v. Mathews* 152 Ill. 155, 38 N. E. 623, holding presumption that collector attempted to collect tax out of personal property not

rebutted by testimony of deputy that he made no effort to so collect; *Adams v. Osgood*, 60 Neb. 782, 84 N. W. 257, assuming that board of equalization did its duty in holding sessions in years when taxes complained of were laid.

Distinguished in *Mt. Carmel Light & Water Co. v. People*, 166 Ill. 202, 46 N. E. 722, holding that personal property tax cannot be charged to real estate when it is admitted by collector that he made no attempt to collect it from personal property.

Amendment of record.

Cited in *Hoover v. People*, 171 Ill. 187, 49 N. E. 367, holding that copy of ordinance authorizing improvement can be filed by order of court before hearing, as amendment to report of clerk.

16 L. R. A. 507, *EIDAM v. FINNEGAN*, 48 Minn. 53, 50 N. W. 933.

Stipulations, admissions, and waivers in actions.

Cited in *Southern Kansas R. Co. v. Pavey*, 57 Kan. 529, 46 Pac. 969, holding client bound by stipulations of attorney continuing case, and providing for conclusiveness of judgment in certain events; *Stone v. Bank of Commerce*, 174 U. S. 422, 43 L. ed. 1032, 19 Sup. Ct. Rep. 747, Reversing 88 Fed. 405, denying authority of attorney to bind party until he has been retained as such in action begun; *Grand Lodge, I. O. of F. S. of I. v. Ohnstein*, 110 Ill. App. 329, holding promise of attorney to one claimant to pay claim upon discontinuance of suit, if other claimant successful, binding on client; *Brown v. Arnold*, 127 Fed. 392, holding attorney employed to defend action, without power, after judgment and termination of term of court, to bind client by stipulation.

Cited in note (32 L. R. A. 678, 679) on admissions and waivers of fiduciaries in actions.

16 L. R. A. 510, *MINOT v. RUSS*, 156 Mass. 458, 32 Am. St. Rep. 472, 31 N. E. 489.

Liability of drawer of check.

Followed without discussion in *Randolph Nat. Bank v. Hornblower*, 160 Mass. 402, 35 N. E. 850.

Cited in *Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 113, 46 Am. St. Rep. 560, 36 N. E. 833, holding drawer of check having it certified liable to payee on failure of drawee before presentment.

16 L. R. A. 512, *SIZER v. QUINLAN*, 82 Wis. 390, 33 Am. St. Rep. 55, 52 N. W. 590.

Right of owner of soil subject to way.

Cited in *Dyer v. Walker*, 99 Wis. 408, 75 N. W. 79, and *Wille v. Bartz*, 88 Wis. 428, 60 N. W. 789, holding that owner of land may maintain gate across right of way over it if it does not unreasonably interfere with way; *Boyd v. Bloom*, 152 Ind. 154, 52 N. E. 751, holding that grant of "free and undisturbed right to use" way does not prevent maintenance of gates across it, not interfering with use.

16 L. R. A. 514, *KELLY v. LYNCHBURG & D. R. CO.* 110 N. C. 431, 15 S. E. 200.

16 L. R. A. 516, *MUTUAL ACCI. ASSO. v. JACOBS*, 141 Ill. 261, 33 Am. St. Rep. 302, 31 N. E. 414.

Trust funds and bank deposits.

Cited in *Whitbeck v. Ramsay*, 74 Ill. App. 544, holding that sureties of state treasurer cannot recover from administrator of his estate money withdrawn by him and mingled with funds of estate, until they identify it as special deposit; *Woodhouse v. Crandall*, 197 Ill. 110, 58 L. R. A. 387, footnote p. 385, 64 N. E. 292, Reversing 99 Ill. App. 555, holding that special deposit in trust need not be identified specifically, if the money is in the bank, though mingled with other funds; *Lang v. Metzger*, 101 Ill. App. 387, holding that owner of misapplied trust fund, to make it charge on real estate taken by executor, must show that the money was invested in the property; *Weir v. Mowe*, 81 Ill. App. 297, holding that fund deposited in bank and used indiscriminately by banker cannot be said to be represented by overdrafts; *Seiter v. Mowe*, 182 Ill. 356, 55 N. E. 526, Affirming 81 Ill. App. 353, holding that money of *cestui qui trust* cannot be followed into hands of assignee of insolvent trustee, who has mingled it with own funds; *Kneisley v. Weir*, 81 Ill. App. 257, holding owner of trust fund mingled with other funds in bank not preferred over other creditors of general fund; *Moninger v. Security Title & T. Co.* 90 Ill. App. 249, holding that trust fund mingled with general funds has lost its identity as specific trust fund; *Lantermann v. Travous*, 174 Ill. 464, 51 N. E. 805, Affirming 73 Ill. App. 678, holding that insolvency of depositing bank, known to it, does not make depositor whose funds are mingled with other depositors a preferred creditor; *Bayor v. American Trust & Sav. Bank*, 157 Ill. 69, 41 N. E. 622, holding that mere promise by banker, unfulfilled, to keep deposit in separate package, does not make it special deposit; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 215, 41 N. E. 728, Reversing 57 Ill. App. 110, holding that bank decreed to be trustee of deposit in action in which it invoked equitable jurisdiction cannot deny that jurisdiction in action to have fund distributed; *Geuder & P. Mfg. Co. v. American Trust & Sav. Bank*, 51 Ill. App. 350, holding drawer of check payable to its order and indorsed for deposit with banker's firm to credit of drawer is entitled to its return on insolvency of depositor; *Bayor v. Schaffner*, 51 Ill. App. 185, holding that deposit of money mingled with funds of bank passes to assignee of bank notwithstanding certificate of deposit.

Cited in footnotes to *Beal v. Somerville*, 17 L. R. A. 291, which holds no title to check passes by depositing for collection; *Merchants Nat. Bank v. Guilmartin*, 17 L. R. A. 322, which holds special deposit accepted for depositor's accommodation, gratuitous; *State ex rel. First Nat. Bank v. Bartley*, 23 L. R. A. 67, which holds as loan, money deposited on open account subject to check; *Heironimus v. Sweeney*, 33 L. R. A. 99, which requires repayment of special deposit with savings institution before regular depositors are entitled to dividend; *Leaphart v. Commercial Bank*, 33 L. R. A. 700, which holds money deposited in bank by one described as "manager" subject to check; *Allibone v. Ames*, 33 L. R. A. 585, which holds deposit of public money by county treasurer in bank designated as depository not unlawful loan; *Muhlenberg v. Northwest Loan & T. Co.* 29 L. R. A. 667, which denies equitable lien of special depositor on funds of bank in hands of receiver; *Kimmel v. Dickson*, 25 L. R. A. 309, which holds trust fund constituted by deposit in bank for payment to specific person on presentation of

deed; *Anderson v. Pacific Bank*, 32 L. R. A. 479, which holds deposit of gold coin in pledge, to secure obligation on bail bond, special.

Distinguished in *Anderson v. Pacific Bank*, 112 Cal. 602, 32 L. R. A. 480, 53 Am. St. Rep. 228, 44 Pac. 1063, holding that money deposited with bank to secure it from loss for furnishing bail is special deposit which bank cannot mingle with common funds without consent of depositor.

16 L. R. A. 519, *FISHER v. OREGON SHORT LINE & U. N. R. CO.* 22 Or. 533, 30 Pac. 425.

Expert testimony.

Cited in *First Nat. Bank v. Fire Asso.* 33 Or. 181, 53 Pac. 8, holding expert testimony employed where question of science, art, or trade involved, and witness possesses especial skill or knowledge therein; *Farmers' Nat. Bank v. Woodell*, 38 Or. 299, 61 Pac. 837, holding opinion evidence admissible on cultivation of sugar beets where preliminary examination disclosed witness had cultivated them one year and observed growth another.

Who are fellow servants.

Cited in *Wellston Coal Co. v. Smith*, 65 Ohio St. 77, 55 L. R. A. 102, 87 Am. St. Rep. 547, 61 N. E. 143, holding that mine boss cannot delegate his duties to miner so that latter in that capacity is fellow servant of other miners; *Brunell v. Southern P. Co.* 34 Or. 265, 56 Pac. 129, holding section hands, men operating hand car, and overseer of surfacing gang of railroad, fellow servants; *Mast v. Kern*, 34 Or. 251, 75 Am. St. Rep. 580, 54 Pac. 950, holding superintendent and manager of quarry fellow servant of workman with whom he is engaged in blasting.

Cited in footnotes to *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant roadmaster not fellow servant of gang of men working under him; *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants.

Cited in note (18 L. R. A. 794) on what constitutes common employment.

Bills of exceptions.

Cited in *Beeman v. Hamlin*, 23 Or. 319, 31 Pac. 707, declaring bill of exceptions should not contain whole proceedings on trial *in extenso*.

Master's liability to servant.

Cited in notes (54 L. R. A. 103) on vice principalship as determined with reference to character of act which caused injury; (17 L. R. A. 607) on reliance upon orders as affecting contributory negligence of employee; (41 L. R. A. 45) on knowledge as element of employer's liability to injured servant.

16 L. R. A. 526, *GILKERSON-SLOSS COMMISSION CO. v. SALINGER*, 56 Ark. 294, 35 Am. St. Rep. 105, 19 S. W. 747.

Husband's liability for antenuptial debts of wife.

Cited in *Kies v. Young*, 64 Ark. 385, 62 Am. St. Rep. 198, 42 S. W. 669, holding married man liable for antenuptial debts of wife, where married woman's act did not expressly relieve him.

Husband and wife as copartners.

Cited in *Haggett v. Hurley*, 91 Me. 557, 41 L. R. A. 367, footnote p. 362, 40 Atl. 561, holding that married woman cannot enter into partnership with husband so as to subject her separate estate to partnership debts; *Hoaglin v. Henderson*, 119 Iowa, 725, 61 L. R. A. 758, footnote p. 756, 97 Am. St. Rep. 335, 94 N. W. 247, sustaining wife's right to enter into partnership agreement with husband.

Cited in footnotes to *Seattle Board of Trade v. Hayden*, 16 L. R. A. 530, which holds partnership between husband and wife not authorized; *Fuller & F. Co. v. McHenry*, 18 L. R. A. 512, which denies wife's right to become husband's partner.

16 L. R. A. 530, *SEATTLE BD. OF TRADE v. HAYDEN*, 4 Wash. 263, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224.

Partnership contracts between husband and wife.

Cited in *Haggett v. Hurley*, 91 Me. 558, 41 L. R. A. 367, 40 Atl. 561, holding that married woman cannot become partner of husband so as to subject her separate property to partnership debts.

Cited in footnote to *Fuller & F. Co. v. McHenry*, 18 L. R. A. 512, which denies wife's right to become husband's partner.

Cited in note (16 L. R. A. 527) on partnership between husband and wife in business.

Disapproved in *Hoaglin v. Henderson*, 119 Iowa, 728, 61 L. R. A. 759, 97 Am. St. Rep. 335, 94 N. W. 247, sustaining wife's right to enter into partnership agreement with husband.

16 L. R. A. 538, *SMITH'S APPEAL*, 61 Conn. 420, 24 Atl. 273.

Disqualification of executor.

Cited in *Kidd v. Bates*, 120 Ala. 85, 41 L. R. A. 155, 74 Am. St. Rep. 17, 23 So. 735, holding disabilities mentioned in statute the only ones which authorize refusal of issue of letters testamentary to executor named in will; *Terry's Appeal*, 67 Conn. 184, 34 Atl. 1032, holding that executor, capable of service, accepting trust and qualifying, should have sole administration of estate; *Farmers' Loan & T. Co. v. Smith*, 74 Conn. 627, 51 Atl. 609, denying right of foreign trust company to act as executor; *Saxe v. Saxe*, 119 Wis. 501, 97 N. W. 187, holding that letters testamentary must be issued to executor named in will, if legally competent.

Cited in footnote to *Kidd v. Bates*, 41 L. R. A. 154, which holds that disputed indebtedness to estate does not disqualify one as executor.

16 L. R. A. 542, *ROSS v. MORROW*, 85 Tex. 172, 19 S. W. 1090.

Innocent purchasers.

Cited in *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 609, 28 S. W. 206, holding that innocent purchaser from part of heirs to exclusion of others must show both ignorance of, and diligence to ascertain, their existence.

Computation of time.

Cited in *Linhart v. State*, 33 Tex. Crim. Rep. 508, 27 S. W. 260, holding boy thirteen years old on day before thirteenth anniversary of birth.

Cited in footnote to *Montoya de Antonio v. Miller*, 21 L. R. A. 699, which holds that marriage does not make girl of legal age.

Cited in note (49 L. R. A. 215) on rule as to first and last days in computation of time.

16 L. R. A. 545, *SOUTHWESTERN TELEG. & TELEPH. CO. v. ROBINSON*, 1 C. C. A. 684, 2 U. S. App. 205, 50 Fed. 810.

Proximate cause of injury.

Cited in *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 293, 22 L. R. A. 640, footnote p. 635, 33 Pac. 403, holding negligence in leaving telephone wire where it is touched by traveler on sidewalk, proximate cause of injury.

Concurrent causes.

Cited in *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 379, 18 L. R. A. 157, 53 N. W. 556, holding smoke and steam enveloping train concurrent causes, leaving it for jury to determine whether horses were frightened by train so enveloped.

Liability for negligence in employment of dangerous agencies.

Cited in *Western U. Teleg. Co. v. State*, 82 Md. 312, 31 L. R. A. 576, 51 Am. St. Rep. 464, 33 Atl. 763, holding telegraph company prima facie liable for injury from contact with broken wire hanging across feed wire of electric railway.

Cited in footnotes to *Haynes v. Raleigh Gas Co.* 26 L. R. A. 810, which holds negligence shown by guy wire charged with deadly current hanging to ground from tree; *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care to keep electric wires safe, due towards persons licensed to approach them; *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort where used liable for coaster owner's negligence; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff; *Burt v. Douglas County Street R. Co.* 18 L. R. A. 479, which holds company liable for electric shock of passenger due to imperfect insulation; *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas company which will insure reasonable promptness in detecting leaks; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

Cited in note (31 L. R. A. 588) on liability for injuries by electric wire in highways.

16 L. R. A. 547, *FLACK v. GOSNELL*, 76 Md. 88, 35 Am. St. Rep. 413, 24 Atl. 414.

Liability of cotenant to account for rent and profits.

Cited in note (28 L. R. A. 841. 849) on liability of cotenant to account for use and occupation, and rent and profits.

Distribution of estate.

Distinguished in *Gosnell v. Flack*, 76 Md. 427, 18 L. R. A. 160, 25 Atl. 411, holding that distributee of estate, who is also debtor, cannot receive his share without payment of debt.

16 L. R. A. 550, *STATE v. MURPHY*, 17 R. I. 698, 24 Atl. 473.

Duplicity in indictment.

Cited in *State v. Fidler*, 148 Ind. 222, 47 N. E. 464, holding charging several things conjunctively in single count which, disjunctively, make a crime, not duplicity.

16 L. R. A. 554, *GATES v. PENNSYLVANIA R. CO.* 150 Pa. 50, 24 Atl. 638.

Report of second appeal in 154 Pa. 571, 32 W. N. C. 334, 26 Atl. 598.

Liability due to defective bridge.

Cited in *Smith v. Pennsylvania R. Co.* 201 Pa. 134, 50 Atl. 829, holding railroad not liable for death by negligent construction of bridge by railroad, which occurred long after acceptance of bridge by borough; *Wetherbee v. Michigan C. R. Co.* 122 Mich. 4, 80 N. W. 787, holding railroad company not liable for injury due to defective planking in bridge erected by it over tracks, under agreement with city, after bridge passed under control of city; *Francis v. Franklin Twp.* 179 Pa. 201, 36 Atl. 202, holding duty to repair bridge to have been transferred from township to county, and county liable for unsafe condition.

Joint liability.

Cited in *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 506, 43 W. N. C. 503, holding that injured party can bring action against city for injury in driving into unguarded ditch, if city ultimately liable; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 373, holding injured party can elect which of two, jointly liable, he will proceed against; *Rahenkamp v. United Traction Co.* 14 Pa. Super. Ct. 640, holding that one of two street railways jointly and severally liable cannot defend by alleging that suit can be brought against other, who can settle with it; *Dutton v. Lansdowne*, 10 Pa. Super. Ct. 210, 44 W. N. C. 293, 7 Del. Co. Rep. 402, holding that parties jointly and severally liable for negligence may be joined in same action; *Com. v. Philadelphia, H. & P. R. Co.* 23 Pa. Super. Ct. 210, holding ordinance requiring railroad company to keep watchman at crossing in open country unreasonable.

16 L. R. A. 557, *HART v. COLE*, 156 Mass. 475, 31 N. E. 644.

Liability for injury to trespassers or licensees.

Cited in *Coupe v. Platt*, 172 Mass. 459, 70 Am. St. Rep. 293, 52 N. E. 526, sustaining recovery against owner for personal injuries to visitor of tenant calling on latter's invitation; *Blackstone v. Chelmsford Foundry Co.* 170 Mass. 322, 49 N. E. 635, holding employee of owner, injured on uncompleted staircase of house which contractor has not turned over, mere licensee; *Ganley v. Hall*, 158 Mass. 514, 47 N. E. 416, denying right of recovery to mere licensees for damages for slipping on ice formed by water which dripped from defective gutters of tenement; *Barman v. Spencer (Ind.)* 44 L. R. A. 818, 49 N. E. 9, holding that guest at private residence has right of action against owner, where he fell into unguarded well at night on way to privy; *Wilcox v. Zane*, 167 Mass. 306, 45 N. E. 923, holding owner of building liable for injury to servant of tenant, due to breaking of rotten board on roof used in common by tenants as drying ground; *Cumberland Teleg. & Teleph. Co. v. Martin*, 25 Ky. L. Rep. 789, 63 L. R. A. 470, 76 S. W. 394, holding telephone company not liable for death of pedestrian killed by lightning conducted under store porch by uninsulated wire.

Cited in footnotes to *Baddeley v. Shea*, 33 L. R. A. 747, which denies liability for injury to man refusing assistance in carrying trunk, by breaking of platform in apparently good condition; *Benson v. Baltimore Traction Co.* 20 L. R. A. 714, which denies recovery to student falling into uncovered vat while class inspecting power house under permission; *Fellows v. Gilhuber*, 17 L. R. A. 578, which holds lessor of hotel not liable for injury to guest by defective awning; *Sterger v. Van Siclen*, 16 L. R. A. 640, which holds property owner not required to have stairways safe as to person on premises in search of child; *McGinley v. Alliance Trust Co.* 56 L. R. A. 334, which holds lessor of apartment house retaining control of stairways liable for injury to tenants from lack of repair of stair railing; *Ryerson v. Bathgate*, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation.

Cited in note (23 L. R. A. 157) on landlord's liability as to condition of part of premises not controlled by tenant.

Distinguished in *Parsons v. Manser*, 119 Iowa, 93, 62 L. R. A. 135, 97 Am. St. Rep. 283, 93 N. W. 86, holding owner of bees liable for injuries resulting from attack upon horses standing in road.

16 L. R. A. 558, *YOUNGER v. JUDAH*, 111 Mo. 303, 33 Am. St. Rep. 527, 19 S. W. 1109.

Violation of civil rights act.

Cited in *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 92, 19 L. R. A. 271, 21 S. W. 457, holding regulation of railroad forbidding negroes to ride in same cars with whites reasonable, where safe and commodious cars for them are provided.

Cited in footnote to *Cecil v. Green*, 32 L. R. A. 566, which holds drug store where soda water is sold not place of accommodation and amusement within civil rights act.

16 L. R. A. 561, *SOUTHARD v. CURLEY*, 134 N. Y. 148, 30 Am. St. Rep. 642, 31 N. E. 330.

Reformation of contract.

Cited in *Weed v. Whitehead*, 1 App. Div. 195, 37 N. Y. Supp. 178; *Santa Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 67, 66 N. W. 1140; *Koen v. Kerns*, 47 W. Va. 580, 35 S. E. 902; *Johnstown Min. Co. v. Butte & B. Consol. Min. Co.* 60 App. Div. 347, 70 N. Y. Supp. 257; *Simpkins v. Taylor*, 81 Hun, 468, 31 N. Y. Supp. 169; *Christopher & T. Street R. Co. v. Twenty-third Street R. Co.* 149 N. Y. 58, 43 N. E. 538. Affirming 78 Hun, 467, 29 N. Y. Supp. 233; *Dougherty v. Lion F. Ins. Co.* 41 Misc. 287, 84 N. Y. Supp. 10; *McGuigan v. Gaines*, 71 Ark. 617, 77 S. W. 52,—declaring evidence required to reform written contract on ground of mistake must be of “most substantial and convincing character;” *Kelley v. Root*, 74 App. Div. 505, 77 N. Y. Supp. 431 (dissenting opinion), majority holding right to have contract of sale of stock reformed not shown, although it does not embody entire contract; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 568, 76 N. Y. Supp. 790. holding that right to reform land contract for mutual mistake in description does not require more than satisfactory preponderance of evidence; *Burt v. Quackenbush*, 72 App. Div. 549, 75 N. Y. Supp. 1031, refusing to reform condition of agreement to procure “building loan or other loan,” where evidence does not disclose mutual mistake; *Darmour v.*

Chapman, 2 App. Div. 115, 37 N. Y. Supp. 674, permitting reformation for mutual mistake of bond which should have contained certain condition as provided by declaration of trust; Webb v. Morrison, 92 Hun, 605, 37 N. Y. Supp. 449, reforming and enforcing contract for purchase of land; Cortland Howe Ventilating Stove Co. v. Howe, 92 Hun, 117, 36 N. Y. Supp. 701, reforming contract where evidence disclosed fact that instrument did not contain actual agreement; Stern v. Ladew, 47 App. Div. 340, 62 N. Y. Supp. 267, holding that mutual mistake as to price of hides in contract must be established by party asserting it; Greene v. Smith, 13 App. Div. 465, 43 N. Y. Supp. 610, refusing to reform contract inserting important provisions, on contradictory evidence of parties to it, when it has existed twenty years unchallenged; Doane v. Dunham, 64 Neb. 136, 89 N. W. 640, holding parol evidence of resulting trust, upon conveyance of land by husband to wife, must be clear and convincing.

Evidence required to establish gift causa mortis.

Cited in Reynolds v. Reynolds, 20 Misc. 257, 45 N. Y. Supp. 338, which holds gift *causa mortis* may be established by fair preponderance of evidence; Gibbs v. Carnahan, 4 Misc. 567, 25 N. Y. Supp. 786, holding that gift *causa mortis* does not require to be proved by "clearest, strongest, and most unequivocal evidence;" Cook v. Dowling, 6 Misc. 273, 26 N. Y. Supp. 764, which holds burden of proof to establish right of possession of bonds is on executor of decedent, where it is claimed they had been given to the one in possession of them.

16 L. R. A. 564, GAY v. BRIERFIELD COAL & I. CO. 94 Ala. 303, 33 Am. St. Rep. 122, 11 So. 353.

Right of widow under foreclosure.

Cited in McGough v. Sweetser, 97 Ala. 364, 19 L. R. A. 471, 12 So. 162, holding that widow who has not been made party to foreclosure proceedings has same rights as she would have had before proceedings begun.

Actions pending in courts of concurrent jurisdiction.

Cited in Rodgers v. Pitt. 96 Fed. 677, holding that state and Federal courts do not belong to same system, in so far as jurisdiction is concurrent; Craig v. Hoge, 95 Va. 280, 28 S. E. 317, and Troy Fertilizer Co. v. Prestwood, 116 Ala. 123, 22 So. 262, holding that court will not attempt to interfere with proceedings first instituted in another court of concurrent jurisdiction; Southern Granite Co. v. Wadsworth, 115 Ala. 575, 22 So. 157, refusing to entertain jurisdiction of action against receiver appointed by Federal court; Gardner v. Caldwell, 16 Mont. 233, 40 Pac. 590, holding that judgment creditor has no right to levy execution on property of debtor in custody of receiver in another judicial district; Turrentine v. Blackwood, 125 Ala. 441, 82 Am. St. Rep. 254, 28 So. 95, holding that state court will not interfere with bankrupt's property when Federal court has acquired jurisdiction; Gay v. Briersfield Coal & I. Co. 106 Ala. 620, 17 So. 618, holding that creditors can reach all of debtor's property in hands of alleged fraudulent purchasers, when latter shall have ceased to hold it under claim bond executed in another court; Williams v. Dismukes, 106 Ala. 409, 17 So. 620, holding that property in custody of law under process of one court cannot be seized under process of another court of co-ordinate jurisdiction; George v. Central R. & Bkg. Co. 101 Ala. 623, 14 So. 752, holding that court of equity has jurisdiction to enjoin use of stock of one railroad by another, though that rail

road is in hands of receiver appointed by another court; *Rodgers v. Pitt*, 96 Fed. 670, upholding jurisdiction of Federal court where state court had not exclusive possession of property, and no process against property had been issued, or receiver appointed, or injunction granted.

Distinguished in *Leigh v. Green*, 62 Neb. 354, 89 Am. St. Rep. 751, 86 N. W. 1093, holding that tax lien foreclosure may be prosecuted to sale of land, notwithstanding pending action in Federal court wherein lands have been levied upon under attachment; *Parsons v. Snider*, 42 W. Va. 520, 26 S. E. 285, holding that giving notice by trustee of sale of property in trust deed does not prevent court's taking possession, to administer for benefit of lienors.

Judgment on appeal.

Cited in *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 476, 38 Am. St. Rep. 109, 11 So. 439, refusing to dismiss bill when it is not clear whether facts authorize amendment of bill to give it equity.

Creditors' actions.

Cited in *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 143, 20 So. 84, holding that simple contract creditor may file bill to reach assets of insolvent debtor fraudulently conveyed, or in respect to which suit has been brought to hinder and delay creditors; *First Nat. Bank v. Pullen*, 129 Ala. 642, 29 So. 685, holding that stranger to collusive judgment may attack it collaterally when it imperils his rights in subject-matter.

Power of receiver to create liens.

Cited in note (16 L. R. A. 603) on power to permit receiver of private corporations to create lien on its property.

16 L. R. A. 576, *CROCKER v. SMITH*, 94 Ala. 295, 10 So. 258.

When instrument will or deed.

Cited in *Abney v. Moore*, 106 Ala. 134, 18 So. 60, holding instrument in form of deed, not witnessed, delivered to children named as grantees and stating title to vest on them at death, deed, not will; *Murray v. Cazier*, 23 Ind. App. 603, 53 N. E. 476, holding attempted disposition of rents in lease after husband's death testamentary, requiring statutory formalities; *Moore v. Campbell*, 102 Ala. 452, 14 So. 780, holding parol trust cannot take effect as testamentary bequest or devise; *Kelly v. Richardson*, 100 Ala. 595, 13 So. 785, holding instrument making gift of real estate, but retaining use during life, void as deed, but operative as codicil if formally executed; *Tuttle v. Raish*, 116 Iowa, 335, 90 N. W. 66, construing instrument in form of deed to be attempt at testamentary disposition of property.

Cited in footnote to *Ferris v. Neville*. 54 L. R. A. 464, which holds sufficient, paper executed as will, stating that it is good to specified person for specified amount from writer's estate.

16 L. R. A. 578, *COM. v. GRAHAM*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706.

Validity of extraterritorial marriage.

Cited in *Tyler v. Tyler*, 170 Mass. 151, 48 N. E. 1075, holding marriage by divorced people outside of state, to evade its laws, void under statute: *Jackson*

v. Jackson, 82 Md. 30, 34 L. R. A. 775, 33 Atl. 317, sustaining common-law marriage, valid when consummated; State *ex rel.* Wilkinson v. Dellinger, 126 N. C. 465, 35 S. E. 819, holding that marriage of female after reaching marriageable age emancipates her from parental control.

Cited in footnotes to Jackson v. Jackson, 34 L. R. A. 773, which sustains marriage, valid in state where contracted; State *ex rel.* Scott v. Lowell, 46 L. R. A. 440, which denies father's right to prevent girl, marrying under statutory age, from living with her husband if she so elects; Norman v. Norman, 42 L. R. A. 343, which holds marriage on high seas by parties leaving land to evade laws of residence invalid; *Re Stull*, 39 L. R. A. 539, which holds invalid, marriage between man and paramour in other state to avoid laws of domicile.

Cited in note (57 L. R. A. 172) on conflict of laws as to validity of marriage.

Rights and liabilities of infants.

Cited in *Peck v. Cain*, 27 Tex. Civ. App. 40, 63 S. W. 177, holding infant leasing premises for term of years not liable for rent after abandonment.

16 L. R. A. 581, *FOND DU LAC WATER CO. v. FOND DU LAC*, 82 Wis. 322, 52 N. W. 439.

Assessment of property of quasi-public corporation.

Cited in State *ex rel.* Milwaukee Street R. Co. v. Anderson, 90 Wis. 563, 63 N. W. 746, holding that franchise of street railway and property necessary for its use and enjoyment are to be assessed as an entirety; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 692, 84 Am. St. Rep. 589, 85 N. W. 96, upholding assessment of tangible property of street railway as enhanced by its franchise; *Monroe Waterworks Co. v. Monroe*, 110 Wis. 19, 85 N. W. 685, holding that contract between city and water company to pay part of taxes against company as rental cannot be enforced where this part cannot be separated from whole; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 514, 28 L. R. A. 254, 62 N. W. 417, holding provision of city charter relating to taxation does not authorize assessment for local improvement on tracks and right of way of railroad; State *ex rel.* Ashland Water Co. v. Wharton, 115 Wis. 461, 91 N. W. 976, holding assessment of entire property of water company valid, although classed as real estate; *Merrill R. & Lighting Co. v. Merrill*, 119 Wis. 256, 96 N. W. 686, holding land leased, "owned" within meaning of statute relating to taxation of street railways.

Cited in footnote to *Paris v. Norway Water Co.* 21 L. R. A. 525, which holds water mains, pipes, etc., taxable where located.

Cited in notes (60 L. R. A. 851) on taxation of municipal waterworks; (17 L. R. A. 93) on what property is part of corporate franchise for purposes of taxation; (57 L. R. A. 38, 46) on taxation of corporate franchise in United States; (60 L. R. A. 333) on constitutional equality in United States in relation to corporate franchise.

Lien on property of quasi-public corporation.

Cited in *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 45, holding plant for water supply of city an entirety, and lien cannot be maintained on piping alone, but attaches to entire plant; *Chapman Valve Mfg. Co. v. Oconto Water Co.* 89 Wis. 273, 46 Am. St. Rep. 830, 60 N. W. 1004, refusing mechanic's lien on either portion or entire plant of public water supply com-

pany; *Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 643, 84 Am. St. Rep. 948, 86 N. W. 592, holding lien may be enforced against such property of railway as not necessary to use as railway; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 56, holding that franchise of water supply company, being inseparable from its plant, may be sold to enforce mechanic's lien; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 473, 113 Fed. 801, holding lien laws of state have no application to city water supply companies.

Distinguished in *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 568, 63 N. W. 746, holding that assessment of power houses and lots separately from franchises of company rendered tax void.

Review of assessment.

Cited in *Brown v. Oneida County*, 103 Wis. 158, 79 N. W. 216, declaring tax illegal when board of review, without evidence, arbitrarily raised assessor's valuation; *State ex rel. John R. Davis Lumber Co. v. Sackett*, 117 Wis. 585, 94 N. W. 314, holding change in assessor's valuation of logs, by board of review, without sufficient evidence, invalid.

16 L. R. A. 586, *Ex parte BACOT*, 36 S. C. 125, 15 S. E. 204.

Right of condemnation.

Cited in *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 13, 56 L. R. A. 245, 88 Am. St. Rep. 918, 87 N. W. 849, sustaining right to condemn land for spur of railway for use of single industry; *Leitzsey v. Columbia Water Power Co.* 47 S. C. 479, 34 L. R. A. 220, 25 S. E. 744, holding that statute directing improvement of canal and construction of dam to raise water included right to condemn land necessary for those purposes; *Boyd v. Winnsboro Granite Co.* 66 S. C. 439, 45 S. E. 10, holding charter of private corporation amended by later Constitution and statute, so as to take away right to acquire property by condemnation.

Cited in footnote to *Re Rhode Island Suburban R. Co.* 52 L. R. A. 879, which denies power to condemn land for power house and coal pockets in city 5 miles from street railway lines.

Subject of act expressed in title.

Cited in *Hill v. Abbeville*, 59 S. C. 408, 38 S. E. 11 (circuit court decree, affirmed on appeal), prescribing powers to be exercised by municipal corporations, which was entitled "an act relating to the powers of certain corporations."

Cited in note (55 L. R. A. 839) on power of legislature to enact a Code or compilation of laws, or amend many or undesignated sections thereof by single statute.

Supervisory control over inferior tribunal.

Cited in note (51 L. R. A. 66) on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal.

16 L. R. A. 591, *STANWOOD v. MALDEN*, 157 Mass. 17, 31 N. E. 702.

Damages for diminishing value of land.

Cited in *Rand v. Boston*, 164 Mass. 356, 41 N. E. 484, denying right of recovery for lessening value of land by obstruction of light, air, etc., by building embankment on land on opposite side of street; *Cram v. Laconia*, 71 N. H. 48, 57 L. R. A. 286, 51 Atl. 635; *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 614, 34 L. R. A. 772,

50 Am. St. Rep. 343, 39 N. E. 223; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 428, 44 Atl. 813; *Re Melon Street* (Pa.) 38 L. R. A. 278, 38 Atl. 482, Reversing 1 Pa. Super. Ct. 79,—holding abutting owner on street discontinued at another point not damaged where he has free access to lot; *Buhl v. Fort Street Union Depot Co.* 98 Mich. 604, 23 L. R. A. 395, 57 N. W. 829, holding that inconvenience of abutting owner on street, another portion of which is discontinued, being common with all other abutters, is *damnum absque injuria*; *Sawyer v. Com.* 182 Mass. 247, 59 L. R. A. 727, 65 N. E. 52, holding business not property within statute providing for jury trial to determine damage in case of injury to property by exercise of right of eminent domain; *Taft v. Com.* 158 Mass. 548, 35 N. E. 1046, discussing measure of damages for diminution in value of land because of sewer under public way; *Wellington v. Boston & M. R. Co.* 158 Mass. 189, 33 N. E. 393, denying damages for narrowing private way, to owners not on way or having easement in it; *Emerson v. Somerville*, 166 Mass. 117, 44 N. E. 110, holding owner of buildings erected on land of another, without right to purchase it, not entitled to damages for taking of such land for park after notice to remove buildings; *Natick Gas-light Co. v. Natick*, 175 Mass. 250, 56 N. E. 292, holding town liable to abutting owner only for diminution in value of his land because of discontinuance of way, due to right to keep its main pipe in street; *Sears v. Street Comrs.* 180 Mass. 282, 62 L. R. A. 149, 62 N. E. 397, holding failure to provide for loss of value by diversion of travel due to public improvement, no objection to constitutionality of act providing for it; *Robinson v. Brown*, 182 Mass. 268, 65 N. E. 377, holding action not maintainable by abutting owner for damages for obstructions to way not opposite his premises; *Putnam v. Boston & P. R. Co.* 182 Mass. 354, 65 N. E. 790, upholding right of abutter to recover damages for temporary cutting off of access to streets of city by obstruction not in front of his property.

Cited in note (26 L. R. A. 664) on effect of abandonment of highway.

Criticized in *Lincoln v. Com.* 164 Mass. 375, 41 N. E. 489, sustaining damages to land by taking adjoining land for construction of sewer.

Assessments for improvements.

Cited in *Lincoln v. Street Comrs.* 176 Mass. 213, 57 N. E. 356, holding evidence inadmissible that other estates, not assessed, were benefited, if those benefits were common to all and not special.

Right of way by prescription.

Cited in *Hamlen v. Keith*, 171 Mass. 81, 50 N. E. 462, refusing to enjoin extension of front of building on ground of public right of way by prescription or dedication.

16 L. R. A. 593, *SKOTTOWE v. OREGON SHORT LINE & U. N. R. CO.* 22 Or. 430, 30 Pac. 222.

Duty to provide safe ways, stations, and platforms.

Cited in *Haselton v. Portsmouth, K. & Y. Street R. Co.* 71 N. H. 591, 53 Atl. 1016, holding street railway must maintain platform which it uses for passengers in reasonably safe condition, although it may be within limits of highway; *Union P. R. Co. v. Evans*, 52 Neb. 54, 71 N. W. 1062, holding railway must keep approach to platform reasonably safe for passengers; *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 166, 59 L. R. A. 120, footnote p. 118, 42 S. E. 405, holding evidence inadmissible that after injury railway moved further from track, post used for letter-pouch grab.

Cited in footnotes to *Hunter v. Weston*, 17 L. R. A. 633, which holds alley existing only on city plat not within ordinance prohibiting uncovered excavation near alley; *Graeff v. Philadelphia & R. R. Co.* 23 L. R. A. 607, which denies negligence of carrier in constructing door in such a way as not to prevent stranger's rude act in pushing it against person while hurrying to train.

Cited in note (24 L. R. A. 521) as to when person who has started for train becomes passenger.

16 L. R. A. 600, *HUGHES v. TORGERSON*, 96 Ala. 346, 38 Am. St. Rep. 105, 11 So. 209.

Rights of lienors.

Cited in *Little Rock, H. S. & T. R. Co. v. Spencer*, 65 Ark. 203, 42 L. R. A. 342, 47 S. W. 196, holding that lien can be established without showing work was done with claimant's own hands; *Post v. Miles*, 7 N. M. 332, 34 Pac. 586 (dissenting opinion), majority holding mechanic's lien notice complying exactly with statute sufficient, although infant heirs of former owner not named.

Cited in notes (62 L. R. A. 370) on mechanics' liens upon buildings distinct from land; (18 L. R. A. 310) on who are laborers, employees, or servants within meaning of statutes giving them preferences.

16 L. R. A. 603, *FARMERS LOAN & T. CO. v. GRAPE CREEK COAL CO.* 50 Fed. 481.

Priority of liens or claims.

Cited in *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 73; *Newton v. Eagle & P. Mfg. Co.* 76 Fed. 419; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 68 Fed. 626; *Hanna v. State Trust Co.* 30 L. R. A. 204, 16 C. C. A. 590, 36 U. S. App. 61, 70 Fed. 6; *Hooper v. Central Trust Co.* 81 Md. 591, 29 L. R. A. 272, 32 Atl. 505; *United States Invest. Corp. v. Portland Hospital*, 40 Or. 533, 56 L. R. A. 629, 67 Pac. 194; *International Trust Co. v. United Coal Co.* 27 Colo. 257, 83 Am. St. Rep. 59, 60 Pac. 621; *Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 547, 61 U. S. App. 636, 90 Fed. 147.—refusing to authorize issue of certificates by receiver of private corporation, which will be paramount lien as against existing lienors; *Snively v. Loomis Coal Co.* 69 Fed. 205, denying priority of claims for labor and materials to mining company over mortgage bonds or vendor's lien.

Cited in footnotes to *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456, which denies right to prefer claim for personal injuries over mortgage debt in receiver's earnings; *Houston & T. C. R. Co. v. Crawford*, 28 L. R. A. 761, which holds earning of railroad while operated by receiver subject to equitable lien for company's indebtedness; *Hanna v. State Trust Co.* 30 L. R. A. 201, which denies power to authorize receiver to borrow money to carry on business by issuing certificates superior to first mortgage; *United States Invest. Corp. v. Portland Hospital*, 56 L. R. A. 627, which denies authority of receiver continuing operation of hospital, to contract debts taking precedence over prior claims; *Drennen & Co. v. Mercantile Trust & D. Co.* 39 L. R. A. 623, which holds employee of manufacturing or mining company entitled to priority for wages earned within six months before receiver appointed; *Whitely v. Central Trust Co.* 34 L. R. A. 303, which holds preference to railroad mortgages not gained by paying judgment for damages against company by surety on supersedeas bond.

Distinguished in *Laughlin v. United States Rolling-Stock Co.* 64 Fed. 26, refusing priority of lien to holders of certificates of receivers of private corporation.

16 L. R. A. 605, *BOURGET v. CAMBRIDGE*, 156 Mass. 391, 31 N. E. 390.

Right, duties, and liabilities as to use of electricity or water.

Cited in *Bourget v. Cambridge*, 159 Mass. 389, 34 N. E. 455, holding city liable for defect in highway caused by loosely hanging wire, though defect caused by another.

Cited in footnotes to *Burt v. Douglas County Street R. Co.* 18 L. R. A. 479, which holds company liable for electric shock of passenger, due to imperfect insulation; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current; *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care to keep electric wires safe, due towards persons licensed to approach them; *Ahern v. Oregon Teleph. & Teleg. Co.* 22 L. R. A. 635, which holds telephone company liable for injury from electric wire left hanging on electric light company's pole; *Haynes v. Raleigh Gas Co.* 26 L. R. A. 810, which holds negligence shown by guy wire charged with deadly current hanging to ground from tree; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff.

Cited in note (31 L. R. A. 574, 589) on liability for injuries by electric wires in highways.

Distinguished in *Greenville v. Jones*, 19 Tex. Civ. App. 81, 45 S. W. 970, which holds city not liable for damage to building by use of water at water station erected without its consent, although it has failed to remove nuisance.

Negligence of travelers in touching electric wires.

Cited in *Klages v. Gillette-Herzog Mfg. Co.* 86 Minn. 466, 90 N. W. 1117, holding contributory negligence not shown by one attracted to spot attempting to push loose part of derrick cable, charged with electricity, from street into gutter.

16 L. R. A. 606, *PEOPLE ex rel. BRADLEY v. SHAW*, 133 N. Y. 493, 31 N. E. 512.

Validity of ballots and elections.

Cited in *State ex rel. Crow v. Hostetter*, 137 Mo. 645, 38 L. R. A. 216, 59 Am. St. Rep. 515, 39 S. W. 270, holding that electors are not restricted to names or offices printed on official ballot; *Sanner v. Patton*, 155 Ill. 565, 40 N. E. 290, holding legal ballots, cast for person not nominated, but whose name was written in blank space on printed ticket; *Montgomery v. O'Dell*, 67 Hun, 176, 22 N. Y. Supp. 412, holding ballot pasted on regular official ballot valid, although person voted for not regularly nominated; *State ex rel. Norton v. Van Camp*, 36 Neb. 105, 54 N. W. 113, holding court cannot go behind returns of canvassing board in mandamus proceeding; *People ex rel. Goring v. Wappingers Falls*, 144 N. Y. 619, 39 N. E. 641, sustaining right of voter to write or paste on official ballot office omitted, and name of person voter wishes to fill it; *People ex rel. Bradley v. Essex County*, 69 Hun, 407, 23 N. Y. Supp. 654, holding board of supervisors cannot determine contest to seat of duly elected and qualified member, after rights substantially passed on by court of appeals; *Re Hirsh*, 14 Misc. 332, 36 N. Y. Supp. 19,

holding court cannot pass upon ballots as marked for identification, unless challenged and returned as marked; *People ex rel. Howard v. Erie County*, 42 App. Div. 514, 59 N. Y. Supp. 476, holding that right of supervisor who has received certificate of election to seat on board must be determined by mandamus; *People ex rel. Bush v. McKenzie*, 66 Hun, 270, 48 N. Y. S. R. 793, 21 N. Y. Supp. 279, holding inspectors of election not authorized to attach ballots to statement of result unless election officer or watcher at canvass declares his belief that they were marked for identification; *Re McDade*, 43 App. Div. 315, 60 N. Y. Supp. 333, doubting whether ballots "protested on account of parties" were "marked for identification."

Cited in footnotes to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *Lindstrom v. Manistee County*, 19 L. R. A. 172, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots with device upon them in municipal election; *Eaton v. Brown*, 17 L. R. A. 697, which holds void, ballot law prohibiting marking elsewhere of ballot marked opposite name of political party; *Re Contested Election*, 27 L. R. A. 234, which denies right to paste slip ticket over printed matter on ballot; *Chamberlin v. Wood*, 56 L. R. A. 187, which authorizes limitation of votes to candidates whose names on official ballot.

Distinguished in *Fletcher v. Wall*, 172 Ill. 434, 40 L. R. A. 621, footnote p. 617, 50 N. E. 230, upholding action of board of canvassers in rejecting paster ballots; *State ex rel. Bennett v. Barber*, 4 Wyo. 81, 32 Pac. 14, holding that validity of election cannot be determined when mandamus is asked by one elected to office, to compel canvass of returns; *Vallier v. Brakke*, 7 S. D. 553, 64 N. W. 1119, refusing rehearing where elector did not follow directions of election law in voting for candidate.

Disapproved in *Chamberlain v. Wood*, 15 S. D. 227, 56 L. R. A. 190, 91 Am. St. Rep. 674, 88 N. W. 109, limiting right to vote to candidates on official ballot, unless right to vote for others secured by Constitution.

Title to and possession of office.

Cited in *Williams v. Boynton*, 71 Hun, 316, 25 N. Y. Supp. 60, holding member of public board not officer *de facto* whose claims to office have been denied by court of last resort; *Re Bradley*, 141 N. Y. 530, 36 N. E. 598, holding one who has received certificate of election to office, and qualified, entitled to delivery of books and money from predecessor.

16 L. R. A. 608, *HOEFLING v. SAN ANTONIO*, 85 Tex. 228, 20 S. W. 85.

Right to levy tax.

Cited in *Ex parte Terrell*, 40 Tex. Crim. Rep. 30, 48 S. W. 504, denying power of city to levy occupation tax upon business not taxed by state.

Recovery of illegal taxes.

Cited in footnote to *St. Anthony & D. Elevator Co. v. Soucie*, 50 L. R. A. 262, which sustains right to recover illegal taxes paid under protest to prevent tax collector's sale of personal property.

16 L. R. A. 611, *STATE ex rel. ATTY. GEN. v. FIDELITY & C. INS. CO.* 49 Ohio St. 440, 34 Am. St. Rep. 573, 31 N. E. 658.

Right of foreign corporation to do business in state.

Cited in *People ex rel. Traders' Ins. Co. v. Van Cleave*, 183 Ill. 335, 47 L. R. A. 798, 55 N. E. 698, holding that superintendent of insurance cannot refuse license to foreign insurance company because of similarity of name with that of domestic company.

Cited in notes (24 L. R. A. 304) on restrictions on business of foreign insurance companies; (24 L. R. A. 295) on recognition or exclusion of foreign corporations.

What is necessary to create corporation.

Cited in footnote to *Slocum v. Head*, 50 L. R. A. 324, which holds persons attempting to incorporate by filing original articles instead of copies entitled to all rights of corporation as to persons dealing with them as such.

16 L. R. A. 614, *MORGAN v. BELL*, 3 Wash. 554, 28 Pac. 925.

Mistake as to legal rights.

Cited in *Cunningham v. Duncan*, 4 Wash. 508, 30 Pac. 647, holding one not aware of inability of other party to convey, entitled to recover money paid on contract after action begun for specific performance; *Morgan v. Morgan*, 10 Wash. 122, 38 Pac. 1054 (dissenting opinion), majority holding that statute of limitations had run against action by divorced wife, resident of another state, against former husband to set aside deed of community land, although ignorant of law of land at time of conveyance; *Ormsby v. Graham*, 123 Iowa, 209, 98 N. W. 724, holding vendee not entitled to specific performance of contract to convey title which vendor does not possess.

Cited in footnote to *Alton v. First Nat. Bank*, 18 L. R. A. 144, which denies indorsee's right to recover back amount paid under mistaken belief as to liability.

Distinguished in *Konnerup v. Frandsen*, 8 Wash. 555, 36 Pac. 493, upholding right to specific performance of contract to convey community land where wife encouraged and consented to contract, ratified performance, and accepted benefits.

Damages.

Cited in *Engstrom v. Merriam*, 25 Wash. 77, 64 Pac. 914, holding measure of damages for failure to give possession of leased premises for new business is difference between rent and rental value; *West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* 31 Wash. 613, 72 Pac. 455, holding damages for breach of warranty to be proportionate value of part of land as to which title failed to whole tract.

Cited in notes (20 L. R. A. 757) on damages in lieu of injunction; (52 L. R. A. 241) on loss of profits of sale or purchase as damages.

Right to jury trial.

Cited in *Goldthwait v. Lynch*, 9 Utah, 191, 33 Pac. 699, holding that action for damages for breach of contract is one at law, to be tried by jury where such trial demanded.

16 L. R. A. 625, *MOORE v. ROLIN*, 89 Va. 107, 15 S. E. 520.

16 L. R. A. 627, ILLINOIS C. R. CO. v. MINOR, 63 Miss. 710, 11 So. 101.

Carrier's liability to passengers.

Cited in *Tall v. Baltimore Steam Packet Co.* 90 Md. 254, 47 L. R. A. 122, footnote p. 120, 44 Atl. 1007, holding carrier not liable for shooting of passenger by fellow passenger quarreling over game of cards; *Gulf, C. & S. F. R. Co. v. Shields*, 9 Tex. Civ. App. 656, 28 S. W. 709, holding that railway employee must exercise highest care and diligence to prevent jug or alcohol from being spilled in car, so that it shall not ignite and burn passenger.

Cited in footnotes to *United R. & Electric Co. v. State*, 54 L. R. A. 942, which holds carrier liable for injuries inflicted on passenger by drunken passenger permitted to return and remain after removal; *Richmond & D. R. Co. v. Jefferson*, 17 L. R. A. 571, which holds colored passenger entitled with white passenger to protection; *Savannah, F. & W. R. Co. v. Boyle*, 59 L. R. A. 104, which denies carrier's liability for shooting of passenger by negro tramp attempting to escape from arrest for stealing ride; *Sullivan v. Jefferson Ave. R. Co.* 32 L. R. A. 167, which denies carrier's liability for injury to passenger whose dress ignites by match carelessly thrown by other passenger.

Cited in note (55 L. R. A. 719) on carrier's liability for assault on passenger by strikers, mob, or third persons.

Objections to instructions.

Cited in *Alexander v. Flood*, 77 Miss. 926, 28 So. 787, refusing to consider objections to instructions not made in court below.

16 L. R. A. 631, FLORIDA SOUTHERN R. CO. v. HIRST, 30 Fla. 1, 32 Am. St. Rep. 17, 11 So. 506.

Direction of verdict.

Cited in *De Graffenried v. Wallace*, 2 Ind. Terr. 662, 53 S. W. 452, holding that court, in setting aside verdict for plaintiff, should direct verdict for defendant; *De Graffenried v. Wallace*, 2 Ind. Terr. 662, 53 S. W. 452, holding that court should direct verdict for defendant, if evidence such that contrary verdict should be set aside.

Relation of carrier and passenger.

Cited in *Jackson v. Grand Ave. R. Co.* 118 Mo. 220, 24 S. W. 192, holding it not unreasonable that passengers should acquaint themselves with rules adopted for their safety; *Berry v. Missouri P. R. Co.* 124 Mo. 304, 25 S. W. 229 (dissenting opinion), as to right of public to determine when an exigency may demand suspension of rules of railway company; *Rawlings v. Wabash R. Co.* 97 Mo. App. 518, 71 S. W. 534, holding passenger entitled to recover for inconvenience, loss of time, labor, and necessary expense caused by being carried beyond station.

Negligence of passenger.

Cited in footnote to *Florida C. & P. R. Co. v. Sullivan*, 61 L. R. A. 410, which denies negligence of white passenger in riding in car set apart for negroes.

Risks assumed by passenger.

Cited in note (19 L. R. A. 311) on what risk is assumed by passenger on freight train.

Meaning of gross negligence.

Cited in *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 59, 79 Am. St. Rep. 149,

25 So. 338, upholding instruction using term "gross negligence" where it appears that it was not intended to imply that injury was due to sole fault of defendant; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 665, 95 N. W. 161 (dissenting opinion), as to liability in case of gross negligence.

Wilful injury.

Cited in *Aiken v. Holyoke Street R. Co.* 184 Mass. 272, 68 N. E. 238, holding failure of one injured to exercise due care, no defense to action for wanton and wilful injury.

Injuries due to joint negligence of plaintiff and defendant.

Cited in *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 56, 79 Am. St. Rep. 149, 25 So. 338, holding that statute allowing recovery for injuries due to negligence of railroad company, contributed to by one injured, applies to action brought by latter's representative.

Punitive damages.

Cited in *Florida C. & P. R. Co. v. Mooney*, 40 Fla. 35, 24 So. 148, refusing punitive damage to employees injured through carelessness, not wanton, reckless indifference of engineer of shifting engine.

16 L. R. A. 640, *STERGER v. VAN SICLEN*, 132 N. Y. 499, 28 Am. St. Rep. 594, 30 N. E. 987.

Liability for injury to licensee or trespasser.

Cited in *Flanagan v. Atlantic Alcatraz Asphalt Co.* 37 App. Div. 480, 56 N. Y. Supp. 18, holding owner not liable to servant of contractor doing work on premises and injured by fall of gate while engaged on business of his own; *Reynolds v. Van Beuren*, 155 N. Y. 125, 42 L. R. A. 131, 49 N. E. 263, denying right of recovery against advertisers using sign-board on building, for injuries due to fall of sign; *McCann v. Thilemann*, 36 Misc. 148, 72 N. Y. Supp. 1076, holding that owner of vacant, unfenced lot who does not object to use of way over it is only required to protect mere licensee from wanton, wilful injury; *Wells v. Brooklyn Heights R. Co.* 34 Misc. 46, 68 N. Y. Supp. 305, holding that elevated railroad company owes duty to licensee to avoid running him down with locomotive; *Greene v. Linton*, 7 Misc. 274, 27 N. Y. Supp. 891, holding owner of vacant lots not liable for drowning of child in cesspool at some distance from street; *Moran v. Pullman Palace Car Co.* 134 Mo. 652, 33 L. R. A. 759, 56 Am. St. Rep. 543, 36 S. W. 659, holding owner of premises on which pond of water accumulated not liable for drowning of lad playing in pond; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 63, 38 L. R. A. 575, 66 Am. St. Rep. 856, 41 S. W. 62, holding railway company not liable for drowning of infant in pool of water allowed to accumulate on its right of way; *Huebner v. Hammond*, 80 App. Div. 129, 80 N. Y. Supp. 295 (dissenting opinion), majority holding that longshoreman has no right of recovery for injury due to uptilted grating on lighter, upon which he was sent by his foreman without request from crew of lighter; *Speckman v. Boehm*, 36 App. Div. 264, 56 N. Y. Supp. 758, holding erroneous, instruction that lessor liable though he "did not actually know of decayed condition of floor" of basement into which injured party was sent by tenant of another floor; *Jehle v. Ellicott Square Co.* 31 App. Div. 345, 52 N. Y. Supp. 366, sustaining nonsuit against owner where person killed was employee of independent contractor using elevator in uncompleted and unaccepted building; *Sunderlin v. Hollister*, 4 App. Div. 486, 38 N. Y. Supp. 682, holding it error to dismiss complaint when evidence disclosed that plaintiff fell

into unguarded elevator hole while in store to make purchase. *McNeven v. Arnett*, 4 App. Div. 137, 38 N. Y. Supp. 759, refusing recovery for death of trespasser falling from runway across excavation near sidewalk; *Castoriano v. Miller*, 15 Misc. 255, 71 N. Y. S. R. 471, 36 N. Y. Supp. 419, which holds brewery not liable for injury to child scalded by falling into slop box while going through passageway where he had no business to be; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, holding owner of lot not bound to guard excavation from children coming upon it as mere trespassers; *Clapp v. La Grill*, 103 Tenn. 174, 52 S. W. 134, holding owner not liable for injuries to one rightfully on premises and stepping on grating that gave way and let him into cellar, when owner could not have known condition with ordinary care; *Deyo v. Kingston Consol. R. Co.* 94 App. Div. 584, 88 N. Y. Supp. 487 (dissenting opinion), majority holding street car company not liable for negligence of servant of independent contractor firing skyrocket injuring spectator paying way into public park; *Cumberland Teleg. & Teleph. Co. v. Martin*, 25 Ky. L. Rep. 789, 63 L. R. A. 470, 76 S. W. 394, holding telephone company not liable for death of pedestrian by lightning conducted by uninsulated wire under stone porch.

Cited in footnote to *Benson v. Baltimore Traction Co.* 20 L. R. A. 714, which denies recovery to student falling into uncovered vat while class inspecting power house under permission.

Duty of owner to keep premises reasonably safe.

Cited in *Fogarty v. Bogart*, 59 App. Div. 119, 69 N. Y. Supp. 47, holding that owner of apartment house owes duty of keeping place reasonably safe for one coming to inquire about rooms; *McGovern v. Standard Oil Co.* 11 App. Div. 593, 42 N. Y. Supp. 595, sustaining verdict for death of brakeman swept off car passing under cross-beam placed within 4 feet of top of car; *Taylor v. Constable*, 57 Hun, 373, 10 N. Y. Supp. 607, holding that overseer, directed by commissioner of highways to repair bridge, may recover for personal injuries in breaking of bridge while driving across with loaded wagon; *Barrett v. Lake Ontario Beach Improv. Co.* 68 App. Div. 613, 74 N. Y. Supp. 301 (dissenting opinion), majority holding company not liable for death of boy falling from toboggan slide by slipping beneath lower strip of guard railing; *Frank v. Mandel*, 76 App. Div. 418, 78 N. Y. Supp. 855; *Brady v. Klein*, 133 Mich. 426, 62 L. R. A. 911, 95 N. W. 557, holding that covenant of landlord to repair does not inure to benefit of guest or licensee of tenant.

Cited in footnote to *Baddeley v. Shea*, 33 L. R. A. 747, which denies liability for injury to man refusing assistance in carrying trunk, by breaking of platform in apparently good condition.

Distinguished in *Delaney v. Pennsylvania R. Co.* 78 Hun, 396, 29 N. Y. Supp. 226, holding lessees of wharves in New York bound to keep them in repair for public safety, and to give warning when they are being repaired.

16 L. R. A. 643, *DARLING v. NEW YORK, P. & B. R. CO.* 17 R. I. 708, 24 Atl. 462.

Contributory negligence.

Cited in *Whipple v. New York, N. H. & H. R. Co.* 19 R. I. 592, 61 Am. St. Rep. 796, 35 Atl. 305, holding injury to brakeman brushed from ladder of car by telegraph pole too near track not due to his negligence, where he had no warning of its proximity; *Nicholas v. Peck*, 21 R. I. 406, 43 Atl. 1038, holding it contributory

negligence to walk into defect in sidewalk, perfectly obvious, in broad daylight; *Atchison, T. & S. F. R. Co. v. Rowan*, 55 Kan. 286, 39 Pac. 1010, holding it for jury to determine negligence of brakeman killed by striking beams of low bridge while on top of high furniture car, when no warning had been given.

Cited in note (41 L. R. A. 38) on knowledge as element of employer's liability to injured servant.

Distinguished in *Piper v. Cambria Iron Co.* 78 Md. 252, 27 Atl. 939, which holds master not liable for injury to employee who stepped into space between car and platform while unloading car.

Coercion of jury.

Cited in *Edwards v. Murray*, 5 Wyo. 159, 38 Pac. 681, refusing reversal because bailiff answered question of jurymen as to when judge would call them into court: "I suppose, some time next week."

Cited in footnote to *People v. Sheldon*, 41 L. R. A. 644, which holds jury coerced where they have been kept for eighty-four hours in small room, without beds, and have reason to believe still further detention liable unless they agree.

16 L. R. A. 646, *ALLEN v. ALLEN*, 95 Cal. 184, 30 Pac. 213.

When rights are vested.

Cited in *Falconer v. Simmons*, 51 W. Va. 176, 41 S. E. 193, holding party has no vested right in writ of certiorari granted on strength of former decision which has been overruled; *Weston v. Ralston*, 48 W. Va. 190, 38 S. E. 446, holding that property cannot vest under decision which is later declared erroneous; *Allen v. Allen*, 38 C. C. A. 338, 97 Fed. 527, holding that equitable action in Federal court cannot be maintained to set aside judgment in state court because of impairment of obligation.

Cited in footnote to *Gross v. Whitley County*, 58 L. R. A. 394, which denies county treasurer's right to compensation under statute in force during first term, for services during second term under different statute.

Effect of statute of limitation of another state upon right of action.

Cited in note (48 L. R. A. 637) as to when statute of limitations will govern actions in another state or country.

When court decision part of contract.

Cited in footnotes to *Haskett v. Maxey*, 19 L. R. A. 379, which holds construction of statute of descents at time heirs give quitclaim becomes part of contract.

16 L. R. A. 655, *DAVIS v. BRONSON*, 2 N. D. 300, 33 Am. St. Rep. 783, 50 N. W. 836.

Repudiation or rescission of contracts.

Cited in *Gibbons v. Bente*, 51 Minn. 505, 22 L. R. A. 85, footnote p. 83, 53 N. W. 756, holding that party to executory contract may stop performance, subject to compensate other party in damages for breach; *Ault v. Dustin*, 100 Tenn. 383, 45 S. W. 981, holding that party to contract for manufacture of rope can renounce it, and manufacturer cannot complete and recover, but must sue for damages for breach; *Ward v. American Health Food Co.* 119 Wis. 25, 96 N. W. 388, holding recovery upon breach of executory advertising contract limited to damages sustained thereby; *McCall Co. v. Jennings*, 26 Utah, 465, 73 Pac. 639, holding vendee under executory contract of sale liable on breach only for resulting damages.

Cited in note (30 L. R. A. 70) on right to rescind or abandon contract because of other party's default.

Distinguished in *P. P. Emory Mfg. Co. v. Salomon*, 178 Mass. 584, 60 N. E. 377, holding that anticipatory notice of intention not to fulfil contract to deliver goods by certain date does not bind other party as conclusive of failure; *Stanford v. McGill*, 6 N. D. 567, 38 L. R. A. 771, 72 N. W. 938, holding rescission of contract before performance not breach, but dispenses with offer to perform.

Damages for breach of contract.

Cited in *Southern Cotton-Oil Co. v. Heflin*, 39 C. C. A. 551, 99 Fed. 345, holding measure of damages on breach of contract for failure to take cotton-seed meal is difference between contract price and market price; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 145, 59 L. R. A. 124, footnote p. 122, 94 Am. St. Rep. 112, 42 S. E. 378, holding damages for breach, only remedy of vendor receiving notice before shipment that goods will not be received.

Distinguished in *Martin v. Meles*, 179 Mass. 118, 60 N. E. 397, holding damages for repudiation of contract fixed when demand made under contract.

Construction of contracts.

Cited in *Davis v. Ravenna Creamery Co.* 48 Neb. 478, 67 N. W. 436, holding subscribers to contract to secure erection of creamery liable to extent of subscription only.

Disapproved in *Gibbons v. Bente*, 51 Minn. 507, 22 L. R. A. 85, 53 N. W. 756, holding obligation of subscriber to pay for erection of creamery is several and independent, but obligation of all subscribers is, in other respects, joint.

16 L. R. A. 660, *BARNES v. BARNES*, 95 Cal. 171, 30 Pac. 298.

Dismissal of action.

Cited in *Boyd v. Steele*, 6 Idaho, 633, 59 Pac. 21, holding dismissal of action not defeated by failure of clerk to enter formal judgment.

Mental suffering and cruelty as ground for divorce.

Cited in *Smith v. Smith*, 124 Cal. 652, 57 Pac. 573, holding that complaint contains no cause of action for extreme cruelty, when allegation is that coarse epithets were applied to woman who was accused of want of chastity; *Curl v. Curl*, 130 Cal. 639, 63 Pac. 65, holding it question of fact whether grievous mental anguish was caused by conduct of wife intimately associating with another man; *Mahnken v. Mahnken*, 9 N. D. 191, 82 N. W. 870, holding grievous mental suffering sufficient for divorce, although there be no bodily injury; *Ring v. Ring* (Ga.) 62 L. R. A. 884, 44 S. E. 861, holding habitual and intemperate use of morphine not "cruel treatment" authorizing divorce.

Cited in footnote to *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food.

16 L. R. A. 664, *BALLARD v. BURTON*, 64 Vt. 387, 24 Atl. 769.

Sufficiency of consideration.

Cited in *Merchants' Nat. Bank v. Taylor*, 66 Vt. 577, 29 Atl. 1012, holding that surrender of "trade paper," to take in lieu thereof note secured by mortgage, is sufficient consideration to bind mortgagor as to his false representations, made in such transaction.

When indorser bound on certificate of deposit.

Cited in footnote to *Towle v. Starz*, 36 L. R. A. 463, which requires demand on last day of grace on expiration of six months on certificate of deposit containing provision for leaving money on deposit six months, and not bearing interest after maturity.

Distinguished in *Jackson v. McInnis*, 33 Or. 531, 43 L. R. A. 129, 72 Am. St. Rep. 755, 54 Pac. 884, holding demand of payment on receiver of insolvent bank and notice of nonpayment insufficient to bind indorser of certificate of deposit issued by bank before insolvency.

Time of payment.

Cited in *Citizens Sav. Bank & T. Co. v. Babbitt*, 71 Vt. 186, 44 Atl. 71, holding silence as to time of extension of note and time of payment by guarantor leaves construction to be reasonable time as to both.

Judgment by appellate court.

Cited in *Miltimore v. Bottom*, 66 Vt. 172, 28 Atl. 872, holding that appellate court, on reversal, may render such judgment as lower court should have rendered.

Parol evidence to explain indorsement.

Cited in *Young v. Sehon*, 53 W. Va. 137, 62 L. R. A. 505, 97 Am. St. Rep. 970, 44 S. E. 136, holding parol evidence admissible to explain liability of promisee and another as indorsers of non-negotiable note; *Lyndon Sav. Bank v. International Co.* 75 Vt. 231, 54 Atl. 191, holding that real obligation of indorser in blank on promissory note may be shown by parol.

16 L. R. A. 668, *BLUM v. SCHWARTZ* (Tex.) 20 S. W. 54.

Protection of bona fide purchaser at judicial sale.

Cited in note (21 L. R. A. 34, 54) on how far purchaser at execution or judicial sale is protected as bona fide purchaser.

16 L. R. A. 674, *CINCINNATI, H. & D. R. CO. v. KASSEN*, 49 Ohio St. 230, 31 N. E. 282.

Liability for failure to avoid accident.

Cited in *Lake Shore & M. S. R. Co. v. Schade*, 15 Ohio C. C. 433, sustaining verdict for plaintiff where jury might have found that engineer was not keeping careful watch and failed to give signals on approaching crossing; *Summit Coal Co. v. Shaw*, 16 Ind. App. 16, 44 N. E. 676, holding erroneous, instruction that plaintiff's negligence will not prevent recovery if defendant could have avoided accident, if not limited to negligence after becoming aware of other's danger; *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 418, 60 U. S. App. 156, 88 Fed. 120, holding it proper to submit to jury question whether engineer could not have stopped train after first becoming aware of child on track; *Gahagan v. Boston & M. R. Co.* 70 N. H. 450, 50 Atl. 146, sustaining nonsuit where there was nothing in man's appearance or gait to indicate to engineer of approaching train that he was not fully aware of danger of crossing ahead of train; *Snyder v. Cleveland, C. C. & St. L. R. Co.* 60 Ohio St. 497, 54 N. E. 475, holding railroad owes duty to station agent necessarily on track, to keep lookout so as to prevent his being run down by train giving no warning of its approach.

Distinguished in *Erie R. Co. v. McCormick*, 69 Ohio St. 53, 68 N. E. 571, holding

knowledge of engineer in time to prevent accident necessary to support recovery for injury to one on track.

Proximate cause.

Cited in *Lake Shore & M. S. R. Co. v. Ehlert*, 19 Ohio C. C. 183, holding negligence of railway employees in failing to give warning of approaching train to one negligently standing close to track, proximate cause of death.

Cited in footnote to *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, which holds carrier not liable for death by suicide of one rendered insane by negligent injury; *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *People v. Lewis*, 45 L. R. A. 783, which holds that suicide of person mortally wounded does not relieve assailant from guilt of manslaughter.

Contributory negligence.

Cited in *Schweinfurth v. Cleveland, C. C. & St. L. R. Co.* 60 Ohio St. 223, 54 N. E. 89, holding erroneous, instruction that verdict must be for defendant if negligence, however slight, of plaintiff contributed to accident; *Krause v. Morgan*, 53 Ohio St. 37, 40 N. E. 886, holding that miner must be free from negligence to make operator liable for injury due to explosion of fire damp under statute giving right of action.

Duty of carrier toward disabled passenger.

Cited in footnote to *Reed v. Louisville & N. R. Co.* 44 L. R. A. 823, which requires railroad company to stop and rescue passenger fallen or thrown from train, only when possible without risk of collision.

Cited in note (19 L. R. A. 328) on exposure of drunken passenger to danger by ejection from car.

Last clear chance.

Cited in footnote to *Baltimore Consol. R. Co. v. Armstrong*, 54 L. R. A. 424, which denies liability towards one caught between two street cars by becoming confused after assenting to motorman's instructions as to reaching safe place.

Cited in note (55 L. R. A. 458) on doctrine of last clear chance.

Distinguished in *Pittsburgh, C. C. & St. L. R. Co. v. Redding*, 140 Ind. 104, 34 L. R. A. 768, 39 N. E. 921, holding carrier not guilty of wanton neglect of duty in not stopping freight train on up grade to remove boy who had jumped on car and fallen from and under it.

16 L. R. A. 677, *LEWIS v. ARBUCKLE*, 85 Iowa, 335, 52 N. W. 237.

Legality of acts as affected by insanity or undue influence.

Cited in *Chambers v. Brady*, 100 Iowa, 627, 69 N. W. 1015, refusing to set aside deed of parent to child where grantor, of undoubted soundness of mind, lived with grantee, who took care of him in sickness and in health; *Ramsdell v. Ramsdell*, 128 Mich. 116, 87 N. W. 81, sustaining deed by insane person executed in lucid interval.

Cited in footnotes to *Orchardson v. Cofield*, 40 L. R. A. 256, which holds will prompted by delusion, induced by belief in spiritualism, that beneficiary gifted with spiritual powers invalid; *People v. Gilman*, 46 L. R. A. 218, which holds con-

spiracy to cheat by materializing seances of professed medium punishable, though obvious humbug.

Cited in note (37 L. R. A. 270) on what are insane delusions.

16 L. R. A. 681, *Re LALLY*, 85 Iowa, 49, 51 N. W. 1155.

Custody, education, and welfare of child.

Cited in *Hadley v. Forrest*, 112 Iowa, 126, 83 N. W. 822, refusing custody of her child to divorced woman of loose character, and without means, seeking to obtain it from lady in whose care it had been left; *State v. Bailey*, 157 Ind. 330, 59 L. R. A. 437, 61 N. E. 730, holding that parent may be compelled by statute to educate child; *Miller v. Miller*, 123 Iowa, 169, 98 N. W. 631, holding abandonment of child by parent not made out in absence of adoption proceedings, by declaration of father at death of wife.

Cited in footnotes to *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child, notwithstanding assent to wife's deathbed contract to give custody to her relatives; *Stapleton v. Poynter*, 53 L. R. A. 784, which upholds custody of child taken against its will from wealthy grandparent and given to parent of moral habits; *People v. Ewer*, 25 L. R. A. 794, which holds valid, act prohibiting employment of girls under fourteen as dancers or in theatrical exhibitions; *Re Reiss*, 25 L. R. A. 798, which denies power of court to compel father to send children to visit their grandmother; *Kelsey v. Green*, 38 L. R. A. 471, which denies absolute right of guardian appointed on father's application, as against guardian appointed in other state where child actually resides; *Anderson v. Young*, 44 L. R. A. 277, which sustains court's power to uphold, in interest of child, custody held under void agreement with parent; *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927, which denies father's absolute right to custody of minor child; *Re Young*, 36 L. R. A. 224, which upholds grandparents' right to custody of children to exclusion of father's sister appointed guardian by his will.

16 L. R. A. 684, *PEOPLE v. BRIDGES*, 142 Ill. 30, 31 N. E. 115.

Fish and game laws affecting private rights.

Cited in *State v. Theriault*, 70 Vt. 624, 43 L. R. A. 293, 67 Am. St. Rep. 695, 41 Atl. 1030, holding valid, act prohibiting fishing for a certain period in private streams in which fish placed by fish commissioner; *Peters v. State*, 96 Tenn. 688, 33 L. R. A. 115, footnote p. 114, 36 S. W. 399, holding act to protect fish, affecting all waters, valid notwithstanding private ownership of bodies of water; *People v. Duxtater*, 75 Hun. 477, 27 N. Y. Supp. 481, holding that exclusive right of fishing in lake connecting with navigable river, emptying into large lake, is subordinate to regulations prescribed by legislature for general good; *Re Eberle*, 98 Fed. 297, holding valid, statute requiring payment of license fee by nonresident for privilege of hunting.

Cited in footnotes to *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense; *State v. Mrozinski*, 27 L. R. A. 76, which holds valid, absolute prohibition against taking fish otherwise than by hook and line, with specified exceptions.

Cited in notes (39 L. R. A. 585) on governmental control over right of fishery; (60 L. R. A. 500, 501, 502, 512) in right to fish.

Distinguished in *People v. Miner*, 144 Ill. 312, 19 L. R. A. 348, 33 N. E. 40,

which holds party is twice put in jeopardy under statute giving right of appeal from acquittal in criminal case for illegal fishing.

16 L. R. A. 688, *STATE ex rel. HARTFORD v. CRAIG*, 132 Ind. 54, 32 Am. St. Rep. 237, 31 N. E. 352.

What "town" or "city" includes.

Cited in *Indianapolis v. Higgins*, 141 Ind. 9, 40 N. E. 671, declaring word "town" to be generic, including cities, in act prohibiting driving on sidewalks.

Cited in footnote to *Gibson v. Wood*, 43 L. R. A. 699, which holds residence in suburb before annexation, residence within city for purpose of determining eligibility to city office.

16 L. R. A. 689, *JENKINS v. BALLANTYNE*, 8 Utah, 245, 30 Pac. 760.

Police power over, and property in, dogs.

Cited in *Hagerstown v. Witmer*, 86 Md. 302, 39 L. R. A. 664, 37 Atl. 965, holding ordinance providing that dogs running at large shall be impounded and, if not redeemed, killed, reasonable police regulation; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 521, 51 L. R. A. 684, 80 Am. St. Rep. 767, 59 N. E. 353, upholding statute requiring payment of license fee to society for prevention of cruelty to animals by owners of dogs within cities of certain size; *Sentnell v. New Orleans & C. R. Co.* 166 U. S. 704, 41 L. ed. 1171, 17 Sup. Ct. Rep. 693, holding statute within police power of state which enacts that dogs, to be protected, must be placed on assessment rolls, and that owner cannot recover greater value for killing them than that he has thus fixed. *Walker v. Towle*, 156 Ind. 642, 53 L. R. A. 751, 59 N. E. 20, holding valid, ordinance requiring dogs to be muzzled, and making it duty of certain officers to kill dogs unmuzzled; *Salley v. Manchester & A. R. Co.* 54 S. C. 485, 71 Am. St. Rep. 810, 32 S. E. 526, sustaining property right in dogs sufficient to maintain action for killing them on railway tracks.

Cited in footnotes to *Bowers v. Horan*, 17 L. R. A. 773, which holds that barking and chasing of cats and tracking newly painted porch will not justify killing of dog; *Nehr v. State*, 17 L. R. A. 771, which authorizes killing of dog without collar; *Gibson v. Harrison*, 54 L. R. A. 268, which holds exaction of fee of \$1.50 for privilege of keeping dog authorized by statute; *Hodges v. Causey*, 48 L. R. A. 95, which denies right to kill trespassing dog whose owner notified to keep him from premises.

Cited in notes (37 L. R. A. 659) on liability of railroad for killing dogs; (40 L. R. A. 510) on property rights in dogs.

16 L. R. A. 691, *STATE ex rel. OLSON v. BROWN*, 50 Minn. 353, 36 Am. St. Rep. 651, 52 N. W. 935.

Reform schools.

Cited in *Re Sanders*, 53 Kan. 200, 23 L. R. A. 606, footnote p. 603, 36 Pac. 348, holding that probate judge cannot commit boy under sixteen to reformatory, without his consent and against objection of parents; *State ex rel. Schulman v. Phillips*, 73 Minn. 79, 75 N. W. 1029, upholding act relating to training school for boys and girls as not providing for cruel, unusual, or unequal punishment.

Cited in footnote to *People ex rel. Bradley v. Illinois State Reformatory*, 23 L. R. A. 139, which holds lawful, committal of infants to reformatory with maximum

sentence, subject to reduction; *Re Knowack*, 44 L. R. A. 699, which sustains power of supreme court to restore to parents children committed to charitable institution.

Writ of habeas corpus sought on constitutional grounds.

Cited in note (39 L. R. A. 456) on decision against constitutional right as nullity subject to collateral attack.

Jury trial.

Cited in footnote to *Hall v. Armstrong*, 20 L. R. A. 366, which denies right to jury trial in actions of book account.

16 L. R. A. 695, *COLUMBUS v. COLUMBUS*, 82 Wis. 374, 52 N. W. 425.

Legislative control of municipalities.

Cited in note (48 L. R. A. 488) on power of legislature to impose burdens on municipalities and to control their local administration and property.

16 L. R. A. 699, *Re McLAUGHLIN*, 4 Wash. 570, 30 Pac. 651.

When marriage consummated.

Followed in *Kelley v. Kitsap County*, 5 Wash. 523, 32 Pac. 554, holding issue of white man and Indian woman, who was bought from her relatives for few dollars, cannot inherit father's estate.

Cited in *Re Smith*, 4 Wash. 703, 17 L. R. A. 574, 39 Pac. 1059, holding lawful marriage not instituted by cohabitation so as to entitle woman as to administration as widow; *Re Wilbur*, 14 Wash. 246, 44 Pac. 262, declaring invalid, marriage between white man and Indian woman according to Indian customs; *Re Wilbur*, 8 Wash. 41, 40 Am. St. Rep. 886, 35 Pac. 407, holding marriage between white man and Indian, void under territorial law, not validated by cohabitation after repeal of law; *Hatch v. Ferguson*, 57 Fed. 971, holding right to dispose by will of land acquired during cohabitation, but before marriage, not affected by community property law.

Cited in footnotes to *Hilton v. Roylance*, 58 L. R. A. 723, which sustains sealing for time and eternity under Mormon marriage ceremony; *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *University of Michigan v. McGuckin*, 57 L. R. A. 917, which holds lawful marriage shown between persons whose cohabitation originally meretricious, by continued cohabitation after disability removed, and birth of children baptized as legitimate.

Disapproved in *Western U. Teleg. Co. v. Procter*, 6 Tex. Civ. App. 303, 25 S. W. 811, holding that girl under eighteen cannot marry without parent's consent, a statutory license, or ceremony.

Common-law marriage.

Cited in *Offield v. Davis*, 100 Va. 258, 40 S. E. 910, holding common-law marriage void under statute requiring license; *Re Strauthers*, 34 Pittsb. L. J. N. S. 340, holding children of common-law marriage in Virginia, illegitimate.

16 L. R. A. 707, *MANN v. JACKSON*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886.

What is restraint on marriage.

Cited in footnotes to *King v. King*, 52 L. R. A. 157, which authorizes recovery on fully executed promise to care for person for life, though accompanied by void

promise not to marry; *Herd v. Catron*, 37 L. R. A. 731, which sustains condition in devise to widow that remarriage shall terminate estate; *Ransdell v. Boston*, 43 L. R. A. 526, which sustains condition in will that gift to son shall be for life only, unless divorce procured in pending suit.

16 L. R. A. 710, *McKINNEY v. STATE*, 3 Wyo. 719, 30 Pac. 293.

16 L. R. A. 715, *WOOD v. McGRATH*, 150 Pa. 451, 24 Atl. 682.

Municipal power over streets and drainage.

Cited in *Flynn v. Shenandoah*, 3 Lack. Legal News, 284, 19 Pa. Co. Ct. 626, holding that borough may empty drainage, and permit private citizens to drain into natural stream, if flowage not unreasonably increased; *Boyden v. Walkley*, 113 Mich. 612, 71 N. W. 1099, permitting private citizen to construct private sewer at own expense in streets, if city has no sewer system; *Middletown Drainage Co. v. Middletown*, 1 Dauphin Co. Rep. 112, holding that borough can grant to private citizen right to lay drainage pipes in streets; *Sandy Lake v. Sandy Lake & S. Gas. Co.* 16 Pa. Super. Ct. 240, holding that borough can permit private citizens to lay gas pipes under its streets.

Injunctions.

Cited in *Hafer v. Guynan*, 20 Pa. Co. Ct. 330, 7 Pa. Dist. R. 26, refusing to enjoin as nuisance use of church turned into boiler shop near to railway upon which trains run night and day; *Gitt v. Hanover*, 12 Lanc. L. Rev. 374, 4 Pa. Dist. R. 608, enjoining borough from cutting down tree in sidewalk as widened because not in pursuance of general ordinance.

Distinguished in *Com. ex rel. Tyrone v. Stevens*, 178 Pa. 562, 39 W. N. C. 376, 36 Atl. 166, upholding right to enjoin construction of wall in stream, increasing danger from floods.

16 L. R. A. 719, *ROTHSCHILD v. DOUGHER*, 85 Tex. 332, 34 Am. St. Rep. 811, 20 S. W. 142.

Acknowledgment before interested party.

Cited in *Baxter v. Howell*, 7 Tex. Civ. App. 201, 26 S. W. 453, holding that chattel mortgage cannot be acknowledged before one of beneficiaries under it; *Miles v. Kelley*, 16 Tex. Civ. App. 153, 40 S. W. 499, denying validity of contract to create mechanic's lien on homestead property in favor of association, where acknowledgment was taken before officer of association; *Kothe v. Krag-Reynolds Co.* 20 Ind. App. 301, 50 N. E. 594, holding acknowledgment of chattel mortgage to corporation void when taken by its secretary; *Bexar Bldg. & L. Asso. v. Heady*, 21 Tex. Civ. App. 156, 57 S. W. 583, holding that disqualification of notary to take acknowledgment when interested is not affected by lack of constitutional provision relating to it; *Iron Belt Bldg. & L. Asso. v. Groves*, 96 Va. 140, 31 S. E. 23, denying validity to trust deed in which acknowledgment was taken before trustee, although he was ignorant of fact that he was named in it; *Silcock v. Baker*, 25 Tex. Civ. App. 509, 61 S. W. 939, holding deed of married woman, acknowledged before husband, void.

Cited in note (33 L. R. A. 334, 337) on right of interested persons to take acknowledgment.

16 L. R. A. 721, *GRAND RAPIDS SCHOOL FURNITURE CO. v. HANEY SCHOOL FURNITURE CO.* 92 Mich. 558, 31 Am. St. Rep. 611, 52 N. W. 1009.

Libel of manufactured article.

Cited in footnote to *Marlin Firearms Co. v. Shields*, 59 L. R. A. 310, which denies right to injunction against publishing unjust and malicious criticism of manufactured article.

16 L. R. A. 723, *REECE v. KYLE*, 49 Ohio St. 475, 31 N. E. 747.

What is champerty.

Cited in *Brown v. Ginn*, 66 Ohio St. 325, 64 N. E. 123, holding agreement by attorney to prosecute suit in own name, take all risks and assume all expenses, receiving compensation of recovery, champertous; *Getchell v. Weldon*, 2 Ohio N. P. 390, holding agreement to obtain evidence and judgment in consideration of assignment of part of said judgment, champertous; *Pittsburg, C. C. & St. L. R. Co. v. Volkert*, 58 Ohio St. 372, 50 N. E. 924, holding contract to perform further legal services, if error proceedings instituted after judgment obtained, not champertous.

Cited in footnotes to *Irwin v. Curie*, 58 L. R. A. 830, which sustains right of person placing demands in attorney's hands to recover agreed compensation, though statute forbids such agreements; *Newman v. Freitas*, 50 L. R. A. 548, which holds void, contract to pay attorney one third of all amounts recovered in divorce suit; *Croco v. Oregon Short-Line R. Co.* 44 L. R. A. 285, which authorizes agreement that attorney's compensation shall depend on successes and be payable out of proceeds of litigation; *Johnson v. Van Wyck*, 41 L. R. A. 520, which holds agreement by attorney to prosecute suit at own expense for half of recovery, champertous.

16 L. R. A. 729, *BOYD v. SELMA*, 96 Ala. 144, 11 So. 393.

Situs of taxable property.

Followed in *State v. Kidd*, 125 Ala. 420, 28 So. 480, holding that situs of shares of stock for purpose of taxation is owner's domicile.

Cited in *Re Fair*, 128 Cal. 614, 61 Pac. 184, holding negotiable railroad bonds taxable at residence of owner; *State v. Scottish-American Mortg. Co.* 76 Minn. 162, 78 N. W. 962, holding notes held by nonresident, but secured by mortgages on residents' real estate, not taxable, though loan negotiated by local agents; *National Dredging Co. v. State*, 99 Ala. 467, 12 So. 720, holding personal property within and used in state, owned by nonresident, taxable where found; *Buck v. Miller*, 147 Ind. 595, 37 L. R. A. 388, 62 Am. St. Rep. 436, 47 N. E. 8, holding that, for taxation, term "personal property" includes bonds, notes, choses in action, and other evidences of credits, and that their situs is place where used in business.

Cited in footnotes to *Re Whiting*, 34 L. R. A. 232, which holds bonds of foreign corporation within state, though owned by nonresident, subject to transfer tax; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 45 L. R. A. 524, which holds situs of debt due nonresident is at creditor's domicile for purpose of taxation; *Allen v. National State Bank*, 52 L. R. A. 760, which sustains right of state to tax nonresident mortgagee's interest in land within state; *Kingman County v. Leonard*, 34 L. R. A. 810, which denies right under statute to tax judgments owned by nonresidents.

Situs of property for garnishment.

Cited in *Louisville & N. R. Co. v. Nash*, 118 Ala. 486, 41 L. R. A. 332, 72 Am. St. Rep. 181, 23 So. 825, holding that situs of debt for purpose of garnishment is domicile of creditor.

Defenses in actions on tax bills.

Cited in *Verdin v. St. Louis*, 131 Mo. 116, 33 S. W. 480 (dissenting opinion), as to right of taxpayer in possession of land, if sued, to resist action on ground of invalidity of ordinance.

16 L. R. A. 737, *STATE ex rel. SHERMAN v. GEORGE*, 22 Or. 142, 29 Am. St. Rep. 586, 29 Pac. 356.

Power of appointment to office.

Cited in *State ex rel. Wagner v. Compson*, 34 Or. 28, 54 Pac. 349, and *Eddy v. Kincaid*, 28 Or. 558, 41 Pac. 156, upholding right of legislature to appoint railroad commissioners; *State ex rel. Trauger v. Nash*, 66 Ohio St. 619, 64 N. E. 558, holding that where power of appointment to fill vacancy has been delegated to legislature by people, direction to governor to perform duty makes it purely ministerial; *Atty. Gen. ex rel. Maybury v. Bolger*, 128 Mich. 360, 87 N. W. 366, upholding act providing for appointment of park commissioner by common council of city.

Cited in footnotes to *Johnson v. State*, 38 L. R. A. 373, which holds void, statute depriving governor of power to appoint judges of inferior court by changing its name; *People ex rel. Richardson v. Henderson*, 22 L. R. A. 751, which denies inherent power of the executive to appoint officers; *Fox v. McDonald*, 21 L. R. A. 529, which holds power to appoint to office to fill vacancy not inherent in governor.

Legislative power over local indebtedness.

Cited in *Travelers' Ins. Co. v. Oswego Twp.* 7 C. C. A. 678, 19 U. S. App. 321, 59 Fed. 67, holding valid, act authorizing township to scale down and refund bonded indebtedness; *Simon v. Northup*, 27 Or. 496, 30 L. R. A. 175, 40 Pac. 560, upholding act to create debt against city without its consent, for acquiring bridges and ferries.

16 L. R. A. 743, *WOODARD v. WOODARD*, 36 S. C. 118, 15 S. E. 355.

16 L. R. A. 745, *BATES v. BABCOCK*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605.

Objections to complaint after judgment.

Cited in *South San Bernardino Land & Improv. Co. v. San Bernardino Nat. Bank*, 127 Cal. 247, 59 Pac. 699, holding defendant not having appealed from judgment cannot object to complaint, unless so defective that judgment cannot be sustained.

Partnership property in land.

Cited in *Smith v. Putnam*, 107 Wis. 162, 82 N. W. 1077, holding that contract for partnership dealing in land is within statute of frauds unless fully executed as to such land, when rights of parties may be enforced; *Moran v. McInerney*, 129 Cal. 31, 61 Pac. 575, holding that, in action for dissolution of copartnership, real

estate should be treated as personal property, and sold to pay debts, and residue distributed.

Cited in note (27 L. R. A. 466, 477) as to when real estate will be considered partnership property.

Parol agreements within statute of frauds.

Cited in footnote to *Greenwood v. Law*, 19 L. R. A. 688, which holds parol agreement to sell and assign bond and mortgage within statute of frauds.

16 L. R. A. 752, *PEOPLE ex rel. KUNZE v. FT. WAYNE & E. R. CO.* 92 Mich. 522, 52 N. W. 1010.

What use of street is additional servitude.

Followed in *Dean v. Ann Arbor Street R. Co.* 93 Mich. 331, 53 N. W. 396, holding that electric street railway may not be added servitude on abutting land; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 142, 43 L. R. A. 235, 24 So. 502; *Detroit v. Detroit City R. Co.* 56 Fed. 874; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 674, 12 C. C. A. 372, 22 U. S. App. 570, 64 Fed. 636,—holding street railway but improved mode of street use and does not impose additional servitude on land of abutting owners; *Nieman v. Detroit Suburban Street R. Co.* 103 Mich. 259, 61 N. W. 519, holding that electric street railway may be constructed without condemning right of way; *People v. Eaton*, 100 Mich. 212, 24 L. R. A. 723, 59 N. W. 145, holding placing of telegraph poles not additional servitude on land of abutter on public street; *Detroit v. Detroit City R. Co.* 56 Fed. 880, holding that function of city is merely to consent, upon conditions, that street railway companies may exercise state franchise; *Peck v. Schenectady R. Co.* 170 N. Y. 312, 63 N. E. 357 (dissenting opinion), majority holding that putting electric road in street adds servitude on abutting owners; *Detroit, Ft. Wayne & B. I. R. Co. v. Railroad Comrs.* 127 Mich. 235, 62 L. R. A. 156, 86 N. W. 842 (dissenting opinion), on point that street railway does not create additional servitude.

Cited in note (17 L. R. A. 477) on what use of street or highway constitutes additional burden.

Compensation for erection of embankment in street.

Cited in footnote to *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, which denies liability to abutter for embankment to change grade, necessitated by railroad embankment in intersecting street.

Validity of public contracts.

Cited in *Lewick v. Glazier*, 116 Mich. 500, 74 N. W. 717, holding contract for water supply for village valid, though it creates monopoly.

Quo warranto.

Cited in *Atty. Gen. v. Detroit Suburban R. Co.* 96 Mich. 69, 55 N. W. 562, holding interest of people not sufficient to support quo warranto where municipality has power to grant and has granted, right of way to street railway company.

16 L. R. A. 754, *BOWERS v. SMITH*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101.

Election laws and validity of elections.

Cited in *State ex rel. Bennett v. Barber*, 4 Wyo. 82, 32 Pac. 14, holding statu-

tory requirement for making and filing certificate of nominations of candidates, mandatory; *Cook v. Fisher*, 100 Iowa, 35, 69 N. W. 264, holding election law mandatory on clerk preparing ballot, but should not operate to defeat election; *Miller v. Pennoyer*, 23 Or. 375, 31 Pac. 830, holding that voters cannot be disfranchised by error of county official in printing same name on official ballot under two different groups of electors; *Tebbe v. Smith*, 108 Cal. 108, 49 Am. St. Rep. 68, 41 Pac. 454, holding ballots marked with cross to right of name, but not in square, not invalid where ballot law not mandatory on that point; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 546, 25 L. R. A. 328, 58 N. W. 483, upholding act providing that no one can be assisted in marking his ballot until he first swears he cannot read English; *Stackpole v. Hallahan*, 16 Mont. 54, 28 L. R. A. 508, footnote p. 502, 40 Pac. 80, refusing to declare election invalid because of certain defects in nominating certificates; *Boyd v. Mills*, 53 Kan. 608, 25 L. R. A. 491, 42 Am. St. Rep. 306, 37 Pac. 16, refusing to invalidate election in township where, through mistake of officials, ballots of other color than white were used by all electors alike; *Lynip v. Buckner*, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 762, holding that strips of paper and numbers of unintentionally left on ballots by official, without knowledge of voters, will not disfranchise; *Parker v. Hughes*, 64 Kan. 241, 56 L. R. A. 279, 91 Am. St. Rep. 216, 67 Pac. 637 (dissenting opinion), majority holding that ballots marked to distinguish them, contrary to provisions making such marks criminal, cannot be counted; *Morris v. Board of Canvassers*, 49 W. Va. 263, 38 S. E. 500, declaring mandatory, provision that but one ballot shall be used and names of all candidates voted for must be on that ballot; *Jones v. State*, 153 Ind. 447, 55 N. E. 229, refusing to invalidate election of town trustee because his ticket did not have emblem or device at head, although it was official; *Com. v. Rogers*, 181 Mass. 192, 63 N. E. 421, which holds caucus meeting legal when there was present a warden *de facto*, though elected just before caucus; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 670, 41 N. E. 681, sustaining act requiring use of official ballot; *Kirkpatrick v. Deegans*, 53 W. Va. 286, 44 S. E. 465, holding act requiring poll clerks to write names on back of each election ballot sheet, mandatory; *Stone v. Gregory*, 110 Ky. 503, 61 S. W. 1002, holding election not invalidated because of immaterial mistake in question submitted.

Cited in footnotes to *Ellis v. May*, 25 L. R. A. 325, which holds reasonable, requirement of oath of inability to read before allowing another to mark ballot; *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once; *State, Ransom, Prosecutor, v. Black*, 16 L. R. A. 769, which holds act limiting right to representation on official ballot to political parties casting certain percentage of vote at last election, and to those presenting petitions, valid; *Taylor v. Bleakley*, 28 L. R. A. 683, which holds mandatory, provision against counting ballot not marked as required by statute.

Raising objection to election.

Cited in *Schuler v. Hogan*, 168 Ill. 377, 48 N. E. 195; *State ex rel. Hewen v. Elliott*, 17 Wash. 23, 48 Pac. 734; *State ex rel. Crawford v. Norris*, 37 Neb. 313, 55 N. W. 1086; *Lewis v. Boynton*, 25 Colo. 492, 55 Pac. 732.—holding that contestant cannot raise objections to an election, thereby defeating will of electors, when he has neglected to avail himself of opportunity presented by election law; *Baker v. Scott*, 4 Idaho, 601, 43 Pac. 76, holding objection that name of successful candidate was improperly placed on official ballot too late after election.

Construction of adopted statute.

Cited in footnote to *Wolf v. Youbert*, 21 L. R. A. 772, which requires application in construing adopted statute of construction of courts of state from which adopted.

16 L. R. A. 769, *STATE, RANSOM, PROSECUTOR, v. BLACK*, 54 N. J. L. 446, 4 Atl. 489, 1021.

Election laws and right to vote.

Followed without discussion in *State ex rel. Ransom v. Black*, 65 N. J. L. 688.

Cited in *State ex rel. Lamar v. Dillon*, 32 Fla. 580, 22 L. R. A. 137, 14 So. 383, holding that election for city officer may be regulated by legislature, constitutional provisions not applying; *State ex rel. Lamar v. Dillon*, 32 Fla. 561, 22 L. R. A. 132, 14 So. 383, holding voting a privilege, and not a right; *Morris v. Board of Canvassers*, 49 W. Va. 264, 38 S. E. 500, upholding statute requiring voters to use only one ballot, which must contain names of all persons he votes for; *May & T. Hardware Co. v. Birmingham*, 123 Ala. 325, 26 So. 537, holding valid, provision requiring voters, voting against amendment, to strike out words "For . . . Amendment;" *State ex rel. Runge v. Anderson*, 100 Wis. 533, 42 L. R. A. 243, 76 N. W. 482, upholding act prohibiting political party from being represented on official ballot unless it polled at preceding election 2 per cent of vote; *State ex rel. Plimmer v. Poston*, 58 Ohio St. 633, 42 L. R. A. 238, footnote p. 237. 51 N. E. 150, holding valid, act requiring certified nomination to be made by convention representing political party polling at least 1 per cent of entire vote cast in state; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 546, 25 L. R. A. 328, 58 N. W. 483, holding it reasonable restriction of right to vote to require voter to swear he cannot read English before allowing another to mark his ballot; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681, upholding statute making official ballot compulsory for city officers and optional for town officers; *Ladd v. Holmes*, 40 Or. 181, 91 Am. St. Rep. 457, 66 Pac. 714, holding valid, act limiting right of party electors to vote at primaries of their own parties; *Com. v. Rogers*, 181 Mass. 187, 63 N. E. 421, holding valid, act relating to voting lists at caucuses; *Bliss v. Woolley*, 68 N. J. L. 55, 52 Atl. 835, holding ballots furnished electors by municipal clerk under his construction of law, to be treated as valid.

Cited in footnote to *Britton v. Election Comrs.* 51 L. R. A. 115, which holds void, law depriving members of political party, polling less than 3 per cent of votes at preceding election, of right to nominate candidates; *Lindstrom v. Manistee County*, 19 L. R. A. 172, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots with device upon them in municipal election; *State ex rel. McCarthy v. Moore*, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election; *Chamberlin v. Wood*, 56 L. R. A. 187, which authorizes limitation of votes to candidates whose names on official ballot; *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter, from persons residing less than six months in county, void; *Eaton v. Brown*, 17 L. R. A. 697, which holds void, ballot law prohibiting marking elsewhere of ballot marked opposite name of political party.

Cited in notes (25 L. R. A. 484) on how far right to vote is absolute; (47 L. R. A. 807) on marking official ballot.

16 L. R. A. 774, *BARRETT v. ROCKPORT ICE CO.* 84 Me. 155, 24 Atl. 802.

Appropriation of ice.

Cited in *Becker v. Hall*, 116 Iowa, 591, 56 L. R. A. 574, footnote p. 573, 88 N. W. 324, holding that staking of banks of stream, and marking staking, or cleaning ice before thick enough to harvest, does not amount to appropriation.

Cited in footnote to *Mansfield v. Place*, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired; *Marsh v. McNider*, 20 L. R. A. 333, which authorizes sale by tenant of right to cut ice on running stream; *Eidemiller Ice Co. v. Guthrie*, 28 L. R. A. 581, which holds right to take ice from pond in non-navigable stream in owner of land as against owner of pond with right of flowage; *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, which holds littoral proprietor's right to cut ice on great pond not exclusive; *Sanborn v. People's Ice Co.* 51 L. R. A. 829, which holds taking of ice in large quantities from public lake not exercise of common right in its waters.

16 L. R. A. 776, *HOLLEY v. GLOVER*, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605.

Dower rights as property.

Cited in *Gaffney v. Jefferies*, 59 S. C. 569, 53 L. R. A. 920, footnote p. 918, 82 Am. St. Rep. 860, 38 S. E. 216, holding wife's dower right not barred by partition in kind between alienee of husband and other cotenants; *Chouteau v. Missouri P. R. Co.* 122 Mo. 394, 30 S. W. 299, holding inchoate dower interest not property which cannot be extinguished by condemnation proceedings against husband; *Haggerty v. Wagner*, 148 Ind. 650, 39 L. R. A. 392, 48 N. E. 366, holding that partition sale extinguishes inchoate right of dower of wife of cotenant not made party; *Woman's Club Corp. v. Reed*, 111 Ky. 811, 64 S. W. 739, holding wife's right of dower not passed on sale of husband's interest in land.

Cited in note (18 L. R. A. 76) on power of husband or his creditors to defeat wife's right of dower.

Conclusiveness of decree in partition.

Cited in *Norwood v. Gregg*, 67 S. C. 228, 45 S. E. 163, holding parties to partition suit bound by decree as to land included in description.

16 L. R. A. 787, *ST. LOUIS & S. F. R. CO. v. MURRAY*, 55 Ark. 248, 29 Am. St. Rep. 32, 18 S. W. 50.

Care of passenger required of carrier.

Cited in *St. Louis, I. M. & S. R. Co. v. Rexroad*, 59 Ark. 185, 26 S. W. 1037, holding erroneous instruction that railway liable if conductor in passing out of car might, with reasonable care, have seen child in charge of mother, yet injured her by closing door; *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 557, 31 S. W. 571, holding "highest degree of care" is that which prudent and cautious man would exercise consistent with mode of conveyance and practical operation of railroad.

What is negligence in emergency.

Cited in *St. Louis, I. M. & S. R. Co. v. Touhey*, 67 Ark. 216, 77 Am. St. Rep. 109,

54 S. W. 577, holding, in cases of emergency, passenger justified in jumping from car if person of reasonable firmness and prudence would be so justified; *Western Maryland R. Co. v. State*, 95 Md. 647, 53 Atl. 969, holding sleeping driver, waked suddenly and told to jump from car derailed by breaking of axle, justified in doing as told.

Res gestæ.

Cited in *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 89, 41 C. C. A. 40, 100 Fed. 756, holding admissible, evidence of what passenger and injured woman saw and heard after accident.

Cited in note (19 L. R. A. 749) on how near main transaction declarations must be made in order to constitute part of *res gestæ*.

16 L. R. A. 791, *STATE ex rel. HASTINGS v. SMITH*, 35 Neb. 13, 52 N. W. 700. **Qualification, appointment, suspension, and removal of officers.**

Cited in *State ex rel. Churchill v. Hay*, 45 Neb. 329, 63 N. W. 821, holding governor's power of removal administrative, and not judicial so as to be determined or reviewed by court; *State ex rel. Churchill v. Bemis*, 45 Neb. 737, 64 N. W. 348, holding valid, act making party affiliation a qualification for office; *State ex rel. Horne v. Holcomb*, 46 Neb. 94, 64 N. W. 437, sustaining contemporaneous construction of Constitution as to appointment of officers to institution for blind; *State ex rel. Wheeler v. Stuht*, 52 Neb. 226, 71 N. W. 941, discussing validity of act limiting qualification of persons entitled to appointment of police commissioner; *People ex rel. Engley v. Martin*, 19 Colo. 579, 24 L. R. A. 205, 36 Pac. 543, holding governor's order stating cause for removal of members of fire and police board exclusive and conclusive evidence of such cause; *Hartigan v. West Virginia University*, 49 W. Va. 51, 38 S. E. 698 (dissenting opinion), majority holding professor removable without notice by board of regents.

Cited in footnote to *Re Advisory Opinion*, 18 L. R. A. 594, which holds right to hold office not affected by suspension from same office during preceding term.

Distinguished in *State ex rel. Gapen v. Somers*, 35 Neb. 325, 53 N. W. 146, which holds city officers may be removed without charges where they are removable by mayor at pleasure.

16 L. R. A. 798, *ALLEN v. KEILY*, 17 R. I. 731, 33 Am. St. Rep. 905, 24 Atl. 776. **Right to eject tenant.**

Cited in footnotes to *Irwin v. Hess*, 35 L. R. A. 415, which holds as damages for wrongful ousting of tenant from part of farm, difference in rental value with and without such part; *Smith v. Detroit Loan & Bldg. Asso.* 39 L. R. A. 410, which sustains landlord's right of peaceable re-entry after default and notice that lease terminated.

Cited in note (55 L. R. A. 259) on liability for ejecting sick tenant, lodger, or other occupant from building when right of occupancy has terminated.

16 L. R. A. 800, *UNION P. R. CO. v. LAPSLEY*, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174.

Imputed negligence.

Cited in *Pyle v. Clark*, 25 C. C. A. 193, 49 U. S. App. 260, 79 Fed. 748, and *Turnpike Co. v. Yates*, 108 Tenn. 440, 67 S. W. 69, holding negligence of driver can-

not be imputed to person whom he is driving gratuitously; *Chicago, St. P. & K. C. R. Co. v. Chambers*, 15 C. C. A. 332, 32 U. S. App. 253, 68 Fed. 152, holding negligence of fellow servant not imputable to engineer killed at grade crossing by engine of another road; *Honey v. Chicago, B. & Q. R. Co.* 59 Fed. 425, holding negligence of wife struck by train at crossing not imputable to her husband who had preceded her; *Delaware, L. & W. R. Co. v. Devore*, 52 C. C. A. 82, 114 Fed. 160, holding negligence of father in driving, imputable to child held in its mother's arms; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 343, 65 L. R. A. 727, 100 Am. St. Rep. 830, 46 S. E. 750, holding negligence of father not imputable to daughter riding with him; *West Chicago Street R. Co. v. Dougherty*, 110 Ill. App. 206, and *Farley v. Wilmington & N. C. Electric R. Co.* 3 Penn. (Del.) 586, 52 Atl. 543, holding negligence of driver not imputable to gratuitous passenger.

Cited in footnotes to *Mullen v. Owosso*, 23 L. R. A. 693, which holds negligence of driver of private carriage imputable to woman voluntarily riding with him; *Kopitz v. St. Paul*, 58 L. R. A. 74, which holds negligence of omnibus driver not imputable to member of picnic party carried; *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of driver and team bound to check driver's attempt to cross track without stopping or listening for train.

Distinguished in *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 4, 92 Fed. 313, holding that parent's fault cannot be imputed to infant in arms, suing in own right.

16 L. R. A. 803, *MORNING JOURNAL ASSO. v. RUTHERFORD*, 2 C. C. A. 354, 1 U. S. App. 296, 51 Fed. 513.

Malice in libel.

Followed in *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 94, 14 U. S. App. 173, 55 Fed. 243, holding proper instruction that law implies malice, where there follows statement as to distinction between actual and implied malice and of rule when no actual malice shown.

Damages.

Cited in *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 320, 22 U. S. App. 102, 60 Fed. 999, holding proper instruction that measure of damages for injury to car was difference in value of car before accident and its value after accident and before being dismantled; *Smith v. Matthews*, 6 Misc. 168, 27 N. Y. Supp. 120, sustaining large verdict where proprietors of newspaper gave agent discretionary power of publishing or rejecting charge that married woman had eloped; *Press Pub. Co. v. McDonald*, 26 L. R. A. 535, 11 C. C. A. 162, 26 U. S. App. 167, 63 Fed. 245, holding that punitive damages may be awarded when libel published with "criminal indifference to civil obligations;" *Burdick v. Missouri P. R. Co.* 123 Mo. 250, 26 L. R. A. 400, footnote p. 385, 45 Am. St. Rep. 528, 27 S. W. 453 (dissenting opinion), majority holding that plaintiff may be required to remit excess in amount of damages awarded, as condition of affirmance; *Butler v. Barrett*, 130 Fed. 944, holding that punitive damages may be awarded for publication of libel copied from another paper.

What proper cross-examination.

Cited in *Post Pub. Co. v. Hallam*, 8 C. C. A. 207, 16 U. S. App. 613, 59 Fed. 536, holding it proper cross-examination to show that proprietor stated he ran paper sensationally to increase circulation.

16 L. R. A. 805, CHASE v. JEMMETT, 8 Utah, 231, 30 Pac. 757.

Proper compensation in condemnation.

Cited in footnotes to Becker v. Philadelphia & R. Terminal R. Co. 35 L. R. A. 583, which holds diminution in profits and value of merchandise by removal of business through condemnation of land not element of damages; St. Louis, K. & S. W. R. Co. v. Nyce, 48 L. R. A. 241, which holds purchaser on foreclosure of land on which railroad in course of construction entitled only to value of land on subsequent condemnation of right of way.

16 L. R. A. 808, HAWKINS v. FRONT STREET CABLE R. CO. 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021.

Presumption of negligence.

Cited in Chicago City R. Co. v. Rood, 163 Ill. 484, 54 Am. St. Rep. 478, 45 N. E. 238, holding mere fact of injury to passenger in street car not prima facie evidence of negligence on part of carrier; Klepsch v. Donald, 8 Wash. 164, 35 Pac. 621, holding that hurling of rock nearly a thousand feet, killing man in house, is prima facie proof of negligence in managing blast.

Cited in footnotes to Budd v. United Carriage Co. 27 L. R. A. 279, which holds running and kicking of team to public carriage makes prima facie case of negligence as to passenger; Dixon v. Pluns, 20 L. R. A. 699, which holds presumption of negligence arising from fall of chisel on sidewalk from scaffold; Springer v. Ford, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance.

Negligence of passenger on street car.

Cited in footnote to Sweetland v. Lynn & B. R. Co. 51 L. R. A. 783, which sustains rule forbidding passengers to ride on front platform of electric car; North Chicago Street R. Co. v. Baur, 45 L. R. A. 108, which holds standing on street car platform with back against dashboard not necessarily negligent; Third Ave. R. Co. v. Barton, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track while passing around conductor.

Physician's liability for death.

Cited in footnote to Lathrope v. Flood, 57 L. R. A. 215, which denies physician's liability for death of child by abandoning mother during confinement.

Injuries causing premature delivery of child.

Cited in Plonty v. Murphy, 82 Minn. 271, 84 N. W. 1005, holding it not necessary in action for assault on pregnant woman, causing miscarriage, to show there was great pain and more impairment of health than in natural delivery.

Damages.

Cited in Galveston, H. & S. A. R. Co. v. Baumgarten, 31 Tex. Civ. App. 258, 72 S. W. 78, holding measure of damages for personal injury to wife, to be mental and physical pain suffered and impairment of capacity to labor.

Cited in notes (32 L. R. A. 142) on recovery of damages for miscarriage; (26 L. R. A. 396) on power of appellate court to interfere with verdict for excessive damages.

16 L. R. A. 813, *LINDSAY v. COOPER*, 94 Ala. 170, 33 Am. St. Rep. 105, 11 So. 325.

When estoppel arises.

Cited in *Cooper v. Lindsay*, 109 Ala. 340, 19 So. 379, holding infant distributee of estate not estopped on coming of age, to claim share in land upon which another distributee had taken mortgage; *Ricketts v. Croom*, 102 Ala. 336, 14 So. 637, holding partner inducing purchase of his half interest in partnership by false representation that other's interest unencumbered estopped to set up mortgage thereon; *Goetter v. Norman Bros.* 107 Ala. 596, 19 So. 56, holding that estoppel binds one claiming under person estopped; *Freeman v. Brown*, 96 Ala. 304, 11 So. 249, holding mortgagee estopped to set up lien of mortgage against purchaser of land, knowing he relied on statement that mortgage released, and assisting in sale without informing him to contrary; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 171, 33 S. W. 383, holding that heirs, including minors, cannot accept proceeds of unauthorized sale of land by administrator, and then recover land without returning money; *Hundley v. Chadick*, 109 Ala. 586, 19 So. 845, holding one estopped to deny partnership not existing, not estopped to bring action on attachment bond made payable to such partnership.

Distinguished in *Formby v. Hood*, 119 Ala. 235, 24 So. 359, holding that estoppel does not arise where one claiming property sold by another does not wilfully conceal his title and his statements were not intended to deceive purchaser.

Laches.

Cited in *Rainey v. McQueen*, 121 Ala. 194, 25 So. 920, holding one suing to redeem from mortgage not chargeable with laches if action begun within reasonable time after coming of age.

Rule of caveat emptor.

Cited in *Electric Lighting Co. v. Rust*, 117 Ala. 691, 23 So. 751, holding that purchaser at execution sale acquires only such interest as was possessed by execution debtor, and is bound by mortgage executed prior to sale; *Ezzell v. Brown*, 121 Ala. 154, 25 So. 832, holding that rule of *caveat emptor* applies to judicial sales; *Clemmons v. Cox*, 114 Ala. 355, 21 So. 426, holding that purchaser at execution sale takes title subject to pre-existing equities; *Milner & K. Co. v. DeLoach Mill Mfg. Co.* 139 Ala. 661, 101 Am. St. Rep. 63, 36 So. 765, denying right of bona fide purchaser at attachment sale to hold property as against real owner.

16 L. R. A. 819, *LUTZ v. ATLANTIC & P. R. CO.* 6 N. M. 496, 30 Pac. 912.

Liability for injury due to fellow servant.

Cited in *Maher v. Union P. D. & G. R. Co.* 45 C. C. A. 302, 106 Fed. 310, holding injury due to negligence of fellow servants, and not to despatcher, when train backed from siding into main track in spite of orders; *Miller v. Coffin*, 19 R. I. 170, 36 Atl. 6, holding statute giving right of action for death of anyone, whether or not a passenger, in care of carriers, does not apply to employee killed by negligence of fellow servant.

Master's liability.

Cited in *McGinn v. McCormick*, 109 La. 402, 33 So. 382, holding master liable to servant for injury due to defective hand-car, combined with negligence of fellow servant.

Cited in footnotes to *Pullman's Palace Car Co. v. Laack*, 18 L. R. A. 215, which
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authorizes recovery by servant returning to protect master's property, for injury due to master's negligence concurring with unforeseen cause; *Noble v. Bessemer* S. S. Co. 54 L. R. A. 456, which holds master liable for injury by defective tool, though defect known to fellow servant procuring tool; *Loveless v. Standard Gold Min. Co.* 50 L. R. A. 596, which holds master liable for injury from combined negligence of himself and fellow servant.

Cited in note (54 L. R. A. 168) on vice principalship as determined with reference to character of act which caused injury.

Proximate cause.

Cited in footnotes to *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire proximate cause of destruction of property by back fire; *People v. Lewis*, 45 L. R. A. 783, which holds suicide of person mortally wounded does not relieve assailant from guilt of manslaughter.

16 L. R. A. 834, *WATERS v. RICHMOND & D. R. CO.* 110 N. C. 338, 14 S. E. 802.
Liability for church subscription made on Sunday.

Cited in footnote to *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday.

Duty to furnish cars to shippers.

Cited in note (43 L. R. A. 228) on duty of railroad company to furnish cars to shippers.

Excuse for breach of contract.

Cited in *Crystal Ice Co. v. Wylie*, 60 Kan. 109, 68 Pac. 1086, holding alleged intended illegal use no defense to action for breach of contract to furnish ice; *Darlington v. Missouri P. R. Co.* 99 Mo. App. 18, 72 S. W. 122, holding condition of weather no excuse for breach of contract as to unloading cars.

Carrier's liability to passenger.

Cited in *McNeill v. Durham & C. R. Co.* 135 N. C. 724, 47 S. E. 765 (dissenting opinion), majority holding railroad company liable for injury to gratuitous passenger riding contrary to law.

16 L. R. A. 836, *PEOPLE ex rel. CARTER v. RICE*, 135 N. Y. 473, 31 N. E. 921.

When apportionment valid.

Cited in *Baird v. Kings County*, 138 N. Y. 105, 20 L. R. A. 83, 33 N. E. 827, holding apportionment of representatives for assembly districts among counties according to population means that it shall be equal; *Baird v. Kings County*, 138 N. Y. 113, 20 L. R. A. 83, 33 N. E. 827, holding equality of representation should be, as nearly as may be with regard to convenience and contiguity of territory, indivisibility of town and number of inhabitants; *Re Smith*, 90 Hun, 572, 36 N. Y. Supp. 40, holding that apportionment of towns in assembly districts should have been the reverse of that made, where it is apparent that reversal would make number of voters more nearly equal; *Re Whitney*, 142 N. Y. 533, 60 N. Y. S. R. 110, 37 N. E. 621, holding harmless, error in apportioning assembly districts by which alien as well as voting population were included; *State ex rel. Winnie v. Stoddard*, 25 Nev. 458, 51 L. R. A. 232, footnote p. 229, 62 Pac. 237,

denying mandamus to compel issuance of notice of election under prior apportionment act, where same objection as to constitutionality appears as in later act; *Re Baird*, 142 N. Y. 529, 60 N. Y. S. R. 105, 37 N. E. 619, refusing to set aside apportionment of assembly districts because wards of city were divided; *Parker v. State*, 133 Ind. 189, 18 L. R. A. 572, 32 N. E. 836, holding that apportioning state into assembly districts is legislative, but that apportionment can be passed on by court; *Denney v. State*, 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929, holding that unconstitutional apportionment law may be declared void, notwithstanding it is exercise of political power.

Cited in footnotes to *Farrelly v. Cole*, 44 L. R. A. 464, which holds division of state into legislative districts designed for future elections, and not to affect title to officer of members; *People ex rel. Baird v. Broom*, 20 L. R. A. 81, which requires discretion of supervisors in dividing county into assembly districts to be honest and fair; *State ex rel. Morris v. Wrightson*, 22 L. R. A. 548, which holds constitutionality of apportionment act subject of judicial inquiry; *Parker v. State*, 18 L. R. A. 567, which holds invalid, scheme for allowing county with less than unit of population to vote for two senators.

Distinguished in *People ex rel. Woodyatt v. Thompson*, 155 Ill. 475, 40 N. E. 307, refusing to sustain apportionment where it was made without any regard to requirement that it should be made according to county lines.

Validity and construction of statutes.

Cited in *Re Brenner*, 35 Misc. 215, 70 N. Y. Supp. 744, holding that invalidity of act providing for commissioner of jurors must be shown by those asserting it; *Reilly v. Gray*, 77 Hun, 410, 28 N. Y. Supp. 811, holding that constitutional prohibition of lotteries does not apply to pool selling; *Pearce v. Stephens*, 18 App. Div. 106, 79 N. Y. S. R. 422, 45 N. Y. Supp. 422, sustaining act providing that two police commissioners of county shall not belong to same political party; *New York Bd. Fire Underwriters v. Whipple & Co.* 2 App. Div. 365, 37 N. Y. Supp. 712, holding right to levy assessment upon persons engaged in insurance business in a city, within police power; *Swikehard v. Michels*, 81 Hun, 330, 30 N. Y. Supp. 1135, affirming 8 Misc. 573, 29 N. Y. Supp. 777, holding that local statute providing for sewer not invalid, because sewer constructed incidentally to carry off surface water and drain low land; *Roland Park Co. v. State*, 80 Md. 453, 31 Atl. 298, holding consequence which may result in inequality or injustice potent factor in construction of act, and sometimes conclusive of its meaning; *Re McGinness*, 13 Misc. 717, 35 N. Y. Supp. 820, holding that legislature exceeded powers in changing boundaries of certain counties; *Rathbone v. Wirth*, 150 N. Y. 509, 34 L. R. A. 426, 45 N. E. 15 (dissenting opinion), majority holding act discriminating between parties as to eligibility to membership in certain board, unconstitutional; *Bell v. Gaynor*, 14 Misc. 339, 36 N. Y. Supp. 122 (dissenting opinion), as to presumption of constitutionality of act relating to milk cans; *People v. Lochner*, 177 N. Y. 159, 101 Am. St. Rep. 775, 69 N. E. 373, holding constitutional, act limiting hours of labor in bakeries or confectionery establishments.

Subject expressed in title.

Cited in *Parfitt v. Ferguson*, 3 App. Div. 196, 38 N. Y. Supp. 466, sustaining so much of act relating to lighting town as is expressed in its title.

Constitutional provision as to population.

Cited in *Re Silkman*, 88 App. Div. 109, 84 N. Y. Supp. 1025 (concurring opin-

ion), as to question whether word "population" as used in Constitution includes all inhabitants of state.

Actions affecting public rights.

Cited in footnote to State *ex rel.* Lamb v. Cunningham, 17 L. R. A. 145, which grants private application to restrain publication of election notice on attorney general's refusal to sue.

16 L. R. A. 858, PARKER v. MACOMBER, 17 R. I. 674, 24 Atl. 464.

Recovery where performance prevented by intervening impossibility.

Cited in footnotes to Ontario Deciduous Fruit Growers' Asso. v. Cutting-Fruit Packing Co. 53 L. R. A. 681, which denies liability for failure to deliver specified quantity of fruit contracted for, from failure of crop, due to unusual climatic conditions; Pinkham v. Libby, 49 L. R. A. 693, which denies right to recover amount paid for fruitless service of stallion under agreement for its return, prevented by its death; Angus v. Scully, 49 L. R. A. 562, which sustains right to recover under contract to move building, destroyed by fire before work completed; Pengra v. Wheeler, 21 L. R. A. 726, which holds lessor released from covenant to repair leased dams within specified time by impossibility of making repair; Remy v. Olds, 21 L. R. A. 645, which denies right to recover on contract, performance of which prevented by act of God; Board of Education v. Townsend, 52 L. R. A. 868, which holds blowing down of schoolhouse not excuse from contract to remove and rebuild; Lorillard v. Clyde, 24 L. R. A. 113, which holds dissolution of corporation defense to guaranty of dividends for term of years; Genet v. Delaware & H. Canal Co. 19 L. R. A. 127, which holds agreement implied that lessee will not wilfully incapacitate itself to take out more than minimum quantity of coal per year; Hughes v. Gross, 32 L. R. A. 620, which holds contract of employment by firm not dissolved by death of member.

Cited in notes (24 L. R. A. 235) on effect of part performance of contract for services; (23 L. R. A. 712, 713) on effect on contract of death of party thereto.

16 L. R. A. 861, CHURCH v. CHICAGO, M. & ST. P. R. CO. 50 Minn. 218, 52 N. W. 647.

Liability for injury to volunteer.

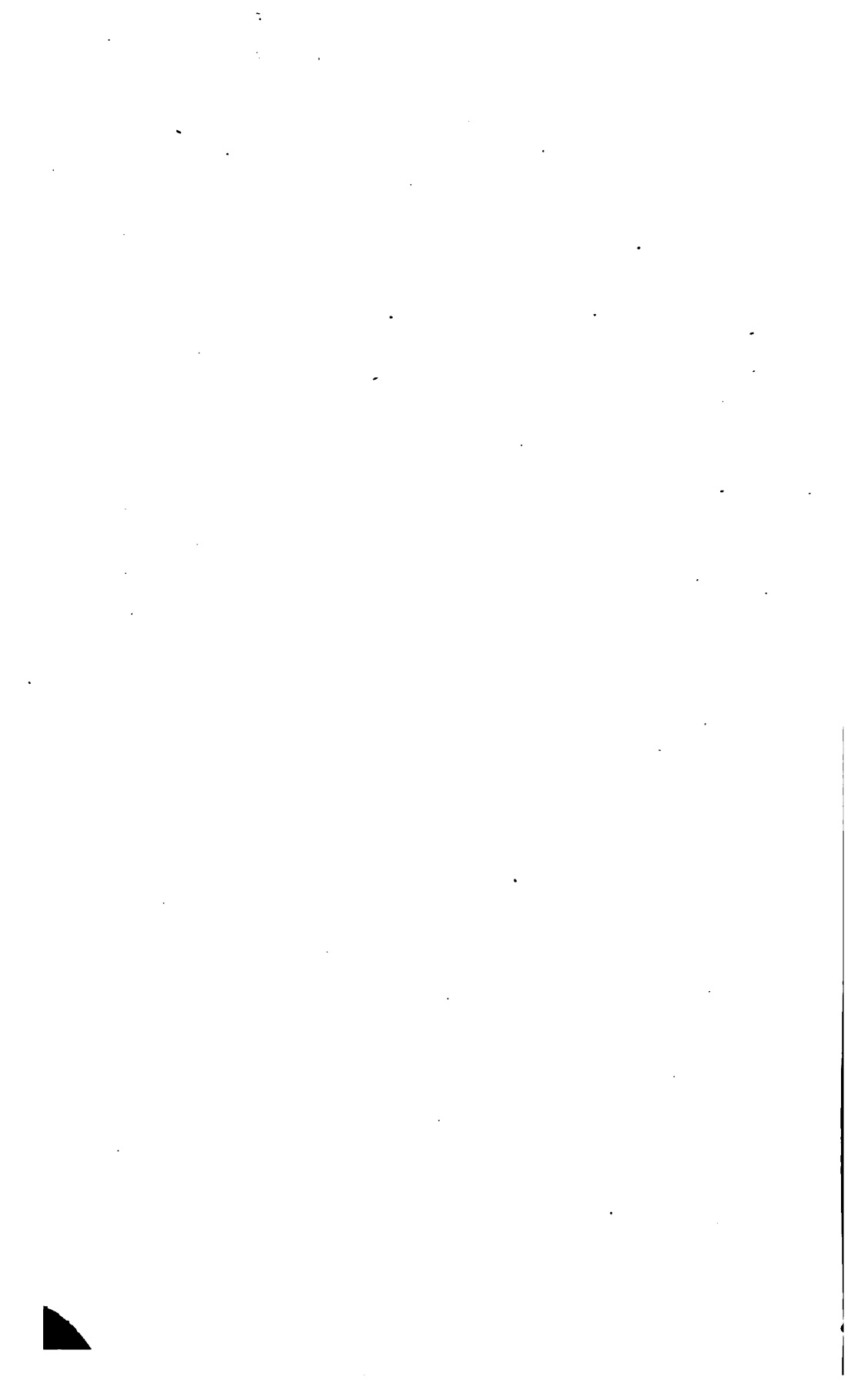
Cited in *Evarts v. St. Paul, M. & M. R. Co.* 56 Minn. 146, 22 L. R. A. 666, 45 Am. St. Rep. 460, 57 N. W. 459, holding railway bound to at least same care towards volunteer assistant as in case of trespasser; *Langan v. Tyler*, 51 C. C. A. 507, 114 Fed. 720, holding that no liability arises against owner for death of volunteer assistant of defendant's servant while taking apart electrical machine; *Louisville & N. R. Co. v. Ginley*, 100 Tenn. 478, 45 S. W. 348, holding that conductor has, by implication, authority to ask outsiders to stop runaway car; *McGill v. Maine & N. H. Granite Co.* 70 N. H. 128, 85 Am. St. Rep. 618, 46 Atl. 684, refusing recovery to man run over by runaway cars he was trying to stop, because acting outside of line of duty; *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 246, 52 L. R. A. 146, 58 N. E. 821, holding that one assisting servant at latter's request, acting in his own behalf, is also regarded as present upon company's sufferance; *Chicago & E. I. R. Co. v. Argo*, 82 Ill. App. 676, holding railroad not bound to look out for volunteer yard clerk and baggage man, acting as substitute with consent of station agent who was without author-

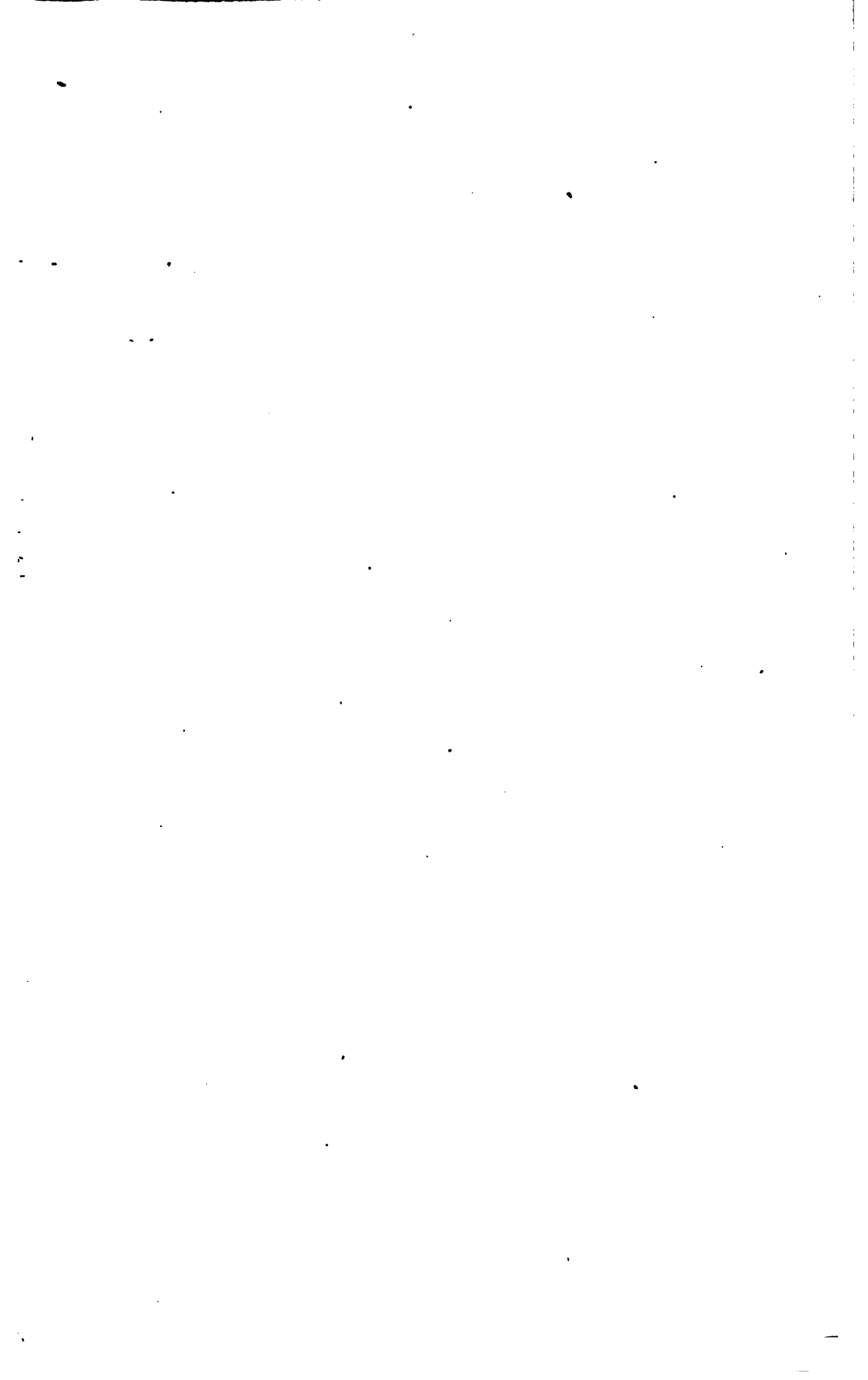
ity to employ; *Wagen v. Minneapolis & St. L. R. Co.* 80 Minn. 95, 82 N. W. 1107, holding that relation of master and servant does not arise by implication because station agent, without authority, directs volunteer to go on train as baggage man.

Cited in footnote to *Mitchell-Tranter Co. v. Ehmet*, 55 L. R. A. 710, which authorizes recovery for injury during noon intermission to servant removing broken timbers at superior's direction.

Cited in note (22 L. R. A. 663) on assumption by volunteer of risks of service.

The annotation in 16 L. R. A. 861, was referred to with approval in *Cincinnati, N. O. & T. P. R. R. Co. v. Finnell*, 108 Ky. 138, 57 L. R. A. 267, 55 S. W. 902, holding railroad company not liable for fatal injury to one voluntarily assisting brakeman.







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